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BY JEFFREY D. FRIEDLANDER

### Lawyering for Education Reform

**P**REVIOUS MAYORAL administrations, despite often profound differences in programs, policies and priorities, have been united in seeking to subject our school system to greater control and accountability. And for the last decade, the constitutionality of the state's resource allocation to New York City public schools has been the subject of litigation. Recent legislation has finally given Mayor Michael R. Bloomberg control over, and accountability for, the operation of our schools and has opened the way for an era of educational innovation.

On top of this, the recent decision of the New York Court of Appeals in *Campaign for Fiscal Equity v. State of New York (CFE)* holds out the promise of improved educational opportunities for this city's children.

This article will explore these developments, and the role the New York City Law Department has played in addressing systemic problems and reshaping the governing structure of the institutions that educate the city's 1.1 million public school students.

In *CFE*, decided June 26, 2003 (2003 N.Y. LEXIS 1678), the Court of Appeals found that the state has failed in its constitutional mandate to provide a "sound public education" — "convey[ing] not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society" — to New York City's public school children. It catalogued the system's shortcomings, noting that "tens of thousands of students are placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment. The number of children in these straits is large enough to represent a systemic failure." Finding that "the political process allocates to City schools a share of State aid that does not bear a perceptible relation to the needs of City students," the Court directed that the Legislature determine the funding level necessary to provide a "sound basic education" to the students of New York City, reform the current system of funding to ensure that "every school in New York City would have the resources necessary for providing the opportunity for a sound basic education" and "ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education." The Court concluded that "it is for the State — through a combination of enforcing existing laws ... and new legislation — to consider corrective measures" and set a deadline of July 30, 2004, for the defendants to "implement the necessary measures."

This landmark decision not only is the highlight of more than a decade of reform efforts but also launches a new phase of reform for public education in New York City. Plaintiffs in *CFE* were represented by Michael A. Rebell Associates and by Simpson Thatcher and Bartlett, acting on a pro bono basis. The mayor, the city, the chan-



cellor and the Board of Education (now called the Department of Education) were plaintiffs in a companion suit to *CFE*, initiated in 1993 by our Affirmative Litigation Division. The court dismissed that case on the ground that our suit did not come within any of the exceptions to the general rule that a municipality lacks capacity to sue the state. *City of New York v. State of New York*, 86 NY2d 286 (1995). This year, our Appeals Division filed an amicus curiae brief supporting the *CFE* plaintiffs before the Court of Appeals.

#### Legislative Efforts

The Court of Appeals' *CFE* decision recognized that "significant legislation reorganizing City school governance has been passed since the trial." Over the years, our Legal Counsel Division, working closely with the Mayor's Office, has drafted bills and participated in negotiations with the state Legislature and the governor's office toward legislation that has gradually but steadily transformed school governance in New York City. In 1996, the Legislature enacted school reform bills (Chapters 45, 46 and 720 of the Laws of 1996), which represented the city school system's first major overhaul since 1969. Among other things, the new laws addressed the mismanagement that had plagued a number of the city's community school boards by limiting their hiring authority and by authorizing the chancellor to suspend and remove community school boards and their members; strengthened the chancellor's powers to intervene in districts and schools that fail to meet educational standards; and limited the city board's executive and administrative powers. The Legal Counsel Division obtained preclearance for the new laws under §5 of the Voting Rights Act, and our General Litigation and Appeals divisions successfully defended the chancellor's exercise of the suspension and removal powers. *Community School Board Seven v. Crew*, 224 AD2d 8 (1st Dept. 1996). Following the 1996 reforms, negotiations between the Mayor's Office of Labor Relations, the Board of Education and the principals' union resulted in state legislation enacted in 2000 and a collective bargaining agreement.

Legislation enacted in 1998 (Chapter 149 of the Laws of 1998) attempted to address the extremely low rate of voter participation in community school board elections by replacing the little-understood proportional voting system with a new system where each voter would have cast a ballot for four candidates. The changes could not be implemented, however, because the Justice Department denied preclearance for the new election procedure, finding that it would have a retrogressive effect on minority voters. With the old election system remaining in effect, voter participation rates have continued their decline. In the most recent community school board elections, held in 1999, there was a mere average three percent voter participation rate, down from 5.3 percent participation in the 1996 elections. Clearly, the community school boards were not truly representative bodies, and the proportional voting scheme intended to benefit minority voters was not attracting their strong support. Voter apathy and the continuing

**Jeffrey D. Friedlander** is first assistant corporation counsel of the city of New York. **Martha Mann Alfaro** assisted in the preparation of this article. Ms. Alfaro is deputy chief of the Law Department's Legal Counsel Division and a principal adviser to City Hall on legal matters relating to education.

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poor functioning of many of the local boards still needed to be addressed.

### Control, Accountability

In both his inaugural address and his first State of the City Message, Mayor Bloomberg emphasized education reform. Working closely with the mayor and Deputy Mayor Dennis Walcott, the Law Department helped draft legislation to realize the goal of the mayor and his predecessors to win accountability for public education. Chapter 91 of the Laws of 2002 is a landmark law that empowers the mayor to appoint the chancellor and a majority of the Board of Education (now known as the "Panel for Educational Policy"), all of whom serve at the mayor's pleasure. It also empowers the chancellor to appoint community superintendents directly, so he is no longer constrained to appoint the nominees forwarded by community school boards. And it provides mayoral control over the School Construction Authority, whose three members, including the chancellor, are all appointed by the mayor.

In the first year since enactment of Chapter 91, the mayor and the chancellor have announced a new citywide curriculum; reforms in the school construction process and the provision of maintenance services by the Division of School Facilities; plans for improvements in special and bilingual education programs; and stronger discipline and security measures.

The mayor's and chancellor's efforts to transform the bureaucracy of what is now known as the New York City Department of Education — by establishing a more streamlined reporting structure with 10 regional superintendents — were challenged in litigation brought by Senator Carl Kruger, D-Kings, Assembly Member Steven Sanders, D-Manhattan, and others. Corporation Counsel Michael A. Cardozo and Chancellor Joel I. Klein led the negotiations to win a favorable settlement that provides for the chancellor to appoint 32 district superintendents, who will report to the regional superintendents. The reorganization and settlement have resulted in reduction of the average staff size in community school districts from 100 to three, and are expected to allow \$125 million a year in administrative costs to be recovered and redirected to other purposes.

### First Amendment Litigation

The Law Department has represented the city's school system in numerous other landmark education

cases, including a number of cases involving major developments in Establishment Clause jurisprudence. In *Agostini v. Felton*, 521 US 203 (1997), argued before the Supreme Court by the corporation counsel, the Law Department won a dramatic overruling of *Aguilar v. Felton*. That 1985 decision had allowed cities to provide publicly funded remedial services to needy children attending parochial schools, but only if services were not delivered on the grounds or in the buildings of such schools. Our victory freed up monies that had been spent on expenses such as leasing buses to be used more productively on direct services.

Other significant Establishment Clause cases involving our school system are working their way through the courts. We are waiting for a decision from the U.S. District Court for the Northern District of New York in *Sumner v. McCall*, a §1983 action where taxpayers have brought an Establishment Clause challenge to four state statutes that require the state to fund and local school districts to loan to all students attending public and private schools — including religiously affiliated schools — a variety of instructional materials including computer software and library books. In *The Bronx Household of Faith v. Board of Education*, 331 F3d 342 (2d Cir. 2003) (pet. for rehearing pending), the Law Department is defending a regulation barring the use of school property for religious worship. The U.S. Court of Appeals for the Second Circuit, in a 2-1 ruling, recently held that the city must lease space in its schools for weekly worship services, reasoning that such services are indistinguishable from the after-school Bible club activities that the U.S. Supreme Court, in *Good News Club v. Milford Central School*, ruled must also be permitted to be held in schools.

### Other Education Litigation

In *Association of Community Organizations For Reform Now v. New York City Department of Education*, 2003 U.S. Dist. LEXIS 10929 (SDNY 2003), Judge John G. Koeltl granted the Law Department's motion to dismiss on the ground that there is no private right of action to enforce the provisions of the No Child Left Behind Act. The court found that "Congress was concerned with improving the educational conditions of children as a whole" and not with creating private rights for individual students.

The chancellor and Department of Education frequently find themselves defendants in class actions involving various aspects of our education system. Often, our representation involves

working with our clients and negotiating with plaintiffs toward the development of corrective action plans. Such opportunities are presented, for example, in *Ma v. Board of Education*, where Advocates for Children claim before the state Commissioner of Education that the department fails to provide parents with limited English proficiency with translations of written materials and interpreters for school meetings; and in *Alianza Dominicana, Inc. v. NYS Education Dept.*, where plaintiffs seek to enjoin the city and state defendants from withholding diplomas from otherwise qualified English Language Learners (ELLs) who are candidates for high school graduation.

### New Challenges

What lies ahead in our representation of the chancellor and the Department of Education is every bit as challenging as what has been accomplished.

Chapter 91 of the Laws of 2002 provided for the elimination of the community school boards and established a state task force to develop recommendations for new bodies to take their place. Over the past year, the Law Department has worked with the mayor and the chancellor to prepare recommendations to replace the community school boards with parent councils that would advise the community superintendents. Last month, the Legislature enacted Chapter 123 of the Laws of 2003, which authorizes the establishment of Community District Education Councils consisting of nine parent members, two borough president appointees and one nonvoting high school student representative. The new law also provides for a citywide council on special education consisting of nine parent members, two appointees of the public advocate and one nonvoting high school student representative. In the coming months, we will be assisting the mayor and the chancellor in formulating a plan for selecting members of the new parent councils and seeking preclearance from the Justice Department for that plan and the elimination of elected community school boards.

As the courts move into the remedy stage of *CFE* and as the state Legislature addresses the Court of Appeals' mandate, we will advise the mayor and the chancellor as to how an outcome that is fair and beneficial to both the school children and the taxpayers of the city can best be effected. Meanwhile, no doubt, the chancellor and the Department of Education will continue to be parties to some of the most interesting litigation in our docket.