SCHOOL FUNDING AND JUDICIAL MISCONDUCT DECISIONS

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Judge Richard C. Wesley was sworn into the Second Circuit Court of Appeals on June 18, 2003, after serving as Associate Justice of the New York Court of Appeals for over six years. His departure came before the end of the Court's term and at a time when decisions in several major cases had yet to be handed down. Judge Wesley's presence on the Court of Appeals surely will be missed.

This month we discuss *Campaign for Fiscal Equity, Inc. v. State of New York*, the New York City school-funding case. The Court of Appeals there defined the "sound basic education" and held that New York City school children have not been given the opportunity to obtain such an education.

We also discuss a pair of closely watched cases, *Matter of Raab* and *Matter of Watson*, in which the Court imposed sanctions upon two judges who had engaged in political activity in violation of certain provisions of the Code of Judicial Conduct, many of which provisions had been held unconstitutional by a federal district court last February.

School Funding

The *Campaign for Fiscal Equity, Inc.* suit against the State yielded 99 pages of opinions. The majority opinion by Chief Judge Judith S. Kaye was joined by all participating judges (Judge Victoria A. Graffeo took no part), with the exception of Judge Susan Phillips Read who wrote a strongly worded dissent. In addition, Judge George Bundy Smith authored a concurring opinion.

This was the second time that the case had reached the Court of Appeals. In 1995, the Court reversed the dismissal of the complaint, finding that it stated a claim under the Education Article of the New York Constitution, which requires the State to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." The case returned to the Court after a lengthy bench trial in which the Supreme Court, New York County (Justice Leland DeGrasse) found New York City school children were not receiving the opportunity for a "sound basic education" to which they are constitutionally

entitled. That decision had been reversed by the Appellate Division, First Department, but the Appellate Division was in turn reversed, 4-1.[i]

The first task before the Court was to define "sound basic education." One of the charges for the trial court had been to flesh-out the outline that the Court of Appeals had provided in *CFE I* for defining that term. The trial had accomplished that task by adducing evidence of the needs for functioning in our modern society. While the Appellate Division would have set an education between the 8th and 9th grades as adequate, the Court of Appeals declared that "a high school level education is now all but indispensable," a proposition with which even the dissent agreed. The Court thus held that children are entitled to the "opportunity for a meaningful high school education, one which prepares them to function productively as civic participants."

The Court next approved the manner in which the trial court had evaluated whether a sound basic education was being made available, by reviewing educational "inputs" and "outputs." The Court agreed with the Supreme Court that plaintiffs had demonstrated the education provided New York City students failed in both respects. With respect to inputs, the number of children in the City's schools experiencing overcrowded classes, unqualified teachers and inadequate facilities and equipment "is large enough to represent a systemic failure," the Court held. And while the State urged the Court to consider not inputs, but only educational outputs or results[ii], the Court determined that the outputs demonstrated that City students do not receive a sound basic education.

The parties looked to test results as the measure of outputs. The Appellate Division had compared City students' test scores with those of students throughout the country. The Court of Appeals, however, regarded such comparison as irrelevant because there was no record evidence that children in other states receive the sound basic education guaranteed by New York's Constitution. The test results reflecting student achievement indicated that City school children are not given a meaningful high school education.

A significant hurdle for plaintiffs had been proving causation, i.e., that the lack of State funding was a cause of an inadequate education being provided. The Court agreed that plaintiff had made a prima facie case that more funds would permit the hiring of better teachers, allow smaller classes and support the purchase of better equipment. Because these factors are associated with a better education, a causal link between funding and adequacy had been established. Further, plaintiffs were required to prove only that lack of funding was a cause, not the sole cause, of City students' failure to receive the constitutionally mandated education.

One of the State's major arguments on this issue of causation had been that the problem was not a lack of funding, but what the City and Board of Education did with funds once received. This argument was rejected on the ground that the City and the Board are creatures of the State and thus its agents. The State delegated some of its authority over City schooling, but

could not delegate its responsibility for ensuring an opportunity for sound basic education was available.

The Court then came to what the majority described as the most challenging issue by far: remedy. It disclaimed the "authority . . . ability, . . . [or] will, to micromanage education financing," and thus settled for "fixing a few signposts in the road yet to be traveled." The State was given one year, until July 30, 2004, to accomplish two things. First, it must determine the "actual cost" of providing a sound basic education in New York City. Second, the State must implement the measures necessary to provide such an education in the City (the Court declined to extend this obligation to the entire State).

As set forth in his concerning opinion, Judge Smith would have (1) imposed an arguably higher standard for a sound basic education, equal to the Regents Learning Standards, (2) made the remedy ordered State-wide in scope rather than limited to New York City, and (3) imposed a more precise remedy, namely a reformulation of the State's present formula for allocating its funds.

Dissenting Judge Read disagreed with the sound basic education standard crafted by the majority, and argued that plaintiffs had not established a causal connection between the level of State funding and the deficiencies in the City's schools. The dissent took great issue with the remedy ordered, proposing instead that the Court should have done nothing more than "specify the constitutional deficiencies" found, and leave it to the Legislature and Executive to implement a remedy. Judge Read feared that the majority decision "casts the courts in the role of judicial overseer of the Legislature," and will leave a "dispute . . . destined to last for decades."

Political Activity by Judges

The Code of Judicial Conduct ("Code") contains provisions that describe what political activity judicial candidates and judges may engage in, and what activity they may not. The constitutionality of some of those provisions was at issue in two cases decided by the Court *per curium* on June 10, 2003. In both *Matter of Raab* and *Matter of Watson*, the Court held that the challenged provisions did not violate the First Amendment and agreed with the State Commission on Judicial Conduct ("Commission") that sanctions should be imposed.

Nassau County Supreme Court Justice Ira J. Raab was charged with engaging in misconduct both during his campaign and after being seated.[iii] While running in a primary, Justice Raab (along with his primary rivals) agreed to give the county Democratic Committee $10,000 to cover shared campaign expenses, and later did pay this sum without seeking any accounting from the Committee to verify that the amount represented expenses incurred on his behalf. Petitioner conceded that this conduct violated the prohibition of contributions to a political organization other than his own campaign for office which, the Court's opinion explained, is intended to prevent the selling - and public perception of selling - of judicial

nominations. Petitioner also conceded that while in office he did volunteer work on behalf of the Working Family Party, in violation of the Code.

Lockport City Court Judge William Watson was charged with misconduct for a series of statements he made during his campaign. He was held to have violated the prohibition against making "pledges or promises of conduct in office other than the faithful and impartial performance" of his duties by, for example, stating that if elected he would "work with the police, not against them."

The Court of Appeals faced the question of whether the rules at issue in these cases violated the First Amendment. In answering that question, it addressed the U.S. Supreme Court's fairly recent decision in *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), in which invalidated a Minnesota Supreme Court rule that barred judicial candidates (but not judges) from "announcing" their views on disputed legal or political issues. As did the *White* opinion, the Court of Appeals' unanimous opinions applied the strict scrutiny level of review to the rules at issue, without deciding if such level was required. Under such test, the proponent of the restraint must establish that the challenged provisions were narrowly tailored to serve a compelling state interest. Unlike the Supreme Court's conclusion in *White,* however, the Court of Appeals concluded that the Code provisions were sufficiently narrow in meeting New York's compelling interests.

The Court of Appeals identified various interests at stake that needed to be balanced. One is the "right of judicial candidates to communicate to voters," which is linked to voters' "right to make informed choices about how to cast their votes." The Court agreed with the Commission and Attorney General as *amicus* that the State has an interest in the judiciary both being and appearing to be impartial and open-minded (the same state interests asserted in *White*). The Court of Appeals also articulated the need to "maintain[] public confidence in New York State's Court system": "litigants have a right guaranteed under the Due Process clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has the obligation to create such a forum and prevent corruption and the appearance of corruption, including political bias or favoritism."

The Court determined that the speech of judicial candidates is different from that of non-judicial candidates and may be circumscribed, particularly with respect to the "ancillary" activity of supporting other candidates other than themselves or political parties. The restraints imposed by the various political activity rules at issue in *Raab*, therefore, were upheld as appropriately tailored to the state's interest.

The Court distinguished *Watson* from *White* because the rule against "pledges or promises" is much narrower than the rule against "announcing" positions. It also distinguished *Watson* from another case in which the Court of Appeals had found no Code violation where a judicial office-seeker asserted that she was a "law and order candidate." *See Matter of Shanley*, 98 N.Y.2d 310 (2002). Statements that "merely express a view point" are different from those

that "unequivocally articulate[] a pledge or promise of future conduct or decisionmaking that compromises the faithful and impartial performance of judicial duties."

It should be noted that both jurists had challenged the sanctions imposed upon them by the Commission. The Court upheld the censure of Justice Raab, but noted that the misconduct "merits our strong disapproval and closely approaches grounds for removal." And although in the case of Judge Watson it reduced the removal sanction to censure, the Court warned, "[d]espite the fact that no judge has been removed for campaign misconduct in the past, our decision in this case should not be interpreted to suggest that violation of the campaign rules can never rise to a level warranting removal."

We would be remiss if we discussed *Raab* and *Watson* without noting that many of the political activity provisions that the two petitioners violated had earlier this year been found unconstitutional by a United States District Court in *Spargo v. New York State Comm'n on Jud. Conduct,* 244 F.Supp.2d 72 (N.D.N.Y 2003). The federal court held that many of New York's judicial rules constituting prior restraint upon judicial candidates' and judges' speech were overly broad in violation of the First Amendment, and that other provisions were void for vagueness.[iv] The Northern District's decision is currently on appeal to the Second Circuit.

Between the time that *Spargo* was decided and the opinions we discuss here were handed down, the Court of Appeals ruled in May in another case involving judicial misconduct, *Matter of Mason*, that it was not bound by the *Spargo* Court's findings of unconstitutionality. *Mason* itself did not present constitutional issues, however, and thus *Raab* and *Watson* constitute the first post-*Spargo* instances in which the Court of Appeals had the opportunity to address First Amendment challenges to the political activity provisions of the Code of Judicial Conduct.[v] In doing so, the Court never referenced the *Spargo* opinion.

Post Script

In response to the Court's strong plea in its recent decision in *Desiderio v. Ochs* for legislative change to CPLR Article 50-A dealing with structured judgments in medical, dental or podiatric actions, to avoid repetition of the bizarre result produced there (turning a judgment of $50 million before structuring into a potential payout of $140 million), the Legislature at the very end of its session passed and sent to the Governor for signature what is seen as a reasonable compromise solution. Its enactment into law seems likely. The Court's affirmance in *Desiderio*, dictated by its adherence to the terms of the CPLR, was claimed by those seeking legislative change to threaten the continued availability of malpractice insurance at premium costs hospitals could bear.

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[i] The First Department was affirmed in its finding that plaintiffs did not have a private cause of action arising under Title VI of the 1964 Civil Rights Act.

[ii] Interestingly, the Court's consideration of "inputs" worked in the State's favor in another education case decided the same day as *CFE II, Paynter v. State of New York*. There, students in

the Rochester School District alleged that they were not receiving the education to which they are constitutionally entitled. They did not challenge the State's funding of the District, however, instead asserting that various state practices and policies result in a District with a high concentration of minorities and poverty. Because the complaint did not allege that "substandard academic performance in their schools stems from any lack of funds or inadequacy in the teaching, facilities or instrumentalities of learning" for the District, it was dismissed for failure to state a claim.

[iv] Judge Watson had attempted to raise a vagueness challenge in the first instance before the Court of Appeals, but it was not considered due to failure to present the issue to the Commission. Justice Raab apparently did not challenge the Code provisions he was charged with violating as void for vagueness.

[v] The Commission found Judge Watson to have violated several rules, including some that were found unconstitutional in *Spargo*. The Court of Appeals reached only one rule, however, which had not been at issue in the federal action, finding it unnecessary to reach the other issues because the sanction would have been the same.