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## Appellate Div. Sends Message to Court of Appeals in CFE Case

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## SCHOOL FINANCE

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The Campaign for Fiscal Equity litigation achieved two of its major goals: it focused media attention on the condition of New York City schools and reinforced the claim that the State of New York “owes” billions of dollars more to City schools. Nonetheless, the Legislature and Governor have failed to appropriate the billions of additional dollars that the courts directed be appropriated. This clash of court demands with political reality has set up a constitutional crisis. The CFE litigation is on its way to the State Court of Appeals for the third time. Perhaps this time the Court of Appeals will listen more closely to advice from the Appellate Division.

To get to the Court of Appeals the CFE litigation has to pass through a sort of purgatory, the Appellate Division of the First Department, the State's mid-level appellate court in Manhattan. The Appellate Division hears appeals after a case leaves the lower, trial court, and before the appeal is heard by the plenipotentiaries in the Court of Appeals. The midway assignment calls for the Appellate Division to sort out and expiate the sins committed by the trial judge and, in doing so, reach a result satisfactory to the high court in Albany. The theory is that the Appellate Division will leave the Court of Appeals with little if anything to do. Twice before with the CFE litigation, the Appellate Division judges tried, but both times they \*50 failed to satisfy the Court of Appeals. They have now tried for a third time.

On March 23, 2006, the Appellate Division rendered a decision that reads like a lecture on the inherent limitations of the judiciary when it comes to managing public educational enterprises. It advised the Court of Appeals to pull back from a direct confrontation with the State Legislature over the authority to appropriate money. The Appellate Division also reminded the Court of Appeals that courts are illequipped to second guess the State's education experts when they make reasonable decisions with a rational basis. Nonetheless, the Appellate Division ordered the State to appropriate billions more for New York City schools, but modified the trial court's order by setting a range of appropriations rather than a precise amount.

Initial reaction to the Appellate Division's decision was confusion. On the one hand, the Appellate Division ordered the State to appropriate more education money, but, on the other hand, sided with the State on how much would suffice, and used words like “consider” where other passages in the opinion made it seem that words like “must” were more appropriate. One lawyer working on the State side said that he disagreed with the opinion's first and last paragraphs, but loved everything in between. The lawyers for the plaintiffs declared that they succeeded in their goals, but acknowledged that the opinion made the nature of the court's directive less clear. Legislators were reportedly confused, and editorial writers hedged their bets.

In a case like CFE where the Court of Appeals will surely weigh in no matter what the Appellate Division does, the intermediate court can do little but send a letter of advice up the chain of command. So far the Court of Appeals has not taken the Appellate Division's advice.

### *The Appellate Division's first attempt.*

In 1994 the Appellate Division tried after Judge Leland DeGrasse approved the CFE case for trial. The CFE complaint was a so-called third generation school funding case. First generation plaintiffs focused entirely on equality of funding and invoked the federal constitution. The United States Supreme Court rejected that theory in 1973. Second generation plaintiffs invoked the State constitution's equal protection clause. They alleged that the State's school funding system disproportionately discriminated against poorer and urban school districts and therefore violated the State's equal protection clause. But this theory was rejected in New York by the Court of \*51 Appeals in 1982. Left open in the Court of Appeals decision, however, was the possibility that plaintiffs could link the State's education funding system to woeful performance in a particular education district. If plaintiffs could show that the funding system caused the woeful performance, they could win. This so-called third generation claim is what the CFE case is all about.

In 1994 Judge DeGrasse ruled that the CFE plaintiffs had in their complaint stated a viable cause of action when they alleged that City schools failed to meet minimum educational standards and that the cause was the State's funding system. The State, which had moved to dismiss the complaint, appealed to the Appellate Division.

The Appellate Division sided with the State and reversed, but not with a lot of explanation. The Appellate Division described the complaint as “conclusory” and said it was “virtually identical” to the earlier equal protection complaint rejected by the Court of Appeals in 1973. While not expressly stated, the effect of the Appellate Division's opinion was that resolution of disputes over the adequacy of the education provided would be through political processes, and not by the courts.

The Court of Appeals, however, had other ideas. Rejecting the Appellate Division's opinion, the Court of Appeals in 1995 enthusiastically embraced judicial intervention in education adequacy issues, and began to read into the State constitution's language a “constitutional floor with respect to education adequacy.” The Court went on to describe the facilities and teachers that were required to provide a sound basic education, and listed the student outcomes that marked an adequate education. The Court of Appeals wrote that “plaintiffs allege and specify gross educational inadequacies that, if proven, could support a conclusion that the State's public school financing system effectively fails to provide for a minimally adequate educational opportunity.”

The Court of Appeals sent the CFE case back for trial. Following months of testimony, Judge DeGrasse in 2001 ruled in favor of the CFE plaintiffs and, as a remedy, listed precisely the managerial, financial and educational reforms that the State had to undertake. He ordered the State to take necessary steps to ensure that the children had qualified teachers, appropriate class sizes, adequate buildings, up-to-date books and libraries, suitable curricula, adequate special education and a safe, orderly environment. All of this was to be achieved by September 15, 2001, then only nine months away.

### *The Appellate Division's second attempt.*

The State appealed to the Appellate Division, and the Appellate Division again reversed Judge DeGrasse. His error, they wrote was to define the constitutional floor at too high a level. Judge DeGrasse defined a sound basic education as one that would train students to evaluate complex campaign issues such as tax policy and global warming, and have the math and reasoning skills to understand statistical analysis. Further, he stated that a sound basic education should prepare students for employment at jobs higher than minimum wage jobs.

The Appellate Division ruled that Judge DeGrasse erred when he set an aspirational standard when all he was called upon to do was to enforce a constitutional floor. The Appellate Division ruled that the constitutional floor lay somewhere between the 8th and 9th grade, basing this conclusion upon the State's evidence on the education needed for a citizen to undertake civic responsibilities.

The Appellate Division's opinion had three major advantages. It insured that the judiciary would only intervene in the worst cases. It kept the constitutional floor low enough to allow educational experts and the political process plenty of room to set aspirational standards. And it avoided the worst aspects of Judge DeGrasse's remedial order which would have had the courts directly dictating school policy and management goals in every area of importance. "This is not to say," the Appellate Division wrote, "that the State should not strive for higher goals," but, as a matter of setting the constitutional floor, an 8th or 9th grade education sufficed.

The Appellate Division judges must have been stunned by the acerbic and violently negative media reaction their opinion received. As logical as its reasoning may have been, the public misread the opinion to mean that the State should provide only an 8th grade education, a policy that would set the State's education policy back to the Nineteenth Century. The Appellate Division thought it was setting a floor; the public read it as a limitation.

The Appellate Division's advice again was rejected when the Court of Appeals heard the case for a second time. The Court of Appeals in its 2003 opinion reinstated most of Judge DeGrasse's opinion, but altered his remedy. The Court of Appeals held that the judiciary should defer to neither the executive nor legislative branch when it came to defining a sound basic education. But, in a major modification of Judge DeGrasse's remedy, it rejected his list of commandments, stating it had no authority to micromanage education financing. The Court told him instead to determine how much money would be required and have the State provide that amount by a deadline of July 30, 2004. It instructed Judge DeGrasse to ascertain the cost of a sound basic education in New York City, look to reforms in the financing of education to insure that the schools had that level of funding, and provide for a system of accountability to measure \*52 whether the reforms actually provided the opportunity for a sound basic education.

The Court of Appeals decision triggered action in the political branches of State and City government, but the State failed to appropriate all of the money that the Governor's own commission had recommended, and the deadline imposed by the Court of Appeals passed. Judge DeGrasse appointed three referees to recommend a remedy. This led to a new opinion by Judge DeGrasse in March 2005 in which he ordered the State to provide \$5.63 billion more annually for the City schools. The State again appealed to the Appellate Division.

### *The Appellate Division's third attempt.*

On March 23, 2006, the Appellate Division issued the opinion which caused so much confusion. Yet, this time the Appellate Division might just convince the Court of Appeals.

First the Appellate Division ruled that Judge DeGrasse and his referees erred when they ruled that costing out a sound basic education was a matter for judicial fact finding. The correct standard, the Appellate Division ruled, was one of deference: "Where there is sufficient evidence to support a range of numbers, it ill behooves the Court to dictate the result; at that point, more than ever, the issue becomes a matter of policy for the other branches of government to determine." Judge DeGrasse, the Appellate Division ruled, had violated this principle when he preferred the plaintiffs' numbers over the State's.

APPELLATE DIV. SENDS MESSAGE TO COURT OF APPEALS IN..., 12 City L. 49

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The Appellate Division then embarked on a long discussion of the doctrine of separation of powers which, in this context was particularly relevant since, as it reminded the Court of Appeals, judges could only look at the education budget, whereas members of the Legislature and Governor looked at the entire budget. There exists, the Appellate Division wrote, a stark difference between stating a constitutional right to education, and telling the State how to achieve that right.

Quoting an earlier Court of Appeals case, the Appellate Division summed up its view of separation of powers as one of the guarantees of liberty. "It is not merely for convenience in the transaction of business that [the powers of the branches] are kept separate by the Constitution, but for the preservation of liberty itself." And, opening up a small window on the politics surrounding the CFE case, the Appellate Division chided those who hoped the courts would take the heat off the Legislature. "The fact," the Appellate Division wrote, "that certain legislators might hope that the courts will take control of educational budgeting . . . is of no moment."

The upshot of the Appellate Division's decision was that the State's lower estimate of the cost of a sound basic education, to be acceptable, had only to meet something like the rational basis test. So long as the State acted rationally in developing its estimate, it was irrelevant that the plaintiffs might have a more refined or improved estimate.

But what was the State to do with its estimate? Here the Appellate Division commanded that the Governor and Legislature "consider" the State's proposed funding plan of at least \$4.7 billion in additional annual operating funds, as well as the Referees' recommended annual expenditure of \$5.63 billion, "or an amount in between, phased in over four years, and that they appropriate such amount. . . ."

The obvious question is what should the Court do now that the Legislature and Governor considered, but failed to appropriate an amount within the range? The Appellate Division would have the judiciary declare that a violation exists, but stop short of interfering in the budget process. The failure of the State to appropriate the money that the judiciary declared was needed did "not give the Court the authority to participate in budget negotiations," the Appellate Division wrote. "The fact that the other two branches of government have not remedied constitutional failings in the past does not authorize the courts to commit their own constitutional violations now."

This reasoning will not sit well with those who only focus on the money, but it has a sound basis in constitutional principles and in past Court of Appeals decisions. And it prevents a constitutional crisis.

It allows the court to accept the State's admission of how much it has shortchanged New York City schools, compels public attention to that shortchanging, forces the Legislature and Governor to consider the unacceptable results of what the State deemed to be inadequate financing of public education, preserves the judiciary's role as the moral arbiter of constitutional rights, and avoids having the judiciary insert itself into the taxing and spending prerogatives of the State.

What it does not do is put the Governor and Legislature in jail, or garnish the State's treasury. The plaintiffs and many in the media act as if such remedies might be in the cards. Judges know better, and, paraphrasing the Appellate Division, it ill behoves the Court of Appeals to pretend that it has such power. Better to acknowledge its limitations when it comes to ordering appropriation of funds and in the process preserve the judiciary's authority as the ultimate arbiter of constitutional rights. The Appellate Division has shown the way to do precisely that.

Footnotes

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