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2 SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS Part 25

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CAMPAIGN FOR FISCAL
5 EQUITY, iNC., et al.,
Index No.
6 111070/93
Plaintiffs,

7

- against - Hon. Leland DeGrasse,
8 J.S.C.
THE STATE OF NEW YORK,
9 Et al.,

10 Defendants.

11 ----------X

12

October 21, 2004
13 1:00 p.m.

14 Fordham Law School
140 West 62nd Street
15 New York, NY 10036

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18 B e f o r e:

19 WILLIAM C. THOMPSON

20 E. LEO MILONAS

21 JOHN D. FEERICK

22 Special Referees

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2 MR. THOMPSON: Good morning. I should

3 say good afternoon. I hope everybody had a

nice weekend. A disaster last night, but those things happen.

Mr. McHale?

MR. McHALE: A couple of brief housekeeping matters, Judge. I circulated by e-mail this morning a letter from the state as to our accountability proposal, but it did not have an attachment because I couldn't do it with the e-mail. I have that same letter with the attachment, if I can just distribute it to you.

MR. THOMPSON: You certainly can.

MR. REBELL: One comment on that. Mr. McHale in there characterizes plaintiffs' positions in several ways, and they invited us to respond if we thought anything was mischaracterized. We do think there were some mischaracterizations. But, rather than belabor this, I think in our findings of fact and conclusions of law we will clarify what the differences are.

MR. THOMPSON: All right.





MR. McHALE: One other housekeeping matter. With regard to possible rebuttal evidence by the state, we have identified one witness who we would propose to call in rebuttal. I prepared his testimony in

advance. It is pretty elementary, and I suggested to counsel that, after they look at it, we might be able to stipulate to it. But it would be, of course, their call. If it were not necessary, we would not even call him as a live witness.

I have copies of that testimony, with one proviso: Attachment Exhibit A of this was a lengthy document which I didn't get until certainly before coming over here today. So I will have to attach Exhibit A; otherwise I can distribute this to the Panel.

MR. REBELL: We haven't had a chance to review it, but we will by the end of today's session --

MR. THOMPSON: That is fair enough.

MR. REBELL: -- to see whether we need to cross-examine.





MR. THOMPSON: All right. Do you want to give us copies now?

MR. McHALE: Yes.

MR. THOMPSON: Good.

MR. MILONAS: I just wanted to ask a question about the letter we got last night from the Attorney General -- or I got, at

9 least -- by e-mail last night around 6
10 o'clock or so, I'm not sure. It was kind of
11 late. Some of us work at 6 o'clock. In any
12 event, the only question I have is that I
13 can understand your problem with Standard &
14 Poor's, but why is there no alternate way of
15 obtaining this information?
16 MR. WAYLAND: That is what I am going
17 to address, your Honor, unless you want to
18 go first.
19 MS. CONRAD: Feel free.
20 MR. WAYLAND: Your Honor, we are
21 prepared, actually, to submit to the Panel
22 evidence of what the results would be if you
23 used the assumptions the Panel asked about,
24 the 90 percent, the 5 percent on each end,
25 the 50 percent middle.





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2 MR. MILONAS: Now the defendant is
3 going to want time to submit papers in
4 opposition to that, and they will do it.
5 MR. WAYLAND: I offer this for the
6 Panel's consideration, but I am not sure how
7 it is that the Panel wants us to submit it.
8 I have a draft letter that actually has the
9 numbers. The top chart is the 5 percent
10 outliers, which the expert for the state
11 testified would be the way that they have

done it in the past, take the 5 percent and eliminate it, drop the high 5 percent. You can see that the number, rather than being 1.93 billion, is 4.06 billion in the lowest category, the one that the Governor wants to focus on, if you do the middle, the 50 percent.

MR. THOMPSON: 25 off the top, 25 off the bottom.

MR. WAYLAND: Yes. The way we did this, your Honor, is essentially, you can go on the S & P website and actually dig out the source code and the underlying data.

MR. MILONAS: You said that earlier in





argument, as I recall. That is why I was wondering that it couldn't be done.

MR. WAYLAND: But it is not as easy, when you push buttons and get that difference, to do this exercise, because it is not just something you do by pushing buttons. I actually had to go into the website and find the underlying data, go into a spreadsheet, which is what I have done. As I reviewed the letter, I realized it is not in evidentiary form in that way. I can put in an affidavit by Mr. Stone, if

that is the way the Panel would like to have it.

MR. MILONAS: Does the state have any objection to that?

MS. CONRAD: Judge, the state's position is that the defendants' proposal which is before you for your consideration is based on the policy judgment of the Zarb Commission which the Governor adopted, about a particular cost-effectiveness factor and the numbers that flow from that judgment. I am not in a position to comment on





calculations made by an attorney for the plaintiffs.

MR. MILONAS: Do you doubt its accuracy?

MS. CONRAD: I am not in a position to without knowing what they have done.

MR. MILONAS: What about accepting it until you find something wrong with it?

MR. THOMPSON: You are not bound by it.

MR. MILONAS: If you happen to find something, let us know.

MR. WAYLAND: That is fine with us. We don't have a monopoly on how to do this.

MR. MILONAS: So far, with all due respect -- I know your position -- the

17 question is, why not accept that and have it
18 introduced in evidence? Is there something
19 wrong with its authenticity, with its
20 reliability? If there is, let us know what
21 it is.
22 MS. CONRAD: I have no idea how this
23 number was reached. Mr. Wayland has just
24 represented that Mr. Stone, a lawyer for the
25 plaintiffs, made some effort to come up with





1
2 this number.
3 MR. MILONAS: Why don't we do the
4 following: Why don't we get an affidavit,
5 and then why don't you do what he did: Find
6 out how he did it?
7 MR. WAYLAND: We will talk to you. We
8 will talk to you on the phone.
9 MR. MILONAS: He will explain it to
10 you, he will walk you through it, he will do
11 the same thing. If you have any objection,
12 let us know on Monday.
13 MS. CONRAD: That is fine.
14 MR. MILONAS: Is that all right with my
15 colleagues?
16 MR. THOMPSON: Yes.
17 MR. FEERICK: Yes.
18 MR. MILONAS: Meanwhile, can we have a

copy for what it is worth?

MR. WAYLAND: It is in draft form. I didn't want to submit it until I talked to the Panel to see what form it should come in.

MR. THOMPSON: So you will get one.

MR. WAYLAND: Your Honor, we are ready





to proceed with our next witness.

MR. THOMPSON: Dr. Berne, please.

MR. WAYLAND: Dr. Berne, please, to the stand.

ROBERT BERNE,

Called as a witness by the plaintiffs,

Having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WAYLAND:

Q. Good afternoon, Dr. Berne.

A. Good afternoon.

Q. I show you the statement that you prepared and that we submitted to the Panel.

MR. WAYLAND: May I approach, your Honor.

MR. THOMPSON: Sure.

Q. I am showing the witness Plaintiffs' Exhibit No. 9, statement of Dr. Robert Berne.

MR. WAYLAND: I handed it up to the

22 Panel.

23 MR. THOMPSON: The same one?

24 MR. WAYLAND: Yes, with attachments.

25 Q. Dr. Berne, do you recognize what we





2 have marked as Plaintiffs' Exhibit 9 as your
3 statement that was prepared in connection with
4 your appearance today before the Panel?
5 A. Yes, I do.
6 Q. Does it accurately reflect your views
7 and your understanding as of today?
8 A. Yes.
9 MR. WAYLAND: Your Honor, I ask that it
10 be admitted.
11 MR. THOMPSON: Any objection?
12 MS. CONRAD: Judge, I have one
13 question, which I indicated to Mr. Wayland
14 prior to commencing the proceedings today.
15 If I may voir dire Dr. Berne as to Exhibit
16 B, which appears to be a Department of
17 Education document?
18 MR. THOMPSON: Yes.
19 VOIR DIRE EXAMINATION
20 BY MS. CONRAD:
21 Q. Dr. Berne, my name is Jane Conrad. I
22 am from the Attorney General's Office
23 representing the state here. Can you tell me how

24 it came about that you obtained Exhibit B to your

25 statement?



1 Berne - direct

2 A. Yes. This was prepared by Mr. Rebell

3 and Mr. Wayland.

4 Q. And provided to you?

5 A. And provided to me.

6 Q. When did you first see it?

7 A. Probably about a week ago.

8 Q. Do you, of your own knowledge, know the

9 facts represented in Exhibit B to be true and

10 accurate?

11 A. No. I have not checked them against

12 the original records.

13 Q. Do you know what the source of the

14 original records is?

15 A. A series of State Education Department

16 documents.

17 Q. New York State Education Department

18 documents?

19 A. Yes.

20 Q. What is the basis for your

21 understanding that that --

22 A. I am sorry. It says it is New York

23 City finance documents.

24 MS. CONRAD: I would object to Dr.

25 Berne serving as the vehicle for Exhibit B,

since he has stated that he does not know the data represented in this document. It is very possible that we will be able to stipulate to this document in some other format, but since the witness is not familiar with this --

Q. I assume, Dr. Berne, it is not part of the regular course of your duties to maintain this document, Exhibit B, is it?

A. I am not sure what you mean by "maintain." I regularly look at city finance documents, but I have not checked these data against the finance documents.

MR. THOMPSON: Why can't he interpret city documents?

MS. CONRAD: I don't even know that this is a city document. He indicated this was prepared by attorneys for the plaintiffs.

MR. WAYLAND: Your Honor, we are not offering Dr. Berne's response to the actual accuracy of these numbers. These are numbers he relied on in the preparation of his statement. We are not saying that he is

the guy who can tell you they are completely accurate. If there is some cross-examination they want to make of that, that's fine.

As I said, and I think if you need me to, I can ask Dr. Berne whether this is the type of information that an expert relies on, I can get that if you want. But, again, we are not offering it for --

MR. THOMPSON: You can handle it on the cross, Ms. Conrad.

MS. CONRAD: And it is not being offered for the truth of the matters set forth in here? Am I correct that Exhibit B is not being submitted for the truth of these numbers?

MR. WAYLAND: It is a Board of Education document. It came from the Board of Education. If you can't stipulate to it, we can put it in in some other way.

MS. CONRAD: It is certainly possible that we can stipulate if I knew the source of the information.

MR. MILONAS: Are you making a





representation that this is an official

Board of Education document?

MR. WAYLAND: No. It is a summary of information.

MR. MILONAS: Are you making a representation that you took these figures from official Board of Education documents?

MR. WAYLAND: Yes.

MR. MILONAS: Are you making a representation that they are accurately transcribed on this piece of paper and they are accurately responsive to the titles that they represent on the left?

MR. REBELL: Your Honor, I would like to answer that. I was the intermediary on this. This document we received from an official representative of the Board of Education when the Sound Basic Education Task Force asked them for up-to-date figures, and this document was their best estimates on September 1, I believe, of what the Board of Ed. Spending would be in the coming year in the categories identified there. We used that as the basis for





determining the city's spending this year, subtracted that from the total needed and came up with our 5.6 billion. If anything

else is needed, I am sure Mr. Kleinman can get us an affidavit from the Director of Finance or someone like that.

MR. KLEINMAN: Your Honor, I note the large numbers, the major numbers, coincide exactly with the submitted testimony of the Chancellor, which has been in evidence.

MR. THOMPSON: We will allow it.

MR. KLEINMAN: Part of it is already part of the official record here.

MR. THOMPSON: We will allow it.

MR. WAYLAND: Your Honors, Dr. Berne was previously accepted as an expert witness by Justice DeGrasse in this case. I assume that is the law of the case. But if there is any question as to his expertise --

MR. THOMPSON: Any objection?

MS. CONRAD: No.

MR. THOMPSON: Without objection.

BY MR. WAYLAND:

Q. Dr. Berne, I just want to call the





Panel's attention to a couple of the reports that you have prepared and worked on during the course of your career.

Before we do that, would you just tell us for how long you have been studying and analyzing New York City and New York State

education finance issues?

A. For about 30 years.

Q. Would you turn to page 4 of your curriculum vitae, which is attached to your statement as Exhibit A.

A. Yes.

Q. Go down about two-thirds of the way on the page. You will see a report titled "Funding for Fairness, Report of the New York State Temporary Commission on the Distribution of State Aid in Local School Districts (Salerno Commission)."

Did you participate in the preparation of that report?

A. Yes. I was the Director of Policy Research for the Salerno Commission.

Q. What was the Salerno Commission?

A. The commission members were composed of





appointees from the Governor's Office, Assembly appointees, and the Senate appointees. It was an 11-member commission charged by the government to look at the ways to improve the state funding for schools in New York State.

Q. Did you have an understanding of the origin of the Salerno Commission, what caused it to be called into being?

A. I think it was called into being in one of those periodic moments when the elected officials thought that they needed to improve the financing system.

Q. What was your specific involvement?

A. As Director of Policy Research, I ran the meetings and gathered the research and drafted the recommendations and report, the final approval of the report with the commission members.

Q. Can you summarize for us, very briefly, what the principal recommendations of the commission were?

A. The commission operated fairly quickly. It was a four-month commission, and its objectives were to recommend improvements in the





school finance system in a way that could guide the legislature and the Governor to make those improvements. They focused around improving the relationship between funding and student needs, recommended using a cost-of-education index to reflect the differences across the state. There were recommendations concerning accountability and how you tie results more closely to outcomes, and a range of more technical recommendations to improve the measures of ability to pay as to school districts.

13 Q. What happened to the recommendations of
14 the commission?
15 A. Nothing, in a legislative or action
16 sense. While we got unanimous agreement from not
17 only the Governor's representatives but the
18 representatives of -- actually, both the Senate
19 and the Assembly chairs of the Education
20 Committee were on there -- and while they agreed
21 in the principles of the commission, no action
22 was taken when they went back to the legislature.
23 Q. Let me ask you to turn to page 11 of
24 your curriculum vitae. I don't want to spend
25 much time on these. I just want to highlight the





2 areas of New York State and New York City
3 investigations that you have conducted in the
4 last decade or so.
5 The first item that we have highlighted
6 is "Principal Investigator, 'Evaluation of New
7 York City Head Start Transition Project,' New
8 York City Board of Education, October 1991 to
9 September 1994."
10 What was the nature of that work?
11 A. The evaluation was one of, I think,
12 eleven federally funded evaluations around the
13 country to look at the ways in which Head Start
14 benefits could be better transitioned into

K-to-12 education. So we were evaluating a number of Head Start transition programs where the links between Head Start programs and kindergarten and 1st grade programs were put into effect and we were doing the evaluation.

Q. Were you retained by the New York City Board of Education for that purpose?

A. Yes. No, I'm sorry. The purpose of that evaluation was a federally funded one. So the money went to NYU for a grant.

Q. Will you skip down to the third point





we highlighted: "Principal Investigator, 'Chairman and Convener of New York State Study Group on Outcome Equity,' New York State Department of Education, April 1992 to July 1993."

What was the purpose of that study and who sponsored it?

A. It was sponsored by the New York State Department of Education. I convened a group of experts in school finance to think beyond what I will call dollar equity, to think about outcome equity in education.

Q. As you see, we have highlighted about a dozen or so particular studies that you were involved in involving New York State and New York City. Let me just move down to the second one

18 from the bottom, the "Principal Investigator,
19 'New York State Temporary Commission on New York
20 City School Governance,' (Marchi Commission),'
21 1991." What was that commission? What was your
22 role?
23 A. In that case I was executive director
24 of the commission. It was another commission at
25 the state level to look at ways of reforming, in





2 that case the governing system of the New York
3 City schools.
4 Q. Have you been involved in any
5 investigations or studies of special education in
6 New York State or New York City?
7 A. Yes. In the mid-'90s a group of
8 colleagues at NYU and myself looked at the
9 special education system in New York City and
10 made some recommendations regarding the
11 improvement of special education services in New
12 York.
13 Q. Dr. Berne, have you read the Court of
14 Appeals opinion in this case?
15 A. Yes, I have.
16 Q. As we have established, you testified
17 in behalf of the plaintiffs in the trial phase of
18 the case?
19 A. Yes.

Q. You were involved in the trial of the case with the plaintiffs?

A. Yes.

Q. Have you followed developments since the time that the Court of Appeals issued its opinion about a year and a half ago?





A. Generally, yes.

Q. You understand that the state has not complied with the Court of Appeals directive?

A. Yes.

Q. Do you have an opinion, based on your professional expertise and experience with New York State education finance reform, as to how this Panel can draft an effective remedy?

A. I think it is ultimately extremely important for the children of New York that the Panel does draft that. I would say that there would be at least three elements in that remedy.

One would be the amount of resources that the Court has mandated to provide a sound basic education.

The second one would be a mechanism so that that amount would be sustained over a period of time.

And the third would be some accountability mechanisms in the way in which that money is spent.

23 BY MR. THOMPSON:

24 Q. In your written testimony you call the

25 plaintiffs' amount conservative -- page 4 of your





1 report. Can you explain why you call it

2 conservative?

3 A. I think there are a number of choices

4 involved in the way the plaintiffs went about

5 their work through the professional judgment

6 study and the cost indexes. In other settings I

7 think reasonable people would have picked higher

8 numbers to come out with an amount in New York

9 City. An example is the cost-of-education index,

10 where there are measures that the plaintiffs' own

11 researchers in that cost-of-education study

12 picked a very conservative number.

13 Q. You thought it was too low?

14 A. No one knows the true number because

15 you are measuring a concept that is hard to

16 measure. But I think, as you go about doing

17 that, you pick a series of assumptions to try to

18 gain what is the accurate number. And in almost

19 all cases, particularly -- this is arcane -- but

20 the fixed-effects methods that they used in their

21 regressions ended up taking away a lot of the

22 variations and made it a smaller number.

23 The Regents themselves use a number not

25 based on econometrics but based on cost of living




1 Berne - direct
2 around the state, that comes up with a higher
3 number for New York City, as an example.
4 Q. Would you say that their estimate is
5 truer, considering the factor of the higher cost
6 of living in New York City?
7 A. No one knows the true number. My feel
8 is, as an academic, as you pick certain kinds of
9 assumptions, I can judge the assumptions in the
10 report as being conservative. I use the state
11 number as a way just to benchmark my own thinking
12 that I came out probably on the right side of
13 that, because the kind of numbers they used in
14 that turned out to be higher for New York City.
15 Q. What do business people generally do?
16 For example, if I transfer you from Ohio, from
17 Dayton to New York, do I generally increase
18 because of the fact of the higher cost of living,
19 about 25 percent?
20 A. Again, the actual numbers that are
21 often used by businesses, which include things
22 like housing, for example --
23 Q. Yes.
24 A. -- those tend to be much higher than
25 the kind that use the wage index of the teachers

or even the wage indexes of professional employees. I have seen numbers that talk about ratios of 1.5 and 2.0 for cost indexes that are done by chambers of commerce.

I am not saying they are applicable to the task at hand, but what I do know is that, by doing the kind of statistical analysis that was done, a lot of the variation that could have been included was teased out in a statistical sense, which is the background for my use of the word "conservative."

MR. THOMPSON: All right.

BY MR. WAYLAND:

Q. Dr. Berne, you said that one of the recommendations you have for the Panel is to specify a particular dollar amount or a range of dollars to be ordered by the Panel or the Court. Based on your experience with education reform, why wouldn't it just be sufficient for the Panel and the Court to say it's not enough, you have to do better?

A. I think it goes back to the history of inaction in New York State. Many, many panels, including the Salerno one, but others that came

before it and others after that, have discussed the inequity and the inadequacy of the formula. No matter who has said it, whether it is stakeholders, whether it is parents, whether it is the Regents, whether it is editorial boards, the legislature and the Governor have chosen not to take action.

Given the importance of this case and the importance of the children who are affected, I fear that unless this Panel is very specific, it will end up in a tail-chasing exercise that won't lead to the real money going into the system.

When you look around the country at court decisions that have overturned financing systems, the path can be tortuous to get to the actual changes that are required.

I overlay that in New York State where the path has been very difficult, to begin with. I am nervous that, despite the Court opinion and despite the work that has gone into it by this Panel and others, unless there is real specificity, nothing will happen.





BY MR. FEERICK:

Q. Is there any precedent that you believe

we should look at in terms of these other judicial controversies elsewhere in the country?

A. I don't think there is any one that comes to mind that is a specific example. When you take the group as a whole, it's often measured in decades, the point in time from the decision to when the Court might say the state has taken the action. In some there are successive litigations that go on for a long time.

The California case, for example, in the '80s, took about a decade before the Court said, Now you have satisfied the very specific measure that they used. That was an equity case, not an adequacy case.

In New Jersey it took successive litigations over a long time to get there.

So I am concerned when I overlay the national picture which has nothing to do with New York with the tendencies in New York.

The tragedy in some sense is that there were two periods, one in the Cuomo years and the





other in the Pataki years, when there were ample revenues that went into the system that did not require taking away from A and giving to B, where there was ample money in the system to, in a

sense, keep everyone whole in reforming the system. And even in those situations, they chose not to do it.

So I am just nervous that, even with the court order and the work of the Panel, it won't happen.

MR. FEERICK: Thank you.

BY MR. MILONAS:

Q. When you said we should be more specific, your attorney mentioned the dollar amounts and range of dollars. In what other categories -- just categories -- should we be more specific?

A. The dollar amount is the first piece, and then the area of specificity that I would advocate is the way in which those dollars are distributed. Because it would be one thing for the state to take the dollar amount that the Court advocates and implement it in the first year. But that won't impose any structural





change in the system, that won't impose the ability of the state in successive years to look to what is typically used, some kind of formula to generate the kind of resources that are consistent with the mandate of the Court and the constitution over a successive period of time. There are tried-and-true formulas that are in

existence in school finance to accomplish the goals that would be consistent with them.

I am mindful of the hesitancy on the part of any court to impose a solution that might step on the prerogatives of the legislature, so to speak. One way could be to propose something that the Court feels is acceptable and say, If the state can do better, that satisfies the constitutional standard, they are free to do that.

But without something out there as a benchmark against which the state knows it has to measure, I just don't have the confidence that they are going to implement sustained change.

Q. You know our mandate is restricted to the city. What kind of formula could we order as a court, or could the Court order?





A. Again, the Court could show how a formula -- let me backtrack. I am not an attorney, so I will obviously accept the judgment that --

Q. I am assuming that --

A. Let's assume that the Court cannot say.

Q. -- we can suggest one.

A. But you can suggest an amount that is driven by a process that, should the state adopt

it, would give an amount based on the same principles of adequacy that would apply to all 700-plus districts. That would give the state the guidance.

Of course, the way in which the Court would use that is beyond the purview of my expertise. But that would show the state that there is a way to address the needs of all districts, using the needs and the costs and the results of a fairly sophisticated costing study that, when I step back and look at it, is very consistent with the work that, say, the Regents have recommended over a long number of years, that would set them up to do a constitutionally appropriate thing for all of the districts, as





opposed to saying it is $5.6 billion and that's our job and stepping away.

BY MR. FEERICK:

Q. Do you see any -- I recognize you are not a lawyer -- but do you see any inconsistency in that approach with respect to a mandate to a Panel to look at the gap with respect to New York City only? An approach that dealt with the entire formula as it might play out with other districts in the state could be viewed as far beyond what this Panel should be doing.

A. From my perspective, where in virtually

every state the distribution to every district is done through one of these formulas, putting an amount out without a formula would leave the state in a situation where it did not have the basis on which that number was generated.

It just seems to me that, given the practice in all 50 states to generate the resources by formula, and given the formula's linkage to the determination of a sound basic education, it certainly is from a public policy perspective -- and I leave the legal aspect to others -- but from a public policy perspective it





is infinitely more important to give the state this guidance on how they can do it than just giving a number.

Q. I take it what you are really saying -- correct me if I am misinterpreting it -- is that if one is looking for relief, with respect to a gap, that will have a certain permanency to it, that necessarily takes you, as I understand the view that you expressed, to dealing with the entire formula. Is that a fair summary?

A. Yes. I would add to that that what the formula gives you -- and the way in which you would update the formula -- is the opportunity to say, not only are we closing the gap, but we are

giving you a mechanism to keep the gap closed.

Q. If you are looking at the principle of permanency, is there any other way of being consistent with that principle of permanency other than dealing with a formula and how it might impact other districts in the state?

A. I suppose you could say, here's the number for New York City and here's the number for the next X years, because in some ways this is an adequacy case and it shouldn't depend upon





what is going on in the other districts. So you could specify a number that is independent of the other 700 districts.

I am concerned about the sustainability of the state government to use that number when the standard practice, which I don't think will change, is to use some sort of distribution mechanism that covers all of the districts.

MR. FEERICK: Thank you.

BY MR. THOMPSON:

Q. Is that what your foundation funding system is based on?

A. Yes. The foundation funding system, which is a tried-and-true kind of formula, combines the notion of ability to pay where districts with the lower ability to pay contribute less and the state contributes more --

it combines that with the notion of understanding the needs and costs of the pupils in those districts so there is a variation across districts by needs and costs, and then there is a variation by ability to pay. That is what is accomplished through the foundation program.

Q. The way you have it laid out here, does





that apply to New York City or does that apply to the whole state?

A. The way it would be implemented in here would be for the whole state.

Q. This is the whole state.

A. Yes, because you substitute the New York City number of an adequate education, the formula and the method that has been composed allows you to calculate that number for every single district. That is your starting number. Then you adjust it for the needs and costs, and in that district take away the local contribution. It gives you the state aid that is required in that district.

BY MR. WAYLAND:

Q. And did you --

MR. MILONAS: Let me finish this.

BY MR. MILONAS:

Q. Is there anything else you would put in

21 any other category? Are there any other
22 categories? You talked about dollar amount, you
23 talked about formulas. Is there anything else?
24 A. Well, I am not quite sure --
25 Q. Of the question?





1 A. I am not sure exactly what you mean by
2 "category." The final point is that I think all
3 of us would have a concern that the money is used
4 effectively. I think that recommending a series
5 of checks and balances on the way in which those
6 resources would be spent would also be a positive
7 contribution to make sure that in fact the extra
8 resources, which are not trivial, are used to
9 benefit the children where they are intended.
10 Q. What about capital construction?
11 A. I think, again, although it was not in
12 the costing study that I looked at, absolutely.
13 In particular, since the extra resources are
14 going to be translated somehow into extra
15 classrooms, and so on, the capital resources have
16 to be addressed.
17 BY MR. WAYLAND:
18 Q. Let me just follow up on a couple of
19 questions that the Panel asked you.
20 We put up on the screen page 16,
21 paragraph 36, of your statement. This set forth
22 the paragraph before, paragraph 35 and 36, sets
23

24 forth a formula that lays out a way in which you
25 would operationalize the specific amount in a





2 costing-out of the adequacy study; correct?
3 A. Correct.
4 Q. When you were just addressing the Panel
5 as to a formula that would do that for the state,
6 this is the formula you were talking about?
7 A. That's correct.
8 Q. Another follow-up question. The way
9 the state finance system operates today is that
10 New York City is not separated out in terms of
11 the formula; I mean, there is a single state
12 formula. Correct?
13 A. There is a formula and New York City is
14 in the formula, but the genesis of the way that
15 formula is arrived at does have a New York City
16 specific element, because the way in which the
17 legislature operates is to select the New York
18 City number and work backwards to that formula.
19 So, you are correct, when you look at
20 the formula, New York City is in it, but when you
21 understand the way in which the negotiations and
22 the analysis take place, it really is: Pick a
23 New York City number, work on the rest of the
24 state, and then combine the two in a way that, if
25 you don't know the way the legislature works and

just look at the formula, you wouldn't draw that conclusion.

Q. So, on its face the formula is not supposed to have a predetermined number for New York City; correct?

A. No. There is no district for which there should be a predetermined number.

Q. But in practice, based on your observations, it doesn't work like that, does it?

A. No, it doesn't.

Q. What happens?

A. There is usually an agreement on two items. One is the total amount of the package, and that usually is an agreement between the legislature and the Governor. And then, within the legislature, there is a determination of how much is the split between New York City and the rest of the state.

Then, finally, for the rest of the state there is a determination of how the formula will operate for the 700 districts that are not in New York City.

BY MR. FEERICK:

Q. Can I just come back at this again.

Working with the kind of page that is up on the screen, if one wanted to use the successful school districts model, put aside how you look at that model, let's assume, for purposes of the question, that if that one were working with the successful schools districts model and you also were working with weightings to take account of the special populations, and you would have some number in terms of number of students, that would give you an expenditure amount per student, focused simply on New York City, and that would generate an expenditure number per student?

A. That's correct.

Q. So far, it doesn't seem to me to implicate, or does it, the foundation formula. It doesn't have to implicate that to get the foundation formula in there.

A. Let me say, we would first determine a foundation amount for any district. And, you are correct, you could use what I will call the AIR/MAP method to get that foundational amount, or you could use the successful schools method to get that amount. So there is an amount per pupil

that we would all agree on, from any method. There are other methods that one could use. Or you could just pick a number. But using your successful schools model you could get a number for New York City.

Q. And you would say that is the number over the next -- it takes X number of years as a practical reality, economically, to get there?

A. Yes. You could use that to get your number. And then the foundation formula you could work just the same way it works with this. The foundation formula for the one district would really be mostly involved in deciding how much of that amount was paid by the city and how much was paid by the state.

But the tradeoff between successful schools and the AIR/MAP Study would get you a different method of getting to that foundation amount.

Q. Are you saying that if you were working with the successful schools model, in the simple way I presented it, you would also have to address the current formula, I take it. My question is, why do you have to address the





current formula?

A. Well, if you are just -- if your goal is just for New York City --

Q. Right.

A. -- what you could be prepared to say is that it would be 15, 16 billion dollars for New York City that comes out of the successful school model, then you could stop there. What you are then doing is leaving it up to the legislature and the Governor to decide the split between city and state, and you are also leaving it up to the legislature and the Governor to decide what would happen in successive years.

The foundation amount from any kind of study would give you the absolute amount of city and state funding. The formula allows you to say, because of ability to pay, how much will be shared by city versus how much will be shared by the state.

Q. Is what is driving the foundation formula approach, as you present it, a need to have something that extends far into the future?

A. In my judgment, it is both extending into the future and providing a mechanism that





does all of the districts, so that the New York City number isn't subject to manipulation the way it is now.

MR. FEERICK: Thank you.

BY MR. WAYLAND:

7 Q. Let me follow up on that last point
8 that you were making about state/city share
9 split. It is a question that the Panel has
10 raised a number of times during the course of our
11 proceedings. One of the issues we have to deal
12 with is whether or not the Court has the
13 authority or can have the authority to even say
14 anything about this state/city share split.
15 Do you have a view, Dr. Berne, as to
16 whether the Court or the Panel ought to involve
17 itself in recommending this state/city share
18 split, and if so, what?
19 A. I think it goes back to my earlier
20 comments. I am really nervous about, right now,
21 leaving the details in a political system that
22 has been unable to grasp the details over 20 or
23 30 years. I know that there are issues about how
24 far a Court should go in, so called, tying the
25 hands of the legislature and the Governor.





2 Again, one approach is to say, Here is
3 something that we think satisfies the Court
4 mandate and the constitutional mandate. There
5 are an infinite number of other ways to do it,
6 which the state can come up with. But in their
7 absence of coming up with any way of doing it
8 over 20 or 30 years, I would rather see a
9 placeholder in there that they know that the

Court can accept that bears a good relationship to public policy, and use that as the standard against which the state is accountable, instead of saying, Here is an amount, we are not going to speak about how it is distributed and we are not going to speak about how much the city or the state pay. Because I think, again, as someone who has observed this, the odds that some judicial proceeding will be reinstituted because the state doesn't do anything will be very high if a lot of the outcome isn't specified.

Q. Let's turn to the AIR/MAP Study in more specificity. You reviewed the analysis that was submitted by AIR/MAP?

A. Yes.

Q. And you reviewed the S & P study that





was submitted on behalf of the Governor?

A. Yes.

Q. Before we get to your opinions on those particular studies, I have a few questions about your experience with costing-out. Have you ever participated yourself in a costing-out study?

A. No, I have never carried one out myself.

Q. Why do you believe that you are qualified to express an expert opinion with

regard to a costing-out analysis by others?

A. As an expert in school finance, I have done a number of different kinds of studies over the years but not every single kind of study that has been done. And I think by being familiar with the literature, by being familiar with the methods, by reviewing them in a critical way, I can offer an opinion on both the kinds of work that I have done directly myself and the kinds of work that I have studied.

Q. Are you generally familiar with the costing-out methodologies and the professional literature concerning costing-out studies?

A. Yes, I am.





Q. Are the concepts involving costing-out methodologies something that would be familiar to an education finance professional?

A. Yes.

Q. You actually have testified regarding costing-out studies before, have you not?

A. Yes.

Q. Where was that?

A. In Massachusetts.

Q. What was the nature of that testimony?

A. The nature of my testimony was to review the successful schools study and the professional judgment study that was entered into

the Court at that time.

Q. You are not associated in any way with either the AIR firm or MAP firm or S & P, are you?

A. No, I am not.

Q. And you are not associated with the Augenblick firm?

A. No, I am not.

Q. You know that they have been identified in testimony as leading users of the professional costing-out methodologies, including professional





judgment?

A. Yes. The Augenblick firm is one of the firms that did the work in Massachusetts.

Q. You have no vested interest in any particular methodology that the Court might endorse regarding costing-out?

A. I have no interest in that.

Q. You are not in the business of selling your services as a costing-out expert?

A. No.

Q. If the Court were to specify professional judgment over successful schools, you don't have an interest one way or the other; right?

A. No.

Q. Do you have an opinion as to the reliability of the AIR/MAP Study as a basis for determining the cost of providing an opportunity for a sound basic education?

A. Yes, I do.

Q. What is your opinion?

A. My opinion is that it is an extremely solid and well-researched, well-documented Study that actually represents probably the best of the





professional judgment studies that I have seen.

Q. Are there any particular factors or elements of the AIR/MAP Study that you focused on in reaching your opinion?

A. It was the way in which they combined different methods. They used multiple panels. They used successive judgments in those multiple panels. They brought together policymakers from individual districts and they brought together policymakers from several districts all at once. And they paid particular attention to special needs of students, including special education.

Q. We will get back to special education. Let me show you page 78 of Volume 1 of the AIR/MAP Study.

I will give you a copy, Dr. Berne.

A. I was hoping you would.

Q. Dr. Berne, you will see at page 78

there is an Exhibit 4-3 titled "Total Actual and Projected Expenditures by Simulated Model." Do you see that?

A. Yes, I do.

Q. Underneath each of the bars there is an indication of various stages, Stage 1, Stage 2,





Stage 3, and Modified Stage 3. Do you see that?

A. Yes.

Q. At paragraph 14 of your statement you say that it is your opinion that the Modified Stage 3 estimate, which is the one furthest on the right -- adjusted, which represents the Stage 3 estimate adjusted for administrative costs -- represents the best estimate of the costs of providing a sound basic education from this study. What is the basis for that opinion?

A. Well, I reviewed in considerable depth the method to get to the Stage 1 estimates, and then the changes that were implemented in Stages 2 and 3 and what they call Modified Stage 3. I think they are all reasonably conservative estimates to accomplish the goals of a sound basic education in New York State.

Q. Why did you pick Stage 3 over Stages 1 and 2?

A. Because I think that there are going to

22 be associated costs at the district level that
23 will go to supporting the kinds of improvements
24 and additional spending that the incremental
25 spending would require.





2 Q. Did you understand that Stages 1 and 2
3 were intermediate steps in this study?
4 A. Yes, I did.
5 Q. Did you understand that the study was
6 designed to include further review and analysis
7 after the first two stages?
8 A. Yes. That was built into the way in
9 which the panels interacted.
10 Q. Did those factors at all influence your
11 opinion as to picking Stage 3 over the other
12 stages?
13 A. In my review of the study, I looked at
14 two things. One was the method to see if the
15 method was sound. So it was done in a way that
16 would not kind of lead the witness, so to speak,
17 to get to a fixed-cost number.
18 Second, I looked at the numbers from my
19 own vantage point of knowing education policy to
20 make my own judgments about the relationship
21 between those numbers and my own experience.
22 Q. Let me direct your attention to pages
23 68 through 70 of Volume 1.
24 Actually, go back to page 67, Dr.

25 Berne. You will see there begins at page 67, and





1 Berne - direct

2 continues on for the next several pages, the
3 description of the modifications and additional
4 considerations that were brought to bear in the
5 successive stages after Stage 1. Do you recall
6 reviewing those stages as part of your review of
7 the project?
8 A. Yes, I did.
9 Q. Do you have an opinion as to whether
10 the intermediate steps and analysis that are
11 described in these pages were reasonable
12 adjustments to Stage 1 numbers?
13 A. I believe they are reasonable and
14 appropriate adjustments and the kind of
15 adjustments you would make when you step back
16 from the work of the Stage 1 panels that are sort
17 of steeped in the individual components and
18 ingredients of what goes in a program. Then,
19 when you step back and ask, what does it take to
20 implement that across your district, there are
21 other kinds of issues, like the ones identified
22 here, that need to be taken into account.
23 Q. Did you understand that this Stage 1
24 process began with individual panels providing
25 responses to resources?

A. Yes.

Q. Defendants have suggested during cross-examination that differences between what some individual panels recommended in Stage 1 and what the final study recommended provide a basis to question the legitimacy of the final recommendations. Do you have a view as to that issue?

A. I think the art and science of a professional judgment study is to try to come to grips with the full range of the programs and what those programs would cost. As you structure Stage 1, you are looking at a very narrow set of issues involved in putting those programs together. Then, as you ask, how is that going to work in a school district and how are you going to accomplish the goals, you step back in successive stages from that and ask what other programs might be needed, what programs might be taken away, in terms of reaching your ultimate goal.

So I think the fact that the stages are in there makes it a check-and-balance process in going through to the ultimate outcome, which is,

in all these studies, an estimate of what it will take to do something that in New York State no one has done before.

Q. Let me ask you about some of the specific criticisms that have been leveled against the AIR/MAP Study here in the writings of the experts sponsored by the defendants or in the cross-examinations in the testimony.

One of the criticisms is that the plan relies on an assumption of a high percentage of special ed. Students being mainstreamed. Do you have a view as to whether the assumptions used in the AIR/MAP Study regarding special education mainstreaming were reasonable?

A. Well, it turns out that work we did for the New York City school district in the mid-'90s recommended a plan of special education which comes amazingly close to what the plan was here, which was to recognize that there are many special-need children in New York State. Some might be categorized as disabled under special ed. Law and some may not. But there are tremendous needs of the children in New York State, and particularly New York City.





If you are into a process of taking

those children and separating them out, you are going to create, in some ways, two systems of education when there are needs in both systems.

There are admittedly a certain number of disabled youngsters who need separate education, and those should be designed to meet their needs in -- what is the term of art -- the least restrictive environment.

However, for many children what is needed is general education with special attention to their needs. That can be done, I believe, in a setting where almost every teacher is educated in the special needs of children, some more than others, and it takes place in a regular classroom setting. That is what we recommended in the 1999 study and, from my reading of the report, that is where the panels came out in the AIR/MAP Study.

Q. Do you believe that the AIR/MAP Study and your recommendations were consistent with the requirements of state and federal law regarding special education students?

A. Yes, I do.





Q. One of the suggestions has been that if students were not mainstreamed, special education students were not mainstreamed, that the cost associated with special education would be

substantially reduced and therefore the AIR/MAP Study numbers ought to come down. Do you have a view on that?

A. What we recommended in the mid-'90s was that the changes should be made but that people should not expect massive savings from the study, because the extra work of training all teachers in treating children of diverse needs would more or less balance out the kinds of extra costs that you had in that separate system. We recommended ours as an improvement in the education system, not as a cost-saving system.

Q. Let me show you what we marked as Plaintiffs' Exhibit 10.

MR. WAYLAND: May I approach, your Honor?

MR. THOMPSON: Yes.

Q. Do you recognize what which we marked as Plaintiffs' Exhibit 10?

A. Yes.





Q. What is it?

A. It is a special education study referred to several minutes ago.

Q. What was your role in the study?

A. I was one of the principal investigators in the study.

MR. WAYLAND: Members of the Panel, we have marked as Plaintiffs' Exhibit 10, Focus on Learning: A Report on Organized and General Special Education in New York City, dated October 1995. I move it in evidence.

MS. CONRAD: No objection.

MR. THOMPSON: Without objection.

(Report on Organized General and Special Education was marked Plaintiffs' Exhibit 10 and received in evidence.)

Q. Dr. Berne, another criticism that has been leveled at the AIR/MAP Study is the class-size assumptions that inform part of the study, particularly the low class sizes recommended for the early elementary school system in the high-risk New York City District. Do you have a view as to whether or not the AIR/MAP Study appropriately took into account





class-size requirements?

A. I do think it took appropriate class-size requirements into account, and if anything, I think there are studies out there that might have suggested they could have gone even lower.

Q. Would you expect that a district that had a high mainstream goal for special education students would require lower class sizes in

general than a district that had more segregated classes for special education students?

A. All else being equal, if you are going to have a high mainstream program and you want to achieve the same educational outcome, you probably would have a slightly smaller class size. Now, that extra cost there would be balanced against the much higher cost that you would have in keeping separate classes.

Q. Another issue that has been raised is the school-size issue. There are certain assumptions about school size that are part of the AIR/MAP Study. Do you have a view of the appropriateness of the school-size assumption in the AIR/MAP Study?





A. I was somewhat surprised by the fact that the AIR/MAP study found as diminishing a cost that they did in larger schools. I am not sure that, in my judgment, those kinds of economies are shown in the larger schools. I doubt they would be shown in the larger schools if you used outcomes of the children in the schools instead of just cost per child.

In other words, if you look at small high schools versus large high schools, and you look at the cost per graduate, and you accept the

13 notion that the smaller high schools are going to
14 probably have higher graduation rates, then even
15 if the cost per child in the smaller high school
16 might be a little higher, the cost per graduate
17 could actually be a little lower. I was just
18 frankly surprised by the slope of the line in
19 some of their studies.
20 Q. Let me see if I can translate that. Is
21 it your view, then, that in respect to the total
22 dollars that the AIR/MAP Study recommends, their
23 numbers are on the conservative side, taking into
24 account their school-size assumptions?
25 A. Yes. Mainly because I think the





2 economies that they foresee in larger schools, in
3 my judgment, would not be there.
4 Q. Lastly, with respect to criticisms, we
5 spent a fair amount of time talking about the
6 standard, what standard ought to be applied in
7 these costing-out studies. Let me show you the
8 standard that was applied in the AIR/MAP Study.
9 That is at page 17 of Volume 1.
10 Dr. Berne, directing your attention to
11 the first sentence of the second paragraph in the
12 book on page 17 of Volume 1, it says:
13 "Your job is to design an instructional
14 program that will provide all students in the
15 school a full opportunity to meet the Regents

16 Learning Standards, and to attain a Regents
17 diploma."
18 Do you believe that was an adequate and
19 appropriate standard to be used in a costing-out
20 study?
21 A. Yes, I do.
22 Q. Why?
23 A. Because it gives the professionals who
24 are involved in the costing-out a sense of the
25 direction that the system is moving. They know





2 what the Regents standards are and they know from
3 the language of the sentence that not every
4 child, almost no matter what you do, is going to
5 be able to achieve that in a period of time of
6 the study. Therefore, they know what they need
7 is a full opportunity for those children to meet
8 that. In their experience they will translate
9 that into educational programs to give it their
10 best judgment -- and it is a judgment -- on how
11 they would get there.
12 Q. Dr. Berne, I want to direct your
13 attention to paragraph 23 of your statement.
14 There you say: "At the outset" -- and this is
15 under the heading "The Appropriate Standard for
16 Costing-Out Analysis" --"At the outset, it is
17 important to distinguish between standards used

for accountability purposes and standards used in a costing-out study to determine appropriate levels of resources necessary to provide an opportunity to obtain a sound basic education."

Could you just elaborate on that issue, Dr. Berne, that is, a distinction between standards that one might use in an accountability system and one that is appropriate for





costing-out methodology?

A. In large accountability systems, specific cutoffs need to be used -- x numbers of children achieving above Y level or X number of children passing certain exams. That is a standard that one uses in an accountability system, in some states like New York with multiple tests, and other states a smaller number of tests. So, in order to actually do the quantitative calculations for an accountability system, you need to specify those kinds of numbers.

Even if one were to take that kind of specificity in a professional judgment study, in my opinion the professionals who are involved will be translating it back to something like the sentence that is there, because it is humanly impossible for you to say, 80 percent will pass the math exam, 80 percent will pass the physics

21 Regents, 80 percent of 8th graders will achieve
22 above a certain level, tell me what education
23 program is needed to achieve that. Human nature
24 says that you are going to translate that to
25 something that is much more along the lines of





2 the statement that is on the board.
3 Q. Lastly, Dr. Berne, before your
4 cross-examination, I want to ask you about the S
5 & P Study, and ask your opinion as to whether you
6 believe the study by itself provides a reliable
7 basis to actually determine the cost of providing
8 the opportunity for a sound basic education in
9 New York City.
10 A. I don't.
11 Q. Why not?
12 A. First of all, I don't think it does
13 provide a number to estimate the cost of a sound
14 basic education in New York. It looks at a
15 series of districts that are sampled in New York
16 State that meet certain statistical criteria,
17 calculates the cost of those, adjusts for costs
18 based not on any educational programs of children
19 in the district but weightings that are picked
20 out of a national literature, and then multiplies
21 that together. It doesn't in any way track back
22 to programs and their costs that are needed to

23 achieve a sound basic education.

24 Q. Finally, Dr. Berne, this is the nature

25 of a court proceeding but it is also somewhat





2 like a commission that you served on before: The

3 Panel is trying to determine what it should do to

4 provide a remedy to the state. Do you have any

5 final words of advice to the Panel before they

6 head off to try to figure out what to do and

7 based on your long experience?

8 MR. THOMPSON: Yes: Do a good job.

9 THE WITNESS: Those are my words

10 exactly.

11 MR. WAYLAND: That is fine. Thank you.

12 MR. THOMPSON: Ms. Conrad?

13 MS. CONRAD: Shall we take a break?

14 MR. FEERICK: Can I just ask the

15 witness one question before a ruling is made

16 on that question.

17 BY MR. FEERICK:

18 Q. At page 14 of your statement, where you

19 are discussing the difference between GCEI and

20 NYRCI, and trying to draw a relationship between

21 them, as in paragraph 29, page 13, you end up at

22 the end of the paragraph 30 with a reflection

23 that perhaps one way to capture their advantages

24 while diminishing the effects of their flaws is

25 simply average them and use that number as the

basis for a regional cost adjustment. I take it that that is averaging the 1.236 and 1.496, if I understand what you are saying there.

A. Yes.

Q. What I am curious about is, what do you end up with at the end of that process? If you use what you said in paragraph 29, there is a swing of $4.10 billion. Do you use an average of some other figure? Am I correct?

A. Yes. You would cut that difference from the widest swing, and what you would do is to capture some of the information that is included in the wage method versus the econometric method.

MR. FEERICK: Is there some way we could get the result of that math? For myself, if I were parsing that, I would not be confident if I didn't have a record basis for it.

BY MR. WAYLAND:

Q. Dr. Berne, I take it that is a calculation that can be done?

A. Yes. That is a calculation that can be done, probably from information you already have

in the database.

MR. WAYLAND: We will do it and provide it, your Honor.

MR. FEERICK: Thank you.

BY MR. MILONAS:

Q. If I understand the drift of your testimony, earlier you were talking about the different methods that were used to arrive at a dollar amount, and the sense that I got from your testimony is that it really doesn't matter too much which formula we use, as long as the dollar amount is within the ballpark of reasonableness for the task that we have ahead. But you were more concerned, it seemed to me, that the formula under which we distribute the funds and the use of the money should be used effectively, even more important. Am I correct?

In other words, what I am thinking about is that we have to deal with a long-term process, and we have to deal with a legislative branch of government and executive branch of government. If they are more comfortable with looking at a successful school model, which model could be used in a reasonable manner, does it

2 really matter?
3 A. I think it does.
4 Q. You think it does?
5 A. Yes. Let me explain the following:
6 What you do in a successful school model is, you
7 take a standard of achievement and you look at
8 the districts who have achieved that level. What
9 you are trying to say is: Can that performance
10 be replicated in the districts that haven't
11 achieved it? Time after time, in state after
12 state, when you do that -- it was true in
13 Massachusetts and I believe it is true in New
14 York -- you end up with very advantaged districts
15 who have been chosen in that screen of
16 performance.
17 So there is a heroic assumption in the
18 successful school model that when you translate
19 from that mix of kids in those districts to the
20 high-need districts, it is just a simple,
21 straight-line extrapolation adjusting for student
22 weights. I think the basic premise, particularly
23 when you lop off the 50 percent --
24 Q. Assuming you don't.
25 A. Assuming you don't, even that basic





2 premise of assuming that the education process in
3 a district with advantaged children can be

reasonably replicated in another one, I think is too heroic an assumption to make me comfortable that the successful school model will work.

If we had a problem where a case was brought and it was the north of the state versus the south of the state, and the mix of the kids in those districts was the same, it was an adequacy case of the south or the north, and the mix of the high-achieving districts in the successful schools somehow was closer in matching the mix of kids in the districts of the less successful schools, I would have less concern about it.

But that is not the case here. The districts themselves are a highly advantaged set of districts. I am not sure it is just a linear extrapolation to say: Put some weights on it from national data and then move to a model that then uses that to form the basis of the resource allocation.

Q. In reality, the numbers do seem to be very similar.





A. The numbers are similar, but I do think it matters on how you got there, because of the nature of the confidence that you have that you can actually put together an educational program. I am not always confident that the numbers are

7 going to get there, but it does turn out that
8 they are all in the ball game in this particular
9 case.
10 BY MR. FEERICK:
11 Q. Maybe you have said all that you had
12 planned to say, but one of the arguments about
13 the comparison of the successful school districts
14 with the disadvantaged school district is dealt
15 with through the weighting system. I take your
16 testimony not to accept that. The argument is
17 that you have the advantaged districts, the 281,
18 say, and you have the disadvantaged districts.
19 As to the demographic differences, weightings are
20 introduced to deal with that. I take your
21 testimony to have trouble with that approach of
22 just using weightings to reflect the differences
23 between the advantaged and disadvantaged.
24 A. Let me answer it in two ways. One is
25 that it is a little circular. First you are





2 asking how much extra the special-needs students
3 require. But in order to get that number, first
4 you are subtracting out dollars based on what you
5 have already decided those special-needs kids
6 require. So there is a circularity to it.
7 If you use those weights, there is a
8 mathematical equivalent weight that will get you

9 to pretty much where you come out in the AIR/MAP
10 Study. So in that sense the kind of questions
11 you have been asking, yes, there can be an
12 equivalency. But when you don't know the number
13 you are shooting for, in some ways three years
14 from now, if they only did a successful schools
15 study and didn't do the AIR/MAP Study, we
16 wouldn't be sitting here saying, they both came
17 out the same, it didn't matter what you did.
18 So if we are going to leave a legacy
19 for the state to get these right for a couple of
20 years, and let these lawyers do some other things
21 for a few years, then we have got to put
22 something in place that is going to have some
23 lasting power. If I had a choice of doing it on
24 successful schools versus professional judgment,
25 I would put more of my money on professional





1 Berne - direct
2 judgment.
3 MR. THOMPSON: Ten minutes.
4 (Recess)
5 MR. THOMPSON: We have one pleasant
6 task we would like to proceed with before we
7 begin the cross-examination, Ms. Conrad.
8 Dean?
9 MR. FEERICK: I just noticed that the
10 Dean of Fordham Law School, Dean William
11 Treanor, has stopped in for a moment, and I

know I speak on behalf of the three judicial referees in expressing our gratitude to him and the law school for making it possible for us to have these hearings here. The school, I know, went through a lot of steps to facilitate that. On behalf of the referees and, I am sure, all the parties, I would just like to say thank you to Dean Treanor.

(Applause)

MR. THOMPSON: Thank you, Dean. Ms. Conrad.

(Continued on next page)





CROSS-EXAMINATION

BY MS. CONRAD:

Q. Good afternoon, Dr. Berne. Your concern historically has been that the funding of education has not been aligned with student need; isn't that correct?

A. That's been a concern that I have had, yes.

Q. The Court of Appeals has now agreed with you that that must be done; is that your understanding?

A. My understanding is the Court of

Appeals has said that education should be a sound basic education, an adequate education, which I would presume would align with student needs.

Q. And the issue before us now is how best to accomplish that; is that your understanding?

A. How best to accomplish the court order, yes.

Q. You testified earlier that you believe there are three elements of the remedy: Adequate resources, an appropriate mechanism going forward, and accountability. Is that correct?

A. That's correct.





Q. With respect to the resources, am I correct in understanding that you prefer the professional judgment model employed here by the AIR/MAP group which resulted in one lump sum for the entire state, as opposed to a successful schools methodology which is based on spending levels of successful school districts and then pupil adjustments based on need?

A. Yes. I think in this case the professional judgment model is a preferred one to getting to the issue of a sound basic education for schoolchildren in different districts.

Q. Do you recall testifying at the trial in this case?

A. Yes.

Q. I know it's been four and a half years, so I will put some of your --

MR. MILONAS: That was somewhere in the middle of this case?

MS. CONRAD: No comment.

Q. I am putting up on the board page 11,848 from the trial record, and there is a question here by Mr. Wayland to you that says:

"Q. Are you familiar with the





concept of pupil weighting?

"A. Yes, I am.

"Q. What is it?

"A. Pupil weights are used in school finance allocation systems to reflect differential pupil needs.

"Q. What kinds of pupil weighting do we generally see in state finance systems?

"A. It's common to see measures based on socioeconomic status. It is common to see measures based on English-speaking ability. It is also common to see measures based on students with disabilities."

Do you recall that testimony?

A. Sure.

Q. Do you still agree with that testimony?

A. Yes.

Q. I am putting up on the screen page 11,909. Mr. Wayland asked you:

"Q. Do you have an opinion as to the appropriate criteria to be used for assessing state education finance systems?

"A. Yes, I do





"Q. And what are those criteria?

"A. One, that it address pupil needs.

"Q. And the other?

"A. Two, that it address regional costs."

And then I won't go on as to --

MR. WAYLAND: There is some more.

MS. CONRAD: All right, I will read the rest.

"Three, that it addresses the District's ability to pay or what we were calling wealth.

"Q. And another?

"A. Fourth is that there is some alignment between the educational goals and the finance system."

Do you recall that testimony?

A. Yes.

Q. Would you still agree with that testimony today?

22 A. Yes.

23 Q. Putting on the screen page 11,914 from

24 the trial record, again, Mr. Wayland asked you:

25 "Q. And is it generally accepted in





2 the academic community that state finance

3 systems should weight for need?

4 "A. Yes, generally accepted."

5 Do you recall that testimony?

6 A. Yes.

7 Q. Do you still agree with that?

8 A. Yes.

9 Q. Are you familiar with this formula that

10 is set forth on page 16 of your statement?

11 A. Yes.

12 Q. Do you recall when you first saw this

13 articulation of a formula proposed by the

14 plaintiffs?

15 A. Probably a couple of weeks ago.

16 Q. Can you tell us the source of the

17 Geographic Cost of Education Index that is listed

18 in here, 1.236?

19 A. Both the numbers that are used in there

20 in terms of the weights come from working

21 backwards out of the AIR/MAP Study.

22 Q. So you have an understanding that the

23 AIR/MAP Study resulted in a GCEI index of 1.236?

24 Is that your understanding?

25 A. Yes.





1 Berne - cross

2 Q. Earlier today, just so the record is

3 clear, you mentioned a cost of education index.

4 Were you referring to a regional cost adjustment

5 like the GCEI?

6 A. Yes.

7 Q. There is an Educational Needs/Scale

8 Index listed on here. What is the source of that

9 index?

10 A. It's a translation of the educational

11 programs costed-out in the AIR/MAP Study and the

12 work of the professional judgment panels across

13 different-size schools, translated back into a

14 single number.

15 Q. So the judgment of the panels about

16 educational programs and services translate into

17 the 1.535 index; is that your understanding?

18 A. When you put costs on the services and

19 move them through the methodology of the study,

20 which includes some regressions for size of

21 district and mix of the schools in the district,

22 you work back to that weight.

23 Q. Are those programs and services for all

24 students or only students with special needs?

25 A. No, that is the way that you adjust the

unweighted number at the bottom of the page for all of the programs in that particular district.

Q. Then how do you get the number at the bottom of the page under d, that is, this foundation amount, if that doesn't include the programs and services? Where does that come from?

A. The foundation amount begins with a statewide number for an unweighted pupil in that particular state.

Q. Where does the unweighted pupil number come from?

A. It comes from the aggregate number of the costing study worked backwards, divided by the number of pupils.

Q. So am I correct in understanding, then, that there was one big lump-sum number for the entire state that resulted from that AIR/MAP projection? Is that right?

A. There is a number that you can get to in an unweighted fashion working backwards from the AIR/MAP Study, which is the numbers at the bottom of the page. And then when you apply the weights you get to the full number that applies

per pupil for the school districts under the study.

Q. Let me just make sure I understand what you believe was the process followed by AIR/MAP that translates into this formula. Do you believe there was one large number for the whole state that resulted from the judgmental panels and the projections resulting from a series of progression analyses? Is that right?

A. Yes, there is an aggregate number --

Q. Maybe you should just say yes or no, and I will ask the next question.

MR. WAYLAND: Unless you can't.

A. There is a aggregate number for the entire state.

Q. And then one breaks out of the aggregate number for the entire state an unweighted per-pupil amount. Is that right?

A. One attributes to the different indexes the variation that goes with those indexes, and you strip out that amount. That varies by the index.

Then you index the numbers and you get back to the actual full amount for the state.





Q. So what needs categories do you

3 understand to be represented by d, the
4 Educational Needs/Scale Index? What does that
5 encompass?
6 A. It encompasses all of the variation in
7 the educational programs across the different
8 districts.
9 Q. Irrespective of the pupils that attend
10 school in those districts?
11 A. I am not sure what you mean by
12 "irrespective." The number itself was generated
13 by a series of steps that took into account a
14 certain percentage of students in poverty, a
15 certain percentage of students who are English
16 language learners, a certain percentage of
17 special education students, in those districts
18 when the professional judgments were made.
19 Q. Let me put on the screen page 115 of
20 Volume 2. I don't know if you observed -- I am
21 trying to get all of this on the screen here --
22 did you observe this chart when you looked at the
23 AIR/MAP Study?
24 A. I have reviewed that volume, so I am
25 sure I looked at that page. It would be helpful,





2 if I am going to talk about it, to actually have
3 a copy I could see.
4 MS. CONRAD: Do you have a copy of

Volume 2?

MR. WAYLAND: I do not.

MS. CONRAD: This is the only copy I have.

MR. MILONAS: It is your cross-examination.

Q. If I understand it, Exhibit C-1 on page 115, these were the characteristics of prototypical schools for which panels made judgments. Is that your understanding?

MR. MILONAS: Can you see it?

THE WITNESS: My vision is really poor.

MR. WAYLAND: If you need to see any of the surrounding materials --

THE WITNESS: I would like to look at the whole page before I say what is on the page.

(Handed to the witness by Ms. Conrad.)

A. So these are the characteristics of the schools for which estimates were made in the professional judgment study.





Q. That is your understanding?

A. That is my understanding.

Q. Then do you have an understanding that regression analyses were utilized to project the panels' judgment for these prototypical hypothetical schools to schools of other sizes

and with other demographic characteristics?

A. The regression analysis was used to get the slope of the line between, let's say, different percentages of free and reduced price lunch. So I think we are saying the same thing.

Q. You testified earlier that you believe the AIR/MAP Study results in a reliable cost projection; is that right?

A. Yes, that's right. I believe it is a methodologically sound method to estimate a sound basic education.

Q. Using regression analyses to project the judgments of members of panels about different hypothetical schools?

A. By using regression analysis to find the relationship among the different estimates that the panels provided.

Q. The term "reliability" in statistics





has a particular meaning; isn't that correct?

A. Yes, it does.

Q. What does it mean?

A. It means that when you do the exercise over and over again, you get something along the lines of the same estimate.

Q. So you believe that one would get approximately the same estimate irrespective of

the composition of these particular panels?

A. No, I think a professional judgment panel could differ in terms of its estimates.

Q. Wouldn't the reliability of the ultimate cost projection be affected by the judgments of the initial panels, which are then subjected to these regression equations?

A. Absolutely.

Q. Let me take that volume back, if you don't mind.

Am I correct in understanding that you yourself have never conducted a professional judgment study?

A. That's correct.

Q. Or a study that utilized both the professional judgment and econometric





methodologies?

A. That's correct.

Q. When you testified at the trial, you testified about these methodologies, and I am putting on the screen page 12,557 from the trial record. I will start with your answer at line 21:

"Again, I think there are three main methods that are being used in various states or by academics.

"The first is what I'd call an

13 econometric approach. That would be an approach
14 where you would try to estimate equations that
15 model the behavior of spending and school
16 performance in the school districts and use the
17 results of those equations to guide education
18 policy and school finance distribution.
19 "I would say at this stage we are at
20 the early point of that, as the estimates are not
21 as stable as one would like, I think, from the
22 early work that's been done in this area.
23 "The second area -- the second way that
24 you go about it would be to say, can I find a set
25 of school districts in a particular state that





2 exhibit a high performance, and can I then
3 measure the resources that are used to achieve
4 that high performance in that particular state --
5 in those particular districts.
6 "So it is an empirically based method
7 but -- not empirically, but not the same as the
8 econometric method I mentioned before."
9 MS. CONRAD: Do you want me to read the
10 whole answer, Mr. Wayland?
11 MR. WAYLAND: I don't know what you are
12 doing, because normally when one reads trial
13 testimony from somebody's testimony, it is
14 to impeach the witness, and this certainly

15 isn't an impeachment, you haven't tried to
16 impeach him. Actually, I am happy to have
17 it read. I think it is procedurally
18 improper, but read as much as you want. I
19 don't think it serves any evidentiary
20 purpose.
21 MR. MILONAS: Is there a third and a
22 fourth after the second?
23 MS. CONRAD: He then mentions the
24 professional judgment study on the next
25 page.





2 MR. MILONAS: Can we see that on the
3 screen?
4 MS. CONRAD: Yes, you can. This is
5 still on page 12,568. Maybe I should read
6 the whole answer. I stopped at line 20 on
7 page 12,557. I will resume on line 21.
8 MR. WAYLAND: I am happy to have you
9 put it into the record. You can put in as
10 much of the testimony of the trial as you
11 want. If it is already in the record, if
12 there is a point, why don't we get to it?
13 MS. CONRAD: I understand that, but
14 Judge Milonas just asked if he could see the
15 next page and I didn't want to leave
16 anything out in Dr. Berne's testimony about
17 the approaches. Yes, I understand that this

is in the trial record, but I don't think there has been any view that this Panel would review the entire trial record.

MR. MILONAS: Let us see the next page on the screen. Can I see the next page?

MS. CONRAD: Yes. Should I read this section?

MR. MILONAS: No. I am looking at it.





THE WITNESS: You will have to read it if you want me to comment on it. I can't see it on the screen.

MR. MILONAS: If you wanted to keep on going -- I am into it -- can I see more?

MS. CONRAD: Yes, you may.

(Pause)

MR. MILONAS: All right.

Q. Dr. Berne, do you agree with the testimony that you gave at the trial which I read to you?

A. The stuff you read -- I can't read it up there -- but I agree with what you read.

Q. Since the time of the trial, are you aware of any state which has based their school financing programs on combined professional judgment and econometric models?

A. No.

20 MR. FEERICK: I would hope that those
21 two pages will be provided us so that it is
22 part of what we have before us.
23 MS. CONRAD: Gladly.
24 BY MR. MILONAS:
25 Q. But you had an offsetting combined





2 professional judgment and the successful schools
3 district models?
4 A. States have used it in coming to an
5 amount in their court decisions. I don't know of
6 anyone who has put a professional judgment and
7 successful school model in a formula. There has
8 been testimony in court cases to get to a court
9 decision that have used successful schools and
10 professional judgment. Massachusetts was one of
11 them, where both successful schools and
12 professional judgment were introduced in the
13 proceedings to make the case of whether the
14 amount that was being spent was adequate or not.
15 The remedy is yet to be determined, so I am not
16 sure whether they are going to base it on either
17 of those studies.
18 BY MS. CONRAD:
19 Q. You testified earlier that you believe
20 that accountability is an important component of
21 the remedy in this case; is that correct?
22 A. That's correct.

23 Q. Are you aware of an aspect of the
24 defendants' plan that includes that the school
25 districts would have to prepare resource





2 allocation plans? Did you read about that in the
3 Zarb Commission report?
4 A. I read the Zarb Commission report, and
5 I do believe I recall them talking about
6 different plans that would be submitted, yes.
7 Q. Do you have an opinion as to whether,
8 if the panel recommended adoption of the
9 defendants' plan with discrete identifiable pupil
10 weights for students with special needs, and that
11 were tied to resource allocation plans for
12 individual schools in New York City, whether that
13 would in fact be in the interest of the student
14 in New York City?
15 MR. WAYLAND: Objection.
16 MR. THOMPSON: I will allow it.
17 A. The way I viewed the process that we
18 have been talking about is that it is very
19 important to use sound methods to come up with
20 aggregate amounts of resources. I don't believe
21 that those aggregate amounts or even the way in
22 which they are divided, either in a professional
23 judgment study or in a successful schools study,
24 should be the mechanism that dictates how the

25 money should be spent in the districts. I think




2 those are two completely different issues,
3 because there are a large number of ways that the
4 extra resources could be spent productively. And
5 I trust the people who make those judgments
6 closest to the schools make those judgments.
7 So I don't believe in giving a block
8 grant based on a sound method and asking school
9 districts to justify how they are going to spend
10 it but not using the formula to guide that
11 spending.
12 Q. So you don't think that amounts
13 generated by a formula that included, for
14 example, pupil weights should track students in
15 those school districts where they are educated?
16 A. It's complicated in New York City
17 because you are dealing with over a million kids
18 and over a thousand schools. Do I think that
19 schools with higher needs should get more
20 resources? Yes. Do I think that should be
21 mandated by the formula at the state level? No.
22 There should be an amount that goes to
23 the City of New York. They should be required to
24 justify how those incremental and base resources
25 are being spent. If they say they are going to

do class-size differences or extra training for teachers, or whatever, they should make a case that that extra resource that they are going to get is going to effect a sound basic education.

But do I think the state formula should dictate how much goes to each, let's say, district in New York or school within New York? I'd say no.

Q. But you are in favor of accountability mechanisms pursuant to which school districts would articulate how they propose to meet the needs of students in individual schools?

A. I believe that New York City or any district in the state should come up with a plan of how those incremental resources are going to lead to improved educational outcomes.

Q. Do you understand that the programs and services designed by professional judgment panels in the AIR/MAP Study are not in fact recommendations that the New York City school district adopt particular class sizes or inclusion of large percentage of special education students?

A. Yes. That is consistent with my

statement that I would not impose the findings from the study on the district, even though those findings from the study generated the aggregate amount.

Q. So essentially the professional judgment model is an exercise for coming up with a total aggregate amount, but there are no particular recommendations that are being suggested to the district about programs and services that ought to be delivered?

A. I agree with that statement.

Q. You testified, it appears from your written statement, that you are advocating that the Panel adopt a hybrid regional cost adjustment that is an accommodation of the GCEI and the New York Regional Cost Index which was recommended by the Regents. Do I understand that correctly?

A. Yes.

Q. Are you aware of anyone anywhere who has used a hybrid like that as a basis for regional cost adjustment in any state?

A. No. I have no knowledge. It may be used, it may not be, but I don't know.

Q. Is it your opinion that either one of





these methodologies, the GCEI or the NYRCI, is a legitimate means of adjusting for regional costs?

A. Yes.

Q. So you are just proposing that they be combined because it might generate more money for New York City schools?

A. No, I am suggesting that it be combined because I thought that the set of assumptions that went into the GCEI were overly conservative, and when I looked at those assumptions in comparison with the state numbers, that judgment was supported.

Q. You are aware that the plaintiffs, the Campaign for Fiscal Equity, are supporting the GCEI methodology that was developed by Dr. Chambers?

A. Yes.

Q. I understand that you served as a consultant to the Sound Basic Education Task Force; is that correct?

A. Yes.

Q. Are you aware that in the May 2004 Sound Basic Education Task Force Final Report the GCEI is the methodology that is recommended for





adjustment for regional costs?

A. Yes.

Q. So that this is just your own notion of how it might be done?

A. This is my own opinion.

Q. Am I correct that one of your criticisms of the defendants' plan is the efficiency factor?

A. If by efficiency you mean only including 50 percent of the schools in the successful schools study, the answer is yes.

Q. Were you aware that the Regents proposal also looked at the lower-spending 50 percent of successful school districts?

A. Yes.

Q. So you believe the Regents are also incorrect in using that cost-effectiveness factor?

A. Yes.

Q. Do you believe that cost-effectiveness is a reasonable policy judgment in education finance?

A. I understand why they are making the judgment. I don't see the full justification for





taking out 50 percent of the districts.

BY MR. MILONAS:

Q. If you were to use the successful schools model, what percentage, if any, of the schools would you exclude and why?

A. I'd probably first do it with all the schools, and then, secondly, I would look at the

data and make some judgments about, you know, is there a top 5 and bottom 5 percent that seems to be aberrational? You have to be careful that, despite all of the cleaning of the data, there are joint districts, there are sharing arrangements across districts that lead to some numbers that are unusual, there are some districts that collect money and send kids somewhere else, so that all of a sudden it looks like they are spending a lot. There are districts on Shelter Island that look like they are spending $25,000 a kid.

MR. THOMPSON:

Q. And they have the right to go to school in Connecticut if they want to.

A. Right.

Q. In Fishers Island in the Town of





Southold.

A. So I would take a look at that and I'd run it with all hundred percent of the districts, and I would take some off something at the top and bottom.

BY MS. CONRAD:

Q. Dr. Berne, you served as a member of the Committee on Education Finance which was sponsored by the National Resource Council; is

that correct?

A. Yes, that's correct.

Q. And the committee issued a report entitled "Equity and Adequacy in Education Finance: Issues and Perspectives" in 1999? Do you recall that?

A. Yes, the full committee issued that report, yes.

Q. And you and Dr. Leanna Stiefel also published an individual paper in Chapter 1 of that book; is that correct?

A. You are mixing up two things. The commission had two volumes that it published. One was a series of articles that were published by the commission, of which I coauthored one of





the articles. Those articles were input to the commission and its work. Second, the commission published a similarly sized volume that was the findings and recommendations of the commission.

Q. I would like to show you the question that was posed by Congress to the commission, which is in the Introduction of Equity and Adequacy in Education Finance Issues and Perspectives, which we have marked as Defendants' Exhibit 9 and 10. I believe 9 is the chapter that you and Dr. Stiefel --

MR. MILONAS: Do we have these?

MS. CONRAD: I am passing them up.

MR. REBELL: What year was that, please?

MS. CONRAD: 1999.

Q. Putting on the screen from the exhibit, Introduction to the book --

MR. MILONAS: Just a minute. Do we get one?

MS. CONRAD: We will provide you with additional copies.

MR. MILONAS: There are two parts to one exhibit? Is that what this is?





MS. CONRAD: They are two separate exhibits, but they were both in the same book.

MR. MILONAS: You have one for the three of us?

MS. CONRAD: They should be No. 9 and 10.

MR. REBELL: Which one is 9?

MS. CONRAD: 9 is Chapter 1, and 10 is supposed to be Equity and Adequacy in Education Finance. We will correct these numbering problems.

MR. WAYLAND: We have an extra copy. I will share one with Mr. Rebell, so the Panel

can have it (handing to the Panel).

MR. MILONAS: Then one of us won't read it, that's all. What can I tell you? You should have enough exhibits for everybody. That is the way it usually works.

MS. CONRAD: I apologize.

MR. MILONAS: How about we share and each read a half of it?

Q. Am I correct that the question posed --

MR. MILONAS: Make sure we get another





one, OK?

MS. CONRAD: I promise.

Q. Am I correct that the question posed by Congress to the National Research Council was: "How can education finance systems be designed to assure that all students achieve high levels of learning and that education funds are raised and used in the most efficient and effective manner possible?" Do you recall that?

A. Yes.

Q. Do you agree that the efficient use of education funds is a reasonable education policy goal?

A. Yes, I do.

MS. CONRAD: I would move Exhibits 9 and 10 into evidence.

MR. WAYLAND: No objection. We would

have stipulated to that statement without the documents.

MR. MILONAS: Do you want the exhibits back?

MS. CONRAD: No.

(Defendants' Exhibits 9 and 10 were received in evidence.)





MS. CONRAD: May I have just a minute.

MR. THOMPSON: Yes.

(Pause)

MR. MILONAS: I will take advantage of the minute.

BY MR. MILONAS:

Q. Is it possible to use the AIR/MAP Study numbers to back into weightings for low income, English language learners, disabled students, in a way that would reconcile the successful school district method results and the AIR/MAP results?

A. That's a good question.

Q. You get my idea.

A. It is a good question. I think because of the fact that the prototypical districts had numbers on all three groups, using those three groups, and grouped it together and then designed an education program, you would need to make some strong assumptions to go from an all-needs weight

that we include to something that breaks it out for all three. Now, you could do it, but my guess is that you would need to make some other assumptions in order to get to these specific weights.





MR. FEERICK:

Q. I take it, on that question, that if one wanted to look at the present weightings in the Governor's plan and test them against what weightings might come out of the AIR/MAP plan, you could only do that by using certain assumptions with respect to AIR/MAP; is that what you are saying?

A. Right, although I think you might be able to go the other way. You might be able to take the Governor's numbers and combine them in a way that gives you rough comparability with the numbers that are in the AIR/MAP Study. Going the other way, you'd need to make certain assumptions there.

The issue becomes one where the outcome of the professional judgment study is that you really get a single number for every district, based on the costing assumptions and the programmatic assumptions. Any weights that you do get are derivative, they are implicit with that. As you add to the number of groups for

24 which you are weighting, then the complexity of
25 trying to get it right for all 700 districts goes





2 up fairly significantly.
3 Q. Let me see if I follow what you said in
4 response to my question. My focus is New York
5 City. The Governor's plan has certain weightings
6 with reference to special populations in New York
7 City. You could take those weightings and draw
8 some relationship with what is contained in the
9 AIR/MAP plan that takes account, I take it, of
10 the special characteristics of the districts in
11 the state. I am just focusing on the
12 relationship between the weightings in the
13 Governor's plan and what the AIR/MAP plan might
14 suggest with respect to New York City.
15 A. Yes. It is a complicated question. I
16 know what the question is, and I believe, if you
17 just had one district that you were doing it
18 for -- New York City -- you could make a rough
19 equivalency between the individual weights for
20 the groups and the AIR/MAP Study for the single
21 district.
22 Q. And the district I am referring to is
23 New York City.
24 A. Yes, New York City.
25 Q. So you could do it, and my question is:

Are you able to do it? I don't mean as you sit here.

A. I think the team that I have been working with, who are associated with the plaintiffs, could figure out how to do that. We could answer the question of whether it is doable, and if it is doable, we could calculate it.

MR. FEERICK: I would ask counsel if he could do that.

MR. WAYLAND: Yes.

MS. CONRAD: If I may.

BY MS. CONRAD:

Q. Dr. Berne, did you review the direct testimony statement of Dr. Thomas Parrish?

A. Yes, I did.

Q. Do you recall that in Dr. Parrish's testimony he indicated that, using the AIR/MAP Study, if one were to attempt to identify weights for poor students and English language learners, they would in fact be lower than the weights proposed by the S & P study? Do you recall seeing that?

A. I don't recall it, but if you say it is

in there, I have no reason to doubt it.

MR. MILONAS: Let him finish.

MR. FEERICK: I think counsel responded to my question, if they could develop that.

MR. WAYLAND: Yes, your Honor, we will.

BY MR. MILONAS:

Q. How could you, three or four years down the road, replicate the AIR/MAP Study in a way that wouldn't be so difficult, complex and expensive?

A. Well, expensive is a matter of relativity. If you are spending $40 billion, and you have to spend a million and a half to do the study, I think that is 50 cents a kid in New York State, I think it is worth it every four years to do that, to get some relationship between programs and spending.

Q. Something that would take less than two or three years to do, how about that?

A. I think once you set it up the first time and you know you are going to do it every four years, you could gather the data in advance and then pull the panels together a year ahead of when you need the numbers, and you could get it

done.

Q. Do you think you would have to take a year to do it?

A. I would say six to eight months to set it up and bring the panels together and do the successive iterations.

BY MS. CONRAD:

Q. Following up on the Panel's questions with respect to student-need weights and whether or not one could mix and match the AIR/MAP study and the S & P Study and the Governor's proposal, you indicated at the trial that the usual pupil weighting categories were for English language learners, poor students and disabled students; isn't that correct?

A. Yes.

Q. Are you aware that this Educational Needs/Scale Index, which is on page 16 of your written statement, includes a small school size factor?

A. Yes, I am aware of it.

Q. Are you aware of any pupil-needs weights anywhere that includes school size --

A. Yes.





Q. -- as a component?

A. Yes, there are state school finance formulas that often have a school size -- or

district size factor in them.

Q. But not as part of the pupil-needs weights, are they?

A. No, as part of the overall weighting system. They wouldn't call them pupil weights per se. They would separate them out and call them district factors or something like that.

Q. But in the foundation amount that you are proposing, pupil needs and school size are lumped together into one needs scale index; isn't that right?

A. That's correct. Because of the way the study was conducted, the professional judgment panels were asked to make judgments about schools of different size. As a result of that, the researchers felt that the differences as to the school size were worth including in the numbers they generated for a sound basic education for each district.

As you recall from my direct testimony, I wasn't all that comfortable with that, but they





did it.

MS. CONRAD: Thank you. I have no further questions.

MR. WAYLAND: I have no questions, your Honor.

MR. THOMPSON: Thank you, Dr. Berne.

THE WITNESS: Thank you.

(The witness was excused.)

MR. THOMPSON: What about tomorrow?

MR. McHALE: We were just discussing that. With respect to the testimony that I tendered earlier, the testimony from Michael Murphy, that I was hoping the plaintiffs would agree to submit, I understand that they are agreeable to that. So apparently there is no need to call Mr. Murphy tomorrow.

MR. MILONAS: You gave us copies of that?

MR. McHALE: I am going to have to give you a copy that has a fuller Exhibit A. I will do that tomorrow morning.

MR. MILONAS: Tomorrow morning we are not going to be here.





MR. McHALE: No, I will hand-deliver it.

MR. WAYLAND: Subject, your Honor, essentially, to an exercise of putting some numbers before the Panel. We have some other numbers we think are relevant. We will put them in, too. We don't need testimony.

MR. KLEINMAN: Your Honor, the proposed testimony for tomorrow really concerns a look at New York City capital and debt limits. I have first seen this now, and I don't know whether these numbers are accurate, and it is full of judgments.

MR. MILONAS: You can correct them once you read them and let us know. We will let you do whatever you have to do to make an accurate record. There is no problem with that.

MR. KLEINMAN: Thank you, your Honor.

Also, you had asked the Chancellor some questions, and I have a supplemental affidavit from the Chancellor, which the reporter has marked as City's Exhibit C.





MR. MILONAS: Have you seen this?

MR. McHALE: Yes.

MR. THOMPSON: Any problem?

MR. McHALE: No, your Honor.

MR. THOMPSON: All right.

MR. KLEINMAN: I offer it in evidence.

(Supplemental written testimony of Chancellor Joel Klein received in evidence as City's Exhibit C.

MR. McHALE: On the question of whether

there would be any other possibility to call a witness tomorrow, we need to ask your indulgence for a couple of minutes. Can you get us a break and permit us to report back to you about that?

MR. THOMPSON: All right.

MR. McHALE: I was hoping we could have a break of a few minutes. I can't do it in thirty seconds.

MR. THOMPSON: Ten minutes.

(Recess)

MS. CONRAD: The defendant at this point has no plans to call any witnesses in rebuttal. The only concern that I have is





that the Panel made some requests for information today, some of which I thought that witnesses had already answered on standards on direct testimony. To the extent that the plaintiffs provide information for which we would require an opportunity to respond, we would request that.

MR. MILONAS: We were just going to suggest that, whatever is submitted, you have absolutely an opportunity to respond in any way.

MS. CONRAD: I appreciate that. My

only concern is the time frame, given that our proposed findings and conclusions are due at 5 p.m. a week from tomorrow.

MR. THOMPSON: That is a whole week.

MS. CONRAD: I know it.

MR. THOMPSON: You have a weekend too.

MS. CONRAD: It won't be a week if we are battling over some numbers that surface on Monday or Tuesday. The problem is this open-ended record.

MR. MILONAS: You may need another day





to respond to that document? You can have it.

MS. CONRAD: That is so generous. Thank you.

MR. THOMPSON: He is all heart.

MR. FEERICK: I would say, with respect to the request that I made, that if the answer is to be found somewhere already in the record --

MR. THOMPSON: Just tell us, we will dig it out ourselves.

MR. FEERICK: -- if both parties are in agreement that the answer is there, I accept that.

MS. CONRAD: I assume we will all have

to read the transcript and make sure that the precise question has already been answered. But that was my understanding.

MR. THOMPSON: Then the next meeting now is the 1st, am I correct?

MR. MILONAS: 9 o'clock.

MR. THOMPSON: 9 o'clock right here.

(Time noted: 3:25 p.m.)





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