Public Policy Forum

CFE v. *State of New York*: What the Litigation Means for New York City, New York State, and the Nation

Presented by

Michael A. Rebell

November 20, 2006

Thomas L. Gais:

Welcome to the Rockefeller Institute. My name is Tom Gais, co-director of the Institute. Our speaker today, Michael Rebell, wears many hats. He teaches law and education at the Teachers' College of Columbia University, as well as Columbia Law School. He is a scholar, having written or co-written many articles and two books on education policy of the courts as well as issues of equal educational opportunity. He is also education director of the one-year-old Campaign for Educational Equity at Teachers' College. The campaign was established last year to "overcome the gap in educational access and achievement between America's most and least advantaged students," and is striving to achieve these goals through research; report cards on progress toward, or I guess away from, equity; dissemination activities; and demonstration projects. In fact, the campaign just completed what looks to be a very interesting symposium on No Child Left Behind (NCLB) just this last week.

The chief reason Mr. Rebell is here today is his perseverance over the last 13 years as chief litigator in the case he and others filed with the New York Supreme Court originally in 1993, the case of *Campaign for Fiscal Equity* v. *New York State*. That case essentially involved interpreting and tracing the ramifications of the following words in the New York State Constitution, and I quote from article 11, section 1: "The Legislature shall provide for the maintenance and support of a system of free common schools, where all the children of the state

may be educated." *CFE* v. *New York* eventually led the New York Court of Appeals to determine, 10 years later, in 2003, that this education article required that all state schools should have the resources to provide the opportunity for a sound basic education, which the court further defined as a meaningful high school education. The Appeals Court also held that this requirement was not satisfied under the state's current school funding system. However, to say the least, putting this ruling into effect has not been a simple matter, a topic our speaker will probably mention today. It is a complicated situation, but it's a very important one, and we are very thankful to have Mr. Rebell here to discuss this, not only in reference to its implications for New York State, but also its consequences for other states and also national developments in school reform. So let's welcome Michael Rebell.

Editor's Note: While this Public Policy Forum was underway, the Court of Appeals issued their decision, which said the state must spend at least $1.93 billion more per year for New York City schools in an effort to guarantee students a "sound basic education." The discussion in the transcript does not reflect the Court of Appeals' decision.

Michael A. Rebell:

Thank you, Tom. I appreciate all of you turning out on this early and almost-wintry day. I saw some snow on the ground. It always amazes me that Albany is northern New York State. I come from southern New York State.

Tom mentioned I was asked to speak about the implications of *CFE* v. *State of New York* for the city, for the state, and even for the nation, and I will do that shortly. But first, I thought I ought to give you a little status report about where we are with the case, which may be one of the things that drew many of you to come and talk about where we are with CFE. As Tom mentioned, we got a final ruling, I thought it was a final ruling, from the Court of Appeals, the state's highest court, about three years ago. That ruling said in no uncertain terms that the current system for financing public education in New York State was unconstitutional, at least as far as its impact on the 1.1 million school children in the City of New York. The governor and the Legislature were given about 13 months to correct that situation and the court, in fact, laid out three very clear guidelines on what they were supposed to do over that 13-month period. Those guidelines were that first the state had to determine the actual cost of providing a sound basic education and, secondly, once they had determined that cost, they had to reform the state funding formulas to

make sure that each school in New York City received the proper amount. Finally, after the formula was properly reformed, the state was obligated to take another look at its accountability system and make sure that the reforms were, in fact, geared toward the bottom line objective of the case, which was improving student achievement. So we had three seemingly simple guidelines.

As I'm sure most of you know, the deadline of July 30, 2004, came and went and we did not have compliance with those three orders of the court. So that led us as plaintiffs to bring the case back to Justice DeGrasse, who was the trial judge in New York City that issued the original ruling, and the Court of Appeals had remanded the case in legal terms to Justice DeGrasse for any further proceedings that might be necessary. That in itself was a very interesting procedural move. I sometimes look with envy at my colleagues in places like Kansas, where they had a very analogous noncompliance situation that developed about a year ago, and because their highest court kept jurisdiction, they were able to bring it to a head and get a final ruling on the compliance issue within about six months. We had to go back, start in the Supreme Court, and work our way back through the Appellate Division of the Court of Appeals, so it has now been another two years or so going through this compliance stage.

But there is a method to some of this madness. One of the reasons the judicial process takes so long, as you know, is it is deliberative, it builds facts, and it builds a record. The record in this case that was built in this compliance hearing was a real focus on this first question that was posed by the Court of Appeals, which is, "what is the actual cost of providing a sound basic education?" Now, as many of you probably know, the governor did take some steps in an attempt to comply with the court order back in 2003 and 2004. He established a state commission, the Zarb Commission, to look into the three questions and to come up with recommendations. The Zarb Commission came up with certain recommendations. The governor built from their recommendations with recommendations of his own. He did submit them to the Legislature in an extraordinary session that was held in July 2004, right up against the deadline, but there was an impasse between the two houses. We had a variety of plans, a variety of costing-out studies, and there was no resolution, which is why the matter went back to court.

When it went back to the lower court, we had a full hearing on these costing-out issues, as well as the other issues that were set by the court. That led to the building of a rather voluminous record on all the aspects of these costing-out issues. I'm emphasizing that because,

when we finally got this matter up to the Court of Appeals about a month ago, it was very interesting to me and my co-counsel, Joe Wayland, to see the thrust of the questions being asked by the court, because there really were several issues that had developed over the course of this litigation. Quite frankly, we had assumed that the court would be focusing on the major legal issues that had been raised, which are really past in terms of separation of powers issues, whether the court has the authority to order the governor and the Legislature to take specific actions, especially actions that imply specific appropriations. That is the main issue that the attorney general was arguing below, and it's a matter of what we call first impression as far as the court is concerned in New York. So we expected the majority of the court's questions and the focus to be on those legal issues. In fact, the majority of their questions had to do with some very nitty-gritty factual questions about this costing-out process, how the figures that had come up from the lower courts were determined, and what their implications were. So we can spend a couple of minutes on each of these points because we do expect a decision from the Court of Appeals shortly. As a matter of fact, there are rumors around. Certain reporters somehow got the idea that we're going to get a decision before Thanksgiving. We'll see later today or tomorrow, I don't think the court really works on Wednesday, whether that's going to happen. I'm not sure that it will. I don't know where these rumors come from, but it does seem like a very quick turnaround if that, in fact, is the case. But let me acquaint you then with the major issues there, and then I want to talk about the larger questions and the implications of the case for the city, the state, and the nation.

First, turning to the separation of powers, let me just say a few more things about that. As I mentioned, this question of the court's authority to order the Legislature and the governor to take specific actions has never before been decided by the courts in New York State. It has, however, been decided repeatedly by other courts, certainly the federal courts, who look at the whole history of the implementation of *Brown* v. *Board of Education* desegregation decrees. We had resistance almost from the beginning to the Brown decree and its follow-up, and we have the U.S. Supreme Court taking increasingly strong stands against Governor Faubus, the legislatures in various southern states, and I think we're all very familiar with that history. The federal court's strong insistence on compliance with its decree in desegregation cases also affected New York. Many of you may be familiar with the Yonkers litigation that took place a decade or two ago. In that situation, the U.S. Supreme Court upheld very heavy fines, I think it was in the range of $1 million a day, that were levied against the City of Yonkers for as long as it was in contempt of the desegregation order issued by the Federal District Court of New York. So this idea of the courts being very specific and very firm in ordering legislatures, city councils, whatever the

governmental body is, to take specific actions to comply with the Constitution has been repeatedly established as precedent in the State of New York. As far as state courts are concerned, there have been, as I'm sure most of you know, litigations similar to CFE in a large number of states around the country, in the majority of states as a matter of fact. In many of these instances, we've had prompt compliance, but in some of them, you've had resistance the way we did in New York. In a good number of those cases where there has been resistance, the issue did come to a head as to whether the court had the authority to order the Legislature to take specific action, and repeatedly, those courts said, "Of course we do." The integrity of the whole rule of law, the integrity of the whole judicial process, is at stake if the highest court can issue a clear constitutional ruling and the other branches of government can snub it.

I mentioned Kansas earlier, and since that's the most recent and the most relevant precedent, let me tell you very briefly what happened in Kansas last year. There, as in New York, there had been a final ruling from the state's highest court that the state's education finance system was unconstitutional and the court was given a certain amount of time, I think the date was mid-April, to come up with a requisite solution, which involved changing the formula and increasing funding for education throughout the state. In that situation, the Legislature did act by the due date, but they appropriated about half the amount of money that the major costing-out study, which was in the record, in that case had determined.

So the plaintiffs immediately ran back to court, and as I mentioned there, the Supreme court kept jurisdiction, so the whole thing happened very rapidly. It was brought to the court's attention and some time in May they issued a ruling. Remember, we were talking about an action that took place in mid-April. Within a month, the court issued its ruling saying that the action of the Legislature had not complied with its order, that half a loaf was not enough. They expected the Legislature to double the increase in appropriation for that year to comply with the costing-out study, and they gave them another deadline, June 30th. That was giving them about five weeks or so to comply with this action. It was a very interesting, down-to-the-wire political confrontation with all kinds of rhetoric in the papers about judicial activism and we're not going to stand for this. In the state Senate especially the sentiment that was being expressed down to the wire was that the only way we'll comply with this court order is if, at the same time, there is a constitutional amendment that takes jurisdiction away from the courts forever in any cases like this.

So those were the ways the issues were posed in Kansas. But to make a long story short, they didn't quite get their act together by this June 30th deadline, so the court set a date for another hearing, which was going to be right after the July 4th weekend; I think it was July 8th. What was before the court was a pretty heavy sanction. The court was going to consider closing down all schools in the state of Kansas on the theory that the current system is unconstitutional. They were not going to let an unconstitutional system stay in effect, so that until the unconstitutional violation was cured, no money could flow at all for education anywhere in the state. Needless to say, the members of the Legislature felt a little heat from their constituents about the possibility of all schools being closed down. That year, on the July 4th weekend, there wasn't relaxed celebrating by members of the Legislature. There was a lot of focus on these issues. To make a long story short, I think it was July 5th they finally enacted a bill that complied 100 percent with the court order. So that's how it played out in Kansas.

It didn't play out quite that way in New York so far, and I hope we don't get to the stage of an utter confrontation. But I just wanted to bring those facts before you to indicate that courts in other states, when they've been in similar situations, have been very firm about upholding the integrity of the judicial process. It is my expectation that, in one form or another, the Court of Appeals here is going to do the same thing. We were asked during the oral argument about this question of sanctions. What happens if we issue the order and the Legislature and the governor still don't comply? We took a strategic stance. To be honest about it, we took that strategic stance with a little encouragement from the lower court; that is separating out the sanctions from this immediate legal issue of issuing the order. We did ask Justice DeGrasse to focus on the sanction question and, if he were going to issue an award for the Legislature and the governor to act, our request was that they would be given 90 days and, if they didn't act within 90 days, a sanction of heavy daily fines would go into effect. Justice DeGrasse issued an order that provided the full compliance remedy that we had asked for, the amount of money, etc., but he withheld further action on the sanction. I think, in a very judicious way. The implication was that we don't want to ratchet this up to a major confrontation. If we need to, let's issue the order. We hope and expect that they will comply, and if not, then we'll further consider what needs to be done. So that's the status of the thing. There is no sanction order pending in New York State, but there is an order coming up through both of the lower courts that requires the state to enact an appropriation somewhere in the range of $4.7 to $5.6 billion for New York City, and that amount to be phased in over four years.

As far as the separation of powers issue is concerned, what we have asked for is the Court of Appeals to issue an order requiring the Legislature to come up with an appropriation within 90 days in that requisite amount, somewhere between $4.7 and $5.6 billion. As I said, we have an expectation that, if the court issues such a clear, definitive order, that it will be complied with, so we're not spending much time thinking through how to play out the Kansas fight scenario, because we think it won't be necessary in New York, especially with the change in administration and the fact that our governor-elect has publicly stated that it is his intent to comply with the court order, which was not the kind of statement that the incumbent governor had issued after the trial court or the Appellate Division had issued their rules.

I just want to say one more thing about this separation of powers issue as it plays out in New York. I mentioned that we have precedents in the federal courts. We have precedents in other state courts. We have no precedent right on point in New York State. There is no New York prior decision that says the Court of Appeals has the authority to order the Legislature or the governor to take action of this sort. As we've repeatedly stated to the judges all the way up the line, the reason there's no precedent in New York is we've never had this unusual and unfortunate situation where the other two branches have directly defied a clear order of the highest court. So it's a matter of first impression only because most governors and legislatures throughout New York's history have been law abiding in my point of view. And I think that, when the line is drawn, if the court has to issue a ruling here that they are going to have to make clear that they do have this authority.

By the way, let me make clear what's being asked for here. It actually is not a specific order from the court telling the Legislature exactly how much money it must appropriate and exactly what the formula changes are. It's saying that they must take action to make sure that this amount of money is provided for the New York City schools over the next four years. One of the critical aspects of how that decision will play out in fact has to do with the state/local share. The Court of Appeals in its 2003 decision, and Justice DeGrasse in the Appellate Division in the follow-up compliance decisions, have all emphasized that it's up to the state to determine whether there will be a local contribution by New York City and, if so, how much that will be. So there's obviously a major political decision out there as to the City's share, and that means the exact amount that the Legislature will have to enact to comply with the court order is an open question. If the court fully affirms the lower court decision that has this range of $4.7 to $5.6 billion, let's say for argument's sake, they take the lower end of the range, which would not be totally

surprising to me, that does not mean that there's a $4.7 billion state appropriation that is expected. There's the formula that CFE and a number of other statewide organizations had proposed a couple of years ago. We looked closely at this question and we think there's a very fair formula that determined the local share or what the local share should be not only for New York City but for every other district in the state depending on two major factors: their ability to pay and the extent of their relative need and needy populations. Under that arrangement, New York City would have to pay 23 or 24 percent of the total amount. So if the total final amount is $4.7 billion for New York State, that would mean the City would have to kick in something in the order of $1.2 billion, which would leave $3.5 billion for the state appropriation. But the Legislature may, in its wisdom, decide on a higher amount or a lower amount. So therefore the court is not ordering a specific dollar amount. It's really ordering the other branches to act in accordance with their constitutional responsibilities and make sure that the requisite amount is provided.

Let me just say a couple of things about this amount of money that was determined here. There were several of these expert costing-out studies that had been presented to the referees that the lower court had appointed to look into this matter. We probably had one of the most extensive analyses of the technical aspects of costing out that has been done in any judicial proceeding around the country. They have had these costing-out studies in about 30 states. In a number of those states, they were ordered by courts, but it's been rare for a court to look into the details of what the economists and educational authorities had actually done in a technical sense in these areas. The Wyoming court did and a few other courts did, but it is relatively rare. I think if you look at the report and recommendation here, you will have a good understanding of the successful schools methodology, the professional judgment methodology, all of which was hammered out in great detail. Unless somebody wants to get into it during the question period, I'm not going to go into the details of that, which aspects of the various methodologies were upheld or criticized, etc. But in any event, there was a good airing of all these technical issues, and when the dust settled, the referees had recommended $5.6 billion. That was affirmed by Justice DeGrasse, and then when it went up to the Appellate Division, they looked at the record and said, "Well, there's justification

in the record for that $5.6 billion figure but we think there's also justification for $4.7 billion," which was the amount the governor had recommended at one point in the bill he proposed to the Legislature during that extraordinary session and they were kind of holding him to his word on it. So those are the figures that went up to the Court of Appeals.

As I mentioned during our oral argument in October, the court really probed in great detail where these various numbers of $4.7 to $5.6 billion came from. That somewhat surprised us because normally the Court of Appeals does not look into detail on factual issues that are not in dispute between the lower courts. Both lower courts had agreed on a minimum of $4.7 billion, so we assumed the court would accept that figure, but would look more closely at the separation of powers issues. They have decided to look closely at that figure, however, and in addition to asking a lot of questions at the argument, there has been some follow-up. I don't know if you're all aware of that, but the day after the argument we got a call from the clerk of the Court of Appeals asking for a full copy of the various costing-out studies. The full versions had not been in the record. They then asked for additional documents explaining the costing studies and the positions of the various parties in the case. So there have been a couple of weeks of submission of further documents that have been going on. This is sheer speculation; these things always are speculation, but if that rumor is true that the court is going to be issuing a decision some time this week, my suspicion is that it may be some kind of procedural order based on their review of these additional documents. They may want further briefing. They may want another argument. I would be very surprised if they come up with their substantive decision this soon, especially when they know a new governor was just elected. But surprises are part of what makes this litigation business very interesting, so we will see.

I'll just say one more thing about the status quo or the current status of the case. Because of the election of Mr. Spitzer, I think the political landscape has shifted dramatically in regard to the CFE case, as it has in many other areas. As I mentioned earlier, Eliot Spitzer has gone on record as saying that he intends to comply with the court order and has been talking about settling in figures in the range of $4 to $6 billion for New York City. He mentioned $4 to $6 billion, I think, during his debate. Other times he said within the parameters established by the court. He claims that on day one, I guess January 1st, everything changes. So we're looking forward to settling the case on or about January 1st. But seriously speaking, I would expect that the new governor is going to have to deal with the CFE matter in his budget request, which comes in around the end of January, and that this issue will be ripe for decision during the current

legislative session. I take Eliot Spitzer at his word. He's certainly been very clear about it, and I know a lot of his constituents would like to have this matter settled.

But even if I were a skeptical lawyer, who wondered whether I could take him at his word, there's a very interesting circumstance here that not all of you may be aware of, and that is Eliot Spitzer actually, at this time and until December 31st, has a different role in the CFE case than he will have after January 1st. He's actually been the main lawyer opposing us for the last eight years in this litigation, and it's been a very tricky situation for him because, quite frankly from a political point of view, I think it's fair to say that most of the power supporters would probably be in the category of prime constituents. We talk about the base for getting out the vote for a Democratic candidate who comes from New York City. I think a lot of our supporters would be part of Eliot Spitzer's base, and he's known that for years. He's had some hard questions asked of him by many of his supporters as to why he's carrying out the governor's water, and does he believe that a great education is enough for our kids, do you think that New York City is being fairly treated, etc? He has had a consistent answer and, quite frankly, although I was skeptical about his answer at first, I've come to believe that it was a very genuine, ethical stance that he felt he had to take. His stance is that, as the chief lawyer for the government, he has to represent the state's position. When there's an impasse between the governor and the Legislature, the governor has the legal right to articulate the state's position and, therefore, it's his duty and responsibility to represent the governor's position in a situation like this as best he can as the chief lawyer for the state.

From my point of view, I still think that he could have excused himself. He could have said it's a conflict of interest. He doesn't see it that way. Since I don't think this situation has helped him politically, I do think that's been a very genuine stance. On the other hand, say what you will about what he's done over the last eight years. We have a very interesting situation come January 1st and that is if the CFE case is not quickly resolved and it does have to go back to court, well, Eliot Spitzer is now the governor. He is going to have to call the shots and he is going to have to determine what the state's position is going to be. So there is no more hiding behind another figure or saying that I'm taking a stance that is not palatable to many of my constituents. Somebody's ordered me to do it. So I quite frankly think that Eliot Spitzer would love to get this out of the way and not see it return to court. That's another reason why I do look forward to our having a resolution of this very quickly after January 1st.

Let me talk about the implications of a resolution of the case for New York City, New York State, and the nation, and I'll try to do that in short order so we can leave plenty of time for questions and comments. As far as the implications to New York City, they are in line to get a lot of money if we win this case. We'll see what the exact amount is. But there are two other issues that have not gotten as much publicity but I just want to briefly mention. One is the city's share. Mayor Bloomberg has consistently taken the position that he thinks it's unfair for New York City to have to pay anything here and he's been kind of adamant about saying the City's share should be zero. At times, I wonder if the mayor understands the legal theory under which this case is argued. Whenever he's pressed about it, he talks in terms of an equity theory. We didn't win on an equity theory; we won on an adequacy theory. So the mayor sees it as a case that is looking to rectify injustice done to New York City by the rest of the state and, therefore, the rest of the state owes us $4.7 billion, or whatever the number is. That may or may not be the fact, but it is not the fact determined by the court. The court determined that kids in New York City were being denied their right to a sound basic education, and they didn't determine liability, whether the City had put up enough money or the state had put up enough money. In fact, as I'll say in a few minutes, from CFE's point of view, for legal strategic reasons we brought this case in New York City on behalf of New York City kids. For equitable and political reasons, from the beginning we've seen it as a statewide litigation, and we've understood why Buffalo and Syracuse and Rochester, for instance, have gotten substantially more state aid on a per capita basis than kids in New York City, and we've accepted that because, when you look at a fair formula, they are just as needy, as a matter of fact, more needy in terms of the numbers of poverty-bound kids than New York City. They're also much poorer cities, so on a fair formula, they should get higher state aid than New York City. The mayor has not fully understood that and he's pointed out that other cities in the state get a higher share of state aid and he stands adamant on New York City being owed something by the rest of the state. So this is going to be a major issue and I don't know, quite frankly, whether the mayor's stance is a good solid bargaining position, that he's going to stand strong until the moment arrives that he's really got to put up or shut up and then he'll put up, or whether he fully believes that this thing is going to go to the wall.

There already has been some sparring between the governor-elect and the mayor on this. I don't know if you're all aware of this, but there was a very interesting comment that Eliot Spitzer made in an interview with the editorial board of the *Daily News* a couple weeks before the election. I think he was starting to put out some messages about how he'd like to resolve the CFE case and one of the critical issues is that the mayor's got to come forward with a reasonable share.

So Spitzer mentioned to the editorial board that he thought a fair amount for the city was around 23 or 24 percent, which happened to be the amount that we've been advocating, and which the Assembly advocated shortly after CFE and its task force came up with that figure. So I think that was a very realistic figure for them to throw out, but the mayor's response to that was, "We're not kicking in anything." And the governor-elect's response to that was, "Well, I hope the mayor sees this in the full context of the number of education issues that are going to have to be decided in the next few years, including whether we reauthorize mayoral control in 2009." I think lines are starting to be drawn here and it will be interesting to see how that all plays out.

The other point as far as New York City is concerned is the question of accountability. I haven't said much about that. The court was serious about it. It put it in its order, the three-pronged order. On that one, accountability issues have come up through this compliance litigation but it's actually been very interesting that, as the matter developed and as the issue now sits with the Court of Appeals, we're actually in agreement with the governor's side on the accountability issue. Although we didn't agree with all aspects of the accountability plan that the governor put up and they didn't agree with all aspects of ours, what the referees below did is take all the areas where we were in agreement with the governor and put those in an order and say we're going to require the city to adopt these particular accountability provisions that both parties have agreed to, even though the city strongly objected to any accountability. The mayor testified during the hearings that he defines accountability as his going before the voters every four years, and they either liked what he did or they didn't. The only problem I have with that is he gave that testimony about six months before he was reelected. Now since he's been reelected, I don't know how you square that with any theory of accountability, because he's not going before the voters in New York City again. But in any event, what the courts ordered at our urging and the state's urging is a requirement for the City to come up with a comprehensive plan on how it's going to spend the money and a very specific accountability report annually that will have indicators and benchmarks to indicate whether whatever plan they have adopted has been followed and how successful the funding has been. The mayor and the chancellor, quite frankly, have been very resistant to any kind of public process for planning. They issued what they called a plan a few years ago, which in my mind, was more of a listing of the budget categories than a really adequate plan. The court did agree with us on that. The referees called the mayor's plan a good first draft, but not a real plan. So that's before the Court of Appeals whether they're going to order the City to come up with this comprehensive plan and this additional accountability

scheme. If they do, it's going to be a very interesting political dynamic to see how it develops and plays out in the City.

Let me quickly say something about the implications of a CFE resolution, whether it's a political resolution or a court order, as far as the state is concerned. Here again, despite our very substantial disagreements with the governor and members of the Legislature over the past few years, the one issue that we have always been in agreement with all the parties has been that when there is a resolution, it has to be a statewide resolution. Mr. Spitzer clearly agrees with that, too. His staff people have made it clear that, when they're starting to sharpen their pencil and think through how to work out a settlement for CFE, it's not just $4 to $6 billion dollars for New York City, it's also comparable amounts for districts upstate that are underfunded. Exactly how he's going to determine what underfunded means and how it's going to work out will be one of the interesting issues to follow. I think it goes without saying that, throughout this whole period that CFE has been pending before the Legislature, that's the one thing that Governor Pataki, Speaker Silver, and Majority Leader Bruno have all agreed on, that the solution has to be statewide for obvious reasons. Our CFE task force, which included about 50 members and had representation from all the major groups that have a stake in education, came up with recommendations on what the statewide formula should be. Basically what we did is take the costing-out formulas that the referees adopted below and recommended to the court for New York City and applied the same factors to other districts throughout the state. When we did that, under the original court recommendation for $5.6 billion for New York City, the amount for the rest of the state was roughly another $3 billion, making the whole price tag about $8.5 billion. Since the court has now said that the New York City number can go down a bit to $4.7 billion that would have implications if you follow the same logic, with the rest of the state's package being about $7.5 billion. Now, remember though, there is local share in that. That's not all state funding. So it's clear that the discussions and the final resolution will be statewide but exactly what the figures are and what the formulas will be is another matter.

I'll say two other things about how the statewide formula might work out. We've been very insistent with the court that we need to have provisions for future costing-out studies essentially to keep the Legislature honest because the court has not ordered formula reform. We have proposed a whole expanded foundation funding system, again coming out of our statewide task force, but the court decided not to get into the intricacies of formula reform, because it said the legal issues that came before the court involved New York City, and as long as New York

City gets the amount that's been identified, they don't care exactly what the details of the formula are. But since, in fact, we're looking for statewide relief, it is important that we have reform of the formula. I think Mr. Spitzer is going to look at the reforms that he's going to recommend in that way. I think he is going to be serious about formula because you've got to have formula if you're going to distribute the funding to all 700 districts in New York State. I suppose you could just pass a bill saying New York City will get X amount regardless of a formula but it won't work if you're doing 700 districts around the state. One of the problems we've had with formulas in New York State is whatever they say on paper, in practice they tend to get undermined, as many of you know, with a lot of transparent, and not-so-transparent, manipulations that go into the 50-odd formulas and grants and aid and all that compose education funding. So one method that we think we can ask the state to adopt, or we've asked the court to order it actually, is that periodically, we've said every four years, we go through this exercise of a public costing-out process where we have some elucidation of what the factors are that go into various positions on what the formula should be. Even though these costing-out studies certainly are not scientific in the natural science sense that there's one right answer, one precise amount, the Appellate Division was quite right in saying a range is probably reasonable because these things involve judgment. But what they do is force people to focus on the funding issues and force them to focus on it in a public, transparent way. So that is a major reform that we believe has to come into effect, whether it's by court order or by settlement, and we will definitely be pushing for that.

We also mention in our court papers that the phasing, which is a four-year phase-in as ordered by the court below, that some thought should be given to timing the phase-in to productive use of the funds, certainly in the case of New York City, in accordance with a comprehensive plan that we see coming down the road. In other words, instead of saying in a just absolute sense it's 25 percent of the money each year, we think the court or the State Education Department or whoever is the ultimate authority that looks at this should examine New York City's plan. Maybe they'll make good use of 40 percent of the money the first year but maybe they'll only make good use of 10 percent of the money. Again, we don't want to be throwing money at the problem. We've been accused of that time and again. It's not our approach. We're very serious about these accountability devices. We think the kids need at least that amount of money that's being asked for, but we want that money spent well because we know the scrutiny that this is going to get. We know this is a rare point in time, so we would be open to really working that phase-in in conjunction with an intelligent implementation of the plan.

A lot of issues have been brought up, and probably I should stop here, but especially because Tom spoke about No Child Left Behind and it's been on my mind from the symposium that we just finished at Teachers' College. I want to say a few things about the implications of the CFE situation for education and finance reform and adequate education nationwide. Most of you probably know, as I mentioned earlier, that we've had litigations and challenging of state constitutional schemes against state education finance schemes in 43 states under the equity theory, the adequacy theory. There's a lot churning in the courts around the nation. I think it's fair to say that, in the last few years, the CFE case has become something of the focus of the court's role in these state court litigations, partially because we're the latest major decision. The Kentucky case got a lot of attention back in 1989. The New Jersey case got a lot of attention in the past and I guess when we came on the scene, it was our turn. It's also that New York's the media market and people pay a lot more attention to it. I'd like to believe, though, that the reason that we get a lot more attention is that our Court of Appeals really did an incredible job of focusing the issues, both the liability issues and that remedy with the three very clear guidelines, which really say in concise terms what the court has to do to get an effective remedy here to determine the actual cost, reform the formula, and look at accountability. What implications does CFE have with all the attention it's getting nationwide?

I was thinking about No Child Left Behind and some of the major problems we have in having that law really have a chance of realizing its very ambitious goals, which, as you know, is 100 percent proficiency of all students in the nation by 2014. One of the real problems in No Child Left Behind that people are probably aware of is there is no federal definition or requirement for what this proficiency is. It means that states are all over the place in the rigor of their actual standards. Now, this is one area where I think CFE and the other adequacy cases have something really important to contribute to the national discussion on NCLB, because what's been going on in CFE and the other adequacy cases is they've been focusing on a standard. In this case, like many of the other cases, there's been a very active dialogue with the state standards. There's been a very deep analysis of those standards and their relationship to constitutional requirements. Now in New York, we have relatively high standards and, as a matter of fact, the court indicated that the Regents standards are probably higher than what the Constitution requires. But what this means is that the focus the adequacy cases are given in some sense is establishing a constitutional floor for these state proficiency standards. That's not the law yet, but it is one of the proposals we're going to be making. Together with the rest of our adequacy network, we have a group called Access, which ties together most of the lawyers and advocates

around the country that are involved in these cases, looking at about a dozen cases where courts did articulate standards. As in New York, we saw a real common core, so we've issued what we call a consensus definition of what an adequate education is and what a quality education is. Essentially we're recommending that the Department of Education adopt these as a floor, as a minimum standard for proficiency from which they would be reviewed with some rigor nationwide.

There are two other things that I wanted to mention. One of the big problems I see in No Child Left Behind is that it talks about highly qualified teachers, but the "highly qualified" that it's ordering really are minimally qualified teachers because the only qualification that the federal government now enforces is that teachers essentially be state certified. State certification in most states is based on minimal competency. The focus we've had in CFE on improving the quality of teachers, which was the number-one priority according to the Court of Appeals, and the emphasis on going beyond minimum competency, is important and, again, it's got a lot of lessons that we can apply to the substance of what a qualified teacher is, which I think is the heart of No Child Left Behind if it's going to succeed. I certainly agree with the Court of Appeals that improving the quality of our teaching is job number one if we're really going to have a shot at bringing all the kids up to the level of standards or substantially reducing, if not eliminating, achievement gaps.

Finally, one of the major problems of No Child Left Behind is the federal government never attempted to do any kind of analysis of the amount of funding that's needed to really provide the range of opportunities these kids need. There is all kinds of bickering and squabbling going on between President Bush and the Democrats in Congress about whether the president has actually allowed Congress to appropriate the full amount that was agreed to in the bipartisan deal that led to No Child Left Behind in 2001. The president says that, in the last four or five years, the federal spending has increased almost $10 billion in No Child Left Behind. George Miller, the about-to-be House education chairman, and Ted Kennedy, the Senate chairman, say the amount agreed to was about $20 billion. But the fact is these amounts only relate to reimbursement to the states for the cost of testing and extra administration. The federal government has never tried to determine how much the states actually need to do the full job and actually provide sufficient resources to all kids. That's what our case at CFE has been about in large part. That's what the other adequacy cases have been about. We've learned a lot from these costing-out studies, so we're recommending to the federal government they have to do a national costing-out study in

conjunction with focused methodologically consistent costing-out studies on what resources are actually needed to meet the goals of No Child Left Behind. We're not taking a position about how much of that extra funding should come from the states or from the federal government, but people should at least know what we're talking about. I don't have time to get into it, but consistent with our deep concern for accountability, we think the methodologies for costing out have to go beyond what we've learned from what was done in New York State several years ago. We think this costing out has to be done in conjunction with an analysis of best practices, not just costing out present practices, but costing out best practices along the lines of what's known as a quality education model that's been tried in Oregon and a variation that's going on in a very interesting way now in California.

I've probably talked longer than Tom had in mind and longer than I had in mind, but a least I covered all the topics on my list, and now I'd be happy to answer questions or hear comments from the very notable people we have in the audience.

Deborah Cunningham:

I'm with the State Education Department. It was very interesting and great to hear your perspectives at this point. Can you tell me what the rationale was behind the 23 to 24 percent City share? Secondly, in the settlement, would you give the state credit for the increases that they have provided to New York City since the June 30, 2004, order? That would be 2004, 2005, and 2006 and something a little more than $1 billion?

Michael A. Rebell:

Let me take the second part of that question first. I think what Deborah's referring to is the obvious fact that we're now just about three years behind the original date that was the date used by the lower court for calculating this $4.7 to $5.6 billion, and there have been increases that have been voted over these past few years. Deborah's figure is $1.2 billion. That issue did come up before the Court of Appeals and our position on that was, "Of course they should be given credit for that." On the other hand, the court order has a built-in inflation adjustor factor and an enrollment change factor, so our position has been to let that formula work itself out. It's not the kind of thing that should be done before the Court of Appeals. We've asked them to issue an order that says $4.7 to $5.6 billion in 2003, I think, was our base year, which then should be

adjusted to take into account actual increases since then, but also inflation and other factors since then. Inflation, by the way, would be on the base of total expenditures for New York City not just on the increase, because we're talking about having enough funds to both carry on the program as it was at that time and to pay for what the court thought was a necessary increase. When you do all of that, I think, we've done some tentative calculations, the number still would be around $5 billion when you offset inflation and these other factors.

As far as where we got the 23 and 24 percent, basically it's accepting the present combined wealth figure as the basic wealth of the district, but the difference in the way we approached it is we added a need factor. There was an adjustment based largely on the number of free-lunch kids in each district. When you do that, New York City, because it has a large number of those, gets a greater share than it does under the present formula. Rochester and Buffalo and others get even more than they do under the present formula. We also, obviously, have to take into account the amount that the district, or in this case New York City, has been providing in past years.

David Shaffer:

I'm with the Business Council. You mentioned in passing having some competent authority following up on the implementation, whether it be the judge or the Education Department. That strikes me as really something that eventually is going to be worth a lot more than mentioning in passing. Do you think it is advisable simply to remand control to Judge DeGrasse, a fine man and a parochial school graduate, or somehow turn the supervision of the implementation back over to the Board of Regents, the competent body under our Constitution?

Michael A. Rebell:

That actually is the position we've taken in litigation. Believe it or not, we're not asking the court to retain jurisdiction. As a matter of fact, we told the Court of Appeals we want this case to end and proceed on legislative action this session and comply with the court order. If that happens, we think the litigation should be over. The question of who would have oversight in terms of this accountability was one of the areas where we had strong disagreements with Governor Pataki. I don't know what Governor-elect Spitzer's position is on this, but the position Governor Pataki took in the lower court was that he wanted to set up a new office of accountability within the

governor's executive office. I think the exact way he proposed it was that this new accountability czar would somehow share authority with the State Education Department. It wasn't exactly clear how that power sharing would come about. On that one, we agreed with the city's position, and I think it was also the position of the State Education Department, that this was not only unnecessary, but it was additional bureaucracy that would get in the way. But because there was that dispute, as I mentioned, the lower court said the plaintiffs and the governor agree that there has to be comprehensive planning. There has to be annual reporting. They didn't agree on who the reports go to or who's approving this comprehensive plan. So that was kind of left open and I guess that will go to the Legislature. But our position, which as I said the court hasn't decided on that oversight thing, our position is that it's something that probably will belong with the Regents.

Felix Muniz:

I'm with the New York State Senate Finance Minority. I was wondering if you could give me some suggestions of how the money should be spent financially? For example, we know that there are concerns with middle school dropout rates. Should that be an area that should be targeted with this money?

Michael A. Rebell:

I guess I can say a few things about that, but I really deeply believe that this is something that should not be decided either by the court or even lawyers who appear before the court. There are some priorities that are spelled out in the court order, and I think they're rather apparent. As I mentioned, improving teacher quality is priority number-one as far as the court was concerned. I think that is Chancellor Klein's number-one priority, so we don't have any disagreement with him. How you go about doing that, of course, is another question. To my mind, the best plan I've seen, and I'm not saying this to be punitive in any way, but I'd love to see more public discussion out there about it, was the report issued by the City Council CFE Commission, which did do the kind of comprehensive planning that we've been asking the mayor and the chancellor to do for years. They had wide public hearings. They had a distinguished commission. They had Tony Alvarado and a really expert group writing up the report. What they were proposing for improving the quality of teachers is appointing a number of master teachers in the districts or the schools that are hard to staff. The idea is if you can get not one, but a cadre of master teachers, you may begin to create conditions that will be attractive to bright and talented young teachers.

Not only will it get them to come to these schools, but it will get them to stay. That report came out in the middle of the last election. It came out of the auspices of a losing mayoral candidate, so it was kind of dead on arrival. But as I say, I'd like to, for lack of anything else that's substantive to be put forward, I think it's a very useful plan for looking into details on. The chancellor did negotiate a real breakthrough in the union contract from a couple of years ago that allows him to pay $10,000 extra to so-called master teachers or lead teachers. I think there is a potential for doing this thing.

The other aspect of that City Council report that I found very interesting is the notion of what they called laboratory schools in laboratory districts, which was to take some number of schools (I don't think they've put down the number, but let's say you start with 25 or 50 schools), you put the resources in there, and you see how it works before you spread it out to the City. You make sure it works. So there again, I can see timing that in with the phasing. One other thing I'll say in terms of the mayor's current organizational priority. He's established this empowerment zone now with about a third of the schools in the City giving more authority to the principals, which is another promising direction. Again, I don't think it's our role to really get into the nuts and bolts of the educational policy here. But one thing I've been concerned about in the way they've rolled out the empowerment zone is that's based on a new system of accountability. There's going to be a lot of data generated by each of these schools and these principals are going to be held accountable. I guess the implication is if their statistics don't look good after a couple of years, then they're liable to be fired. The missing element there, from my point of view, is a review of whether each of these principals has had adequate resources. So I would say if the first year your statistics on achievement and dropouts and all the rest don't look good, before you put the principal's head in a vise, we ought to look and see that the school has a reasonable amount of resources. If it was getting additional CFE money, then maybe that's one area where the additional resources could be targeted. Those are just some things to think about, as I say.

Robert Ward:

I'm also with the Business Council. Assuming that the court and the Legislature and the governor do send more money to New York City schools, at least somewhat close to the amount that's being requested, what is the likelihood that 10 years from now a majority of kids in New York City will be meeting state standards?

Michael A. Rebell:

What's the likelihood, you're asking? I can't even predict when the court order is coming up and what's going to be in it. I don't think I'm going to go out on a limb by predicting…

Robert Ward:

Isn't that the basis of the lawsuit though?

Michael A. Rebell:

The basis of the lawsuit is to provide the opportunity for a sound basic education. That we can focus on and that's what we have been doing. I have to believe that, if we get sufficient resources and we get qualified teachers and all the rest consistent with the education policy in this state that the Regents have clearly articulated, all children can learn if provided with the proper supports and resources that all children, or certainly a lot more children than currently are learning, will. But I didn't write No Child Left Behind. I didn't say all kids would be proficient in the Regents standards by 2014. I hope they will. I certainly expect there will be substantial progress, but I'm not going to stand here and say in eight years or ten years, it will be 100 percent. Certainly if within a few years we're not seeing dramatic progress, then that's going to be a major problem. That I'm going to be concerned about and you're going to be concerned about and I'm sure everybody in this room will be.

Thomas L. Gais:

I was wondering about your recommendation for an every-four-year costing-out process. Do you think that's simply a prudent and wise thing to do in the legislative process or do you think it is in some way constitutionally required as a way for the state to determine that adequacy criteria are in fact being met by the state?

Michael A. Rebell:

I'd like to see it interpreted as a constitutional requirement. That's why we're asking the court to order it. By the way, the current proposal that we have before the court says that this should be

done under the auspices of the Regents, not under the Legislature, on the theory that the expertise and the bipartisan perspective comes more from the Regents than it will from either house of the Legislature. We'll have to see in four years if that's true or not. I guess what I'm saying is, in my mind, since the court has not issued a constitutional ruling about details of the formula, this is the minimum that we need to have some call for permanent reform in this state.

Elizabeth Davis:

I'm with the Office of the State Comptroller. This is kind of a little off the topic, but you touched a couple of times on the competency of teachers. I didn't know if you've taken the position on the issue of having ever-increasing, and possibly burdensome, requirements on people who become certified as teachers in this state and therefore potentially reducing the number of teachers available, as opposed to making the requirements a little broader or different in structure and encouraging more people to enter the profession as a career.

Michael A. Rebell:

At least in my present position at the Campaign for Educational Equity at Teachers' College, not in my position at CFE, we have taken the position that certification requirements should be beefed up. We think that if you have higher requirements (and, by the way, we're also open to taking a look at the way tenure plays out), the bottom line has to be effectiveness. We've got to be fair to teachers but we've also got to be fair to kids. My understanding of what happens when you increase requirements and look for more highly qualified teachers and provide them with working conditions that make the job truly attractive, you tend to attract more qualified people. That seems to have been the track record in Connecticut where over the past few years they're one of the states in the country that has gone the furthest in beefing up their certification and other requirements and they have dramatically improved their teaching force. So that's my personal view. It's not CFE's position.

David Shaffer:

What are the implications of the early settlement of the teachers' contract for the playing out of the case?

Michael A. Rebell:

Again, I've got to separate my hats here. CFE has no position about that that I know of. But from my other academic policy perspective, I think that was a great development. Not only that it will bring stability in labor relations personnel for the next couple of years, but it means that teacher wages have been determined. You know some people (as a matter of fact, my recollection is that you may have been one them a couple of years ago), predicted that if we got a CFE settlement, it would be quickly gobbled up in the across-the-board increase in teacher wages. Well, it looks like that's not going to happen. The level of teacher wages has been established for the next few years, so that may mean that we can target this $4.7 billion, or whatever the exact amount's going to be, on a number of innovations that we can track in accordance with these accountability provisions that I've been talking about.

David Shaffer:

Or it may also be that the teachers have already gotten to the head of the line in getting their share of the $4.7 billion.

Michael A. Rebell:

Well, that's not the way I would look at it, but that, I guess, will have to play out with this decision of what the City's local share is and how the mayor and the governor-elect interpret these various factors.

Deborah Cunningham:

Have you recommended, in any of your hats, an adequacy formula from the City to the schools?

Michael A. Rebell:

No. That's just too fluid a situation with all these changing empowerment zones and everything else. We did recommend in our task force report that, as part of this comprehensive planning, that we also need comprehensive planning at the local school level. But I think, once we get the final

decision here, we need to think through how that plays out under the new structure of the empowerment zones.

Bill Shapiro:

I'm with the Civil Liberties Union. You talked about the benchmark in the case being an adequate education. Can you talk a little bit more about adequacy for what? Can you put adequacy in the context of economic productivity, citizenship, history of compulsory education, and other, broader issues like that?

Michael A. Rebell:

All of the above. The bottom line of the way the court interpreted the constitutional requirement, as Tom alluded to in the introduction, is the court rejected the governor's position, which had been affirmed by the Appellate Division, that an eighth-grade level education is sufficient. It made very clear that it needs the Constitution to require kids to have the opportunity to develop the skills they need in the 21st century to be competitive employees in a global marketplace and to function productively as civic participants capable of voting and serving on a jury. So a meaningful high school education means a high school education that provides that level of skills. I think that's another variable when we talk about CFE having implications for the nation. I think that the development of the notion of what skills are required for citizenship and employment have gone further in this case than in any other case around the nation. We really focused in the trial on precisely what skills and what level of skills kids need to carry out those functions, and that's what convinced Justice DeGrasse and I think that's what convinced the Court of Appeals that it couldn't be eighth-grade level skills. If you're going to understand complex political issues as a voter, as a juror, if you're going to be able to compete for the cognitively demanding type of jobs that we need to get ahead, they can't be minimal skills. They've got to at least be on the level where the Regents standards are now, or in that range.

Margarita Mayo:

I'm also from the Business Council of New York State. My question is, as you looked at the accountability aspects of this, was there room for the costing out to change and become more

based on actual results as more and more data are collected over the years? Is it possible to collect more data as well?

Michael A. Rebell:

Sure. That's one of the expectations we have in asking for this costing out. It's not to say, "Well, now that we've gotten $4.7 billion, let's have another round and come up with a methodology that will show how much more money is needed." Obviously, it's got to be calibrated with results. It's got to be calibrated with the experience of what's been done with the money in the past. So I see it as an important part of guaranteeing the requisite level of resources, but it's also an important part of ongoing serious accountability.

Damian Leonard:

I'm with Senator Saland's office. You've hinted briefly at the national implications for CFE. Could you maybe elaborate a little bit more on how you see the upcoming decision in this case impacting pending court cases in states like New Jersey and other states around the country? Do you see this having a large impact in changing the course of those cases or possible litigation, or do you see it as maybe not having impact for years to come?

Michael A. Rebell:

As I mentioned earlier, it's been very interesting to me. As a matter of fact, it's been some frustration for my friend and colleague, David Sciarra, who's the attorney in the New Jersey case. He's always saying that if you look at it from a pure analytic point of view, the New Jersey case is really much more important than the CFE. They've been at it longer. They've gotten a lot more elaborate court orders. They've been doing a lot more things, but nobody knows about it. He wails that we have more media in New York so we get all the attention. Whether that's true or not, I don't know. It is a fact that CFE is out there and it's well known, so I think whatever the Court of Appeals does here will have an impact on compliance. That's what the present situation is about. It will be a precedent, whichever way it goes, for any compliance problems that occur in other states. I hope it will also be a precedent on accountability. That's an area that we really have been pioneers on. I think in costing out a few other courts buy into it; on accountability, New York went the furthest except for the trial judge in Massachusetts, who directly quoted the

accountability provisions in the CFE one and then actually added some interesting additional concepts about building capacity and put that into the accountability notion. Her decision was not upheld by the Massachusetts Supreme Judicial Court, so that's no longer a law in Massachusetts. But I think it was a very good indication that other judges, other people faced with these situations, do look to New York and do look to the CFE case. In areas like defining what skills you need to be citizens, to be competent employees, we've probably gone further in New York than any other state. I hope I'll be able to say that as far as the positive accountability notion when the dust settles with this final CFE order of the court and the follow-up from New York City and New York State.

Thomas L. Gais:

Thank you very much, Michael.