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Public School Funding System Upheld

by Brian J. Nickerson and Gerard M. Deenihan

On June 25, 2002, the Appellate Division, First Department,[1] by a 4-1 vote, overturned a dramatic lower court trial decision[2] which declared New York State's school funding system unconstitutional because it failed to ensure that New York City public schools received adequate funding to provide its students a "sound basic education" guaranteed under the education article of the New York State Constitution. The lower court had held that the State's public school finance system did not operate neutrally to allocate funds among school districts and, consequently, perpetuated numerous educational inequalities (uncertified teachers, crumbling school facilities, sub-standard learning tools, and poor test performance) of the New York City and poorer school districts. Reversing the trial court, the Appellate Division ruled that plaintiffs failed to establish any link between alleged inequities in the State's school funding formulas and the less favorable conditions of certain school districts and, therefore, the court could not find any constitutional violation. The court also stressed that the State's obligation is to only guarantee a minimal level of educational opportunity, not some optimal level of educational funding or outcomes, to schoolchildren of the State.

In its appeal, the State argued that the plaintiffs, Campaign for Fiscal Equity, Inc.—a coalition of citizens, parents, school children, community school districts, and advocacy groups, failed to meet their burden of demonstrating that: (1) students in urban school districts are not receiving a "sound basic education," and (2) the education funding formula utilized by the State is the cause of this problem.[3] Addressing the first issue, the State argued that New York State ranks third in the nation in education spending, and the New York City Board of Education has spent more money per pupil than nearly any other urban school district in the entire nation.[4] The State also posited that New York City schools receive less funding overall than schools in several other districts throughout the State because the City does not contribute its fair share through real property taxation to its public schools and because some of the Board of Education's resources are wasted through mismanagement and fraud.[5] Thus, the State argued it could not be held accountable for the shortcomings of the NYC public schools.

Additionally, while conceding that plaintiffs had demonstrated several pressing concerns facing schools in New York City, the State maintained that the education available in the City's schools exceeded the constitutional standard of a "sound basic education."[6] The State noted that the City's schools have one of the lowest pupil-teacher ratios among large school districts throughout the nation, and, according to the City's own evaluation system, nearly all of its teachers are rated as "satisfactory" or better.[7] The City's educational materials and supplies rank at or near the "exemplary" level and school facilities are in fair condition or better, and are sufficient to permit children to learn, as required by Article XI, §1 of the State Constitution.[8] Moreover, ninety-two percent of the City's eleventh-graders demonstrate graduation competency in basic skills and New York City students score near or above the national average in reading and math tests.[9] Thus, the State characterized the New York City school system, despite its documented flaws, as one of the best large urban public school systems in the nation.

In addressing the question of whether any failure to provide a constitutionally adequate education was caused by the State's education funding mechanism, the State argued that the trial court ignored three key factors: (1) whether the total funding available to New York City's schools was sufficient to provide a sound basic education, even if it was not actually being used to that effect, (2) whether available resources were squandered due to local mismanagement and corruption, or (3) whether any shortfall in funding was attributable to the City's failure to make an adequate local contribution.[10] The trial court held that such factors were not germane to the inquiry because the responsibility to provide a constitutionally adequate education rests squarely with the State.[11]

The State contended, however, that had the trial court adequately examined these factors, the answer to the question of whether any failure to provide a constitutionally adequate education was caused by the State's education funding mechanism would have been an emphatic "no."[12] The State pointed to statistics showing that New York City spends more than almost all other urban school districts across the country – $9,500 per student (based on Fiscal Year 2000 data) – and that many schools in New York City, including those in Community School District 2 and local Catholic schools, provide excellent education with significantly less funding.[13] Moreover, even if these resources were not sufficient, the blame for such insufficiency rests squarely with New York City and its Board of Education and not with the State's funding formula.[14]

In its reply, the Campaign for Fiscal Equity (CFE) coalition adamantly disputed the State's depiction of the "adequate" quality of the education available to New York City school children. In order to illustrate the State's failure to provide a constitutionally adequate education, CFE pointed out that only sixty percent of the Class of 1999 who entered the ninth grade would receive a high school diploma.[15] Of those receiving diplomas, many will take as many as seven years to do so and most will find they are unprepared for the demands of citizenship or a productive workplace.[16] CFE also pointed out that the system was short 100,000 seats when the Class of 1999 was in second grade.[17] The State Legislature, in fact, declared that New York City's schools were in such "deplorable physical condition" that they were "a serious impediment to learning."[18] In 1995, when the Class of 1999 was in ninth grade, a blue-ribbon commission declared that the New York City school system was in a state of "imminent calamity" and described overcrowded schools that lacked adequate heat, light and air.[19]

According to the CFE, unprepared and unqualified teachers taught the Class of 1999.[20] When the Class of 1999 was in elementary school, at least one in ten teachers lacked the minimum credentials required for certification by the State and one of four elementary teachers had failed the basic teacher competency exam at least once.[21] During high school, they were taught by at least 1,500 uncertified math and science teachers, compared with only a handful of uncertified teachers in the rest of the state.[22]

(Continued on page 2)

Inside...

Golden v. Ramapo — 30th Anniversary Conference

This year marks the 30th anniversary of one of New York's singular contributions to the nation's land use law. The Court of Appeals decided *Golden v. Ramapo* in May of 1972 and certiorari was denied by the U.S. Supreme Court in November, 1972. On November 9, 2002, the Land Use Law Center of Pace University Law School, the Government Law Center of Albany Law School, the State and Local Government Law Section of the American Bar Association, and a number of illustrious co-sponsors, including the Edwin G. Michaelian Municipal Law Resource Center, will host a national conference on the case entitled "A Golden Anniversary in Land Use Law: Revisiting *Golden v. Ramapo* and its Current Relevance." The conference will be held at the Pace University School of Law in White Plains, New York.

The Town of Ramapo's growth control ordinance helped initiate and establish the constitutionality of growth management in the U.S., which has evolved into today's smart growth approach to controlling sprawl. Since *Golden* was decided, the nation's local governments have been challenged to manage the pressures of growth using an increasingly complex set of land use tools while being urged to accommodate regional and state-wide needs and interests. The topics that will be discussed include: land use planning, infrastructure development, home rule, regional planning, moratoria, affordable housing, non-point source pollution, succession and annexation, and local environmental protection – all critical issues facing municipalities and regional agencies today.

Speakers include several of the nation's leading land use scholars, many of the local officials and professionals involved in developing Ramapo's precocious land use strategy, and several attorneys, planners, and public officials deeply involved in the development of sophisticated land use strategies today. Among the speakers is Robert H. Freilich, the attorney who created the Ramapo Plan, wrote the ordinances and successfully defended the system to the New York Court of Appeals and U.S. Supreme Court. Dr. Freilich has been Editor for 33 years of the *Urban Lawyer* the national quarterly on State and Local government law for

(Continued on page 4)

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School Funding

(Continued from page 1)

CFE also focused on other substantial inadequacies within the New York City school system. For several years, many schools lacked up-to-date textbooks, libraries, a sufficient number of computers together with enough teachers who understood how to use them, and a sufficient supply of basic classroom necessities such as pencils and paper.[23] Overall, according to CFE, the Class of 1999 suffered a collective and cumulative denial of adequate resources, because the multiple inadequacies reinforced each other and the inadequacies continued year after year with devastating effects.[24]

Consequently, when the Class of 1999 took its first standardized literacy test in the third grade, approximately one-third of the class, or about 20,000 children, was judged to be functionally illiterate.[25] By the time the Class reached junior high school, it ranked last in the state in social studies and science competence.[26] In 1999, just one-half of the members of the Class of 1999 that entered the ninth grade graduated on time.[27] By way of comparison, more than 80 percent graduated on time in the rest of the State.[28]

The history of the Class of 1999, argued the CFE, illustrates overwhelming support for the trial court's finding that the quality of the education provided to New York City students falls well below the minimum constitutional standard.[29] The gross inadequacies plaguing the New York City school system are directly attributable to the unmitigated failure of the State education funding mechanism to direct sufficient resources to NYC, urban and poor public schools.[30]

Writing for a four-member Appellate Division majority, Justice Alfred D. Lerner, reasoned that, while the "sound basic education" standard pronounced by the Court of Appeals requires the State to provide "a minimally adequate educational opportunity," it does not guarantee "some higher, largely unspecified level of education."[31] Instead, children are entitled to minimally adequate: (1) physical facilities and classrooms that provide sufficient light, space, heat, and air so as to permit children to learn, (2) instrumentalities of learning, such as desks, chairs, pencils, and reasonably up-to-date textbooks, and (3) teaching of basic curricula, such as reading, writing, arithmetic, science, and social studies, by personnel that are adequately trained to teach those subjects.

Relative to minimally adequate facilities, Justice Lerner opined, although there was evidence that some schools lack science laboratories, music rooms, or gymnasia, CFE failed to demonstrate that these conditions were so pervasive as to constitute a system-wide failure. Moreover, the plaintiffs did not show the existence of any failure caused by the educational funding system or of one that can be cured only by way of reforming the system.

Furthermore, the evidence at trial established that class sizes for kindergarten through the eighth grade averaged between 23.8 and 28.72 students per class. While experts testified that student performance is superior in a class of twenty or fewer children, there was no indication students could not learn in classes consisting of more than twenty pupils. The plaintiffs, in fact, conceded that the City's Catholic schools outperform the City's public schools despite having larger classes. Thus, the appeals court ruled, the trial court's holding that classes consisting of greater than twenty students were unconstitutional is unsupported and erroneous.

Regarding adequate instrumentalities of learning, Justice Lerner pointed out that the plaintiffs conceded that recent increases in funding have alleviated the shortage of textbooks and were able to offer only anecdotal evidence regarding alleged shortages of chalk, paper, desks, chairs, and laboratory supplies. Although the average number of books per student in the City's schools lags behind the rest of the State, and the State allocates only $4 per student for library materials, such factors alone do not demonstrate that the City's libraries are inadequate.

Concerning teacher adequacy, the trial court holding that teachers in the City's public schools were unqualified was based predominantly on a comparison with teachers in the rest of the State on teacher certification status, scores on certification tests, experience, turnover rate, quality of the institutions the teachers themselves attended, and the percentage of teachers holding a Master's Degree or higher. Nevertheless, the appeals court refused to deem NYC teachers inadequate simply because they have lower qualifications than teachers in the rest of the State.

Similarly, with regard to the issue of student performance, the trial court, relying primarily upon poor student performance on standardized tests such as Regents Exams and on the determination of a City University of New York Task Force that most graduates of City high schools need remediation in one or more basic skills, held that students in the City's schools were being deprived of a sound basic education. Justice Lerner, however, held that a minimally adequate education consists only of those skills necessary to enable students to become productive civic participants "capable of voting and serving on a jury, not to qualify them for advanced college courses or even attendance at a higher educational institution."[32]

Justice Lerner declared that, in order to prevail in this case, CFE would have to demonstrate a causal link between the present funding system and any proven failure to provide a minimally adequate educational opportunity. Justice Lerner, however, characterized the plaintiffs' position as a form of *res ipsa loquitur* – the fact that 30% of City students drop out and an additional 10% obtain only a GED must mean the funding mechanism utilized by the State has deprived City students of a sound basic education. Under the correct constitutional standard, however, "the State must offer all children the *opportunity* of a sound basic education, not ensure they actually receive it."[33] The mere fact some students do not achieve a sound basic education does not by itself demonstrate the State has defaulted on its obligation, as the State cannot be faulted when students fail to avail themselves of the opportunities provided.

In sum, Justice Lerner ruled that CFE failed

(Continued on page 3)

Municipal Briefs

Area Variances

By enacting Village Law §7-712(b), requiring a zoning board of appeals to consider statutorily enunciated criteria and balance the competing equities in determining whether to grant an area variance, the Legislature preempted the entire field of area variances precluding a village from enacting its own standard. *Cohen v. Board of Appeals of the Village of Saddle Rock*, __ A.D.2d __ (2d Dept. 2002).

Here, the Petitioner applied for but was denied a building permit to construct a single-family residence on unimproved waterfront property on the grounds that the application violated certain provisions of the Village zoning code. Petitioner appealed to the zoning board of appeals arguing that he was entitled to a building permit as of right, or, in the alternative, area variances. The zoning board of appeals sustained the building inspector's determination and found that the Petitioner had failed to prove "practical difficulty or unnecessary hardships in the way of carrying out the provisions" of the Zoning Code as required by Village Code §150-24(B).

In the ensuing Article 78 proceeding, the Supreme Court, Nassau County ruled that the State, through the enactment of Village Law §7-712(b)(3), had created the standards by which all area variances must be determined and inconsistent or contrary standards embodied in local legislation are preempted. *See Municipal Lawyer* November/December 2000. Thus, the lower court invalidated the Village Code standards for area variances and remitted the matter to the zoning board of appeals for a new determination under Village Law §7-712(b)(3).

On appeal by the zoning board of appeals, the Appellate Division affirmed the lower court ruling. In reaching this result, the Court, citing the legislative history behind the passage of Village Law §7-712(b), opined that the statute was "intended to incorporate and standardize the universally acknowledged concepts of 'use' and 'area' variances in the statute," where prior to its enactment, the "criteria which had to be demonstrated in order to establish entitlement to an area variance was clouded by uncertainty." In *Sasso v. Osgood*, 86 N.Y.2d 374 (1995), the Court of Appeals confirmed that with the enactment of Village Law §7-712(b)(3) an applicant for an area variance was no longer required to demonstrate "practical difficulties."

However, complicating the decision here, is the fact the Village purported to act under its municipal home rule powers to supersede the provisions of Village Law §7-712(b)(3) and reinstate "practical difficulties" as the standard for granting an area variance in the Village. Although acknowledging that home rule authority exists for a village to supersede provisions of the Village Law, the appeals court declared that "by codifying and enacting a comprehensive standard for area variances, in an explicit attempt to eliminate confusion and inconsistent case law, the State clearly evinced an intent to preclude the enactment of conflicting local law (see *Matter of Sasso v. Osgood, supra*)."

Accordingly, the zoning board of appeals applied an improper standard in determining the Petitioner's variance application. Thus, the lower court properly remitted the matter back to the zoning board of appeals for a new determination based upon the standards of Village Law §7-712(b)(3).

FOIL

Notwithstanding the inclusion of a confidentiality clause, a settlement agreement between a municipality and its police chief regarding his separation from service is subject to disclosure under the Freedom of Information Law ("FOIL"). The confidentiality clause, which generally precluded disclosure of the settlement agreement's terms absent a court order, contravenes the public policy of FOIL favoring public disclosure of information regarding the payment of public funds to a public official and is unenforceable. *Village of Brockport v. Calandra*, 191 Misc.2d 718 (Sup. Ct. Monroe Co. 2002).

Nor does Civil Rights Law §50-a except the agreement from disclosure under FOIL. Under that statute, "personnel records 'used to evaluate performance toward continued employment or promotion, under the control of any political subdivision thereof including authorities or agencies maintaining police forces,'" may not be disclosed without a court order. Here, the agreement "did not evaluate [the chief's] performance or contemplate his continued employment, rather it specifically provided for [the chief's] orderly separation from service." In any event, the court stated, to the extent that Civil Rights Law §50-a does apply, the Court granted an order authorizing the disclosure of the settlement agreement to those seeking it under FOIL in this litigation.

Political Affiliation

Plaintiff, a registered Republican active in party politics, was appointed as zoning administrator of the Village of Wappingers Falls in July of 1998 by a Republican controlled town board. Nine months later, on April 1999, a newly elected Democratic administration terminated his employment.

In an action to recover damages for alleged civil rights violations based upon wrongful termination due to political affiliation, the Appellate Division affirmed the denial of the Village's motion for summary judgment opining that the mere fact that plaintiff was a probationary employee does not justify dismissal of the complaint since even a probationary employee may not be fired for constitutionally impermissible reasons.

Fatal to the Village's position was its failure to show that the plaintiff's political affiliation did not play a substantial role in the Village's determination to terminate him. Further, since it was raised for the first time on appeal, the Court refused to consider the Village's argument that plaintiff was a policymaker vested with substantial discretion making political affiliation a relevant consideration for the position. *Miller v. Village of Wappingers Falls*, 289 A.D.2d 209 (2d Dept. 2001).

School Funding

(Continued from page 2)

to demonstrate that students in New York City's schools were being deprived of the opportunity to receive a sound basic education. Moreover, plaintiffs failed to demonstrate that any failure on the part of the City's students to receive a minimally adequate educational opportunity is the result of the funding mechanism utilized by the State. As a result, the decision of the trial court was reversed.

Justice Peter Tom filed a concurring opinion, agreeing with the majority holding that the State's education funding formula does not violate the New York Constitution.[34] Justice Tom noted that the administration of the NYC school system is a substantial contributing factor to its many failures and, consequently, any constitutional challenge to the State's school funding system must address the system in its entirety, rather than specific parts or particular programs.

Justice Tom recognized many of the troubling statistics about education failures and that crisis within New York has been growing over the past few years with a renewed sense of urgency. However, Justice Tom reasoned that the plaintiffs failed to demonstrate a causal link between the system of education funding utilized by the State and the many deficiencies of New York City's schools. Instead, such deficiencies appear to be the result of a slew of administrative, demographic and economic factors that cannot be resolved by simply increasing State funding. In fact, given the current administrative shortcomings characterizing the current system, there is a high likelihood that increased funding would merely be squandered and would not serve to improve the educational opportunities being afforded to New York City's school children.

Alluding to concerns over the separation of powers, Justice Tom also warned that the judicial branch must act with extreme caution when reviewing how education funding is to be distributed since it is inherently political and administrative in nature. Justice Tom asserted that it is not within the jurisdiction of the courts to determine the level of wisdom, efficiency or efficacy with which school funding is distributed.

Despite his reasoning, Justice Tom expressed concern over the failure of the system to attract and retain qualified teachers, an issue given great weight by Justice DeGrasse at trial. If the system continues to be unable to attract and retain qualified teachers, it is doubtful that students would receive a sound basic education as required by the state constitution. Justice Tom noted that factors such as teacher compensation, work environment, the predictability of advancement, job satisfaction, and job location likely play a substantial role in where qualified teachers elect to begin and spend their respective careers. To the extent that the level of educational opportunity offered to New York City school children is impaired by the inability of the system to attract and retain qualified teachers, a constitutional issue may, in the future, be presented. Thus, while Justice Tom joined the majority in part, he was unwilling to completely close the door on the

(Continued on page 4)

School Funding

(Continued from page 3)

plaintiffs' claims that state funding decisions may, at some level, trigger a constitutional violation.

Justice David Saxe issued a partial dissenting opinion[35] holding that the evidence supports the trial court's central conclusions that "at-risk" students are unable to receive a minimally adequate education and the numerous deficiencies of the city's education system are caused by inadequate state funding. Justice Saxe was particularly critical of the majority's ignoring of the evidence and stark negative circumstances concerning the learning of schoolchildren in NYC.

Justice Saxe rejected the State's position that certain socioeconomic conditions are the key factor in poor performance of "at-risk" students since the argument ignores the evidence that adequate resources are a key determinant to educational successes. Justice Saxe cited several intervention programs for "at-risk" students that were only successful when sufficiently funded.

He also disagreed with the majority's assertion that the standard to measure the level of student educational attainment is at a sixth to eighth-grade level since that standard would effectively eliminate the state's responsibility to provide high school level education. Justice Saxe further reasoned that the evidence of the chronic problems of lack of teaching instrumentalities, facilities, and adequate teachers support the conclusion that a large percentage of NYC students are not receiving a minimally adequate education.

Justice Saxe indicated that he would affirm the portion of the trial court's decision that directed the State to determine the actual cost of providing City public schools with the programs they need to serve their students. He, however, stopped short of holding that revamping the statewide funding system was a proper remedy.

CFE filed a Notice of Appeal as of right on constitutional grounds with the New York Court of Appeals on July 22, 2002. Under procedural rules of the Court of Appeals, oral arguments could occur as early as the winter of 2003. There is a somewhat greater likelihood of a decision favorable to the plaintiffs in the present appeal than the last of Court of Appeals school finance case, *Levittown v. Nyquist*,[36] since there is considerable trial court evidence describing several inadequacies of the state's poorer public schools. Also, the current Court members may be more ideologically receptive to arguments which place blame on elected officials for failing to correct perceived funding inequities in the state's public elementary and secondary education formulas. The probable key to a favorable decision to plaintiffs, however, is whether they can demonstrate a causal link between the State's current funding policies and the inadequacies and failures of poorer school districts.

Dr. Nickerson is the Director of the Michaelian Institute for Public Policy and Management of the Dyson College of Arts and Sciences of Pace University. Mr. Deenihan is a third year law student at Fordham University Law School

1. *Campaign for Fiscal Equity v. New York*, 744 N.Y.S.2d 130(A.D. 1st Dept. 2002).
2. *Campaign for Fiscal Equity v. New York* 719 N.Y.S. 2d 475 (Sup. Ct. N.Y. Co. 2001).
3. Appellant's Br. 1 (August 13, 2001).
4. *Id.*
5. *Id.*
6. *Id.* at 2.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 3.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Appellee's Br. 1 (September 28, 2001).
16. *Id.*
17. *Id.* at 2.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 2-3.
23. *Id.* at 4.
24. *Id.*
25. *Id.*
26. *Id.* at 4-5.
27. *Id.* at 5.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Campaign for Fiscal Equity v. New York*, 744 N.Y.S.2d 130, 134 (A.D. 1st Dept. 2002).
32. *Id.* at 143.
33. *Id.* at 143.
34. *Campaign for Fiscal Equity v. New York*, 744 N.Y.S.2d 130, 148-149 (N.Y.A.D. 1st Dept. 2002) (Tom, J.P., concurring).
35. *Id.* at 152-159.
36. *Board of Education, Levittown Union Free School District, et. al. v. Nyquist*, 57 N.Y. 2d 27 (1982).

Golden v. Ramapo

(Continued from page 2)

the American Bar Association and a popular and perennial commentator on developments in land use law at ABA forums and other professional gatherings nationally. Dr. Freilich has recently written "From Sprawl To Smart Growth: Successful Legal, Planning and Environmental Systems." (ABA, Dec. 2000).

The cost of the conference for those who register prior to November 1st is $75 for private registrations and $45 for those working for the public or nonprofit sector. The private rate applies to professionals with their own practices, but who represent the public sector. Late registration fees postmarked after 11/1/02 are $95 and $60, respectively. There are space limitations, so early registration is recommended and registration at the door is not guaranteed. There is a further $10 surcharge for registration on the day of the conference.

Hotel rooms have been reserved at the Crown Plaza Hotel in White Plains [(914) 682-0050] and the Rye Town Hilton [(914) 939-6300]. Conference rates are $115/night at the Crown Plaza and $89/night at the Rye Town Hilton. Reservations must be made by October 8th to secure conference rates.

A dinner with the speakers and distinguished guests will be held on Friday, November 8th at 7:00 p.m. in the Tudor Room at Pace University School of Law. The cost is $50.00 per person. Anyone who registers for the conference is invited to register for the dinner, subject to the availability of seats.

Attorneys may register for 5.5 CLE credits at a cost of $35.00. You must register in advance by adding the cost of CLE to the conference fee.

Individuals may request a reduction of either the conference fee or the CLE fee by submitting a request in writing with a supporting reason by email to amccoy@law.pace.edu.

For further information about the conference call the Land Use Law Center at (914) 422-4262 or email amccoy@law.pace.edu.

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