STATE OF NEW YORK
COURT OF APPEALS

CAMPAIGN FOR FISCAL EQUITY, INC., et al.,

Plaintiffs-Appellants,

- against -

THE STATE OF NEW YORK, et al.,

Defendants-Respondents.

Index No. 11107/93

BRIEF FOR AMICUS CURIAE NEW YORK STATE ASSOCIATION OF SMALL CITY SCHOOL DISTRICTS, INC.

DeGraff, Foy, Holt-Harris & Kunz, LLP
Attorneys for New York State Association of Small City School Districts, Inc.
90 State Street
Albany, New York 12207
(518) 462-5300

Of Counsel:
Robert E. Biggerstaff, Esq.
Amy Quandt, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

Federal Statutes

Federal Regulations

Treatises & Other Authorities

PRELIMINARY STATEMENT

This brief is submitted for the Court's consi

State Association of Small City School Districts, Inc. (“Small City School Districts”) in

Division, First Department. Said dec

Court (DeGrasse, J.) dated January 31, 2001, and dismissed this case in its entirety.[1]

INTRODUCTION

The instant litigation represents a challenge to the constitutionality of New York State's system of public education funding. The plaintiffs in this case alleged, with specific reference to those public schools found within New York City, that this State's public school system fails to provide New York students with a "sound basic education.”

There are only sixty-two (62) cities in New York, including the fifty-seven (57) small cities, representing less than ten percent (10%) of the almost 700 public school districts in the state, yet the city schools educate slightly over half of the state's students. The poverty rate in city schools is seventy-five percent (75%) compared to twenty-four percent (24%) outside of city schools. Seventy-six percent of the poor children in the State are educated in city schools, yet city school districts account for only forty-five percent (45%) of public education spending. In 1999-2000, the average per-pupil spending of city schools was $8,969 compared to $11,144 outside of cities. While the combination of high poverty and low spending is not unique to cities, nor is it present in all cities, it is a predominantly urban phenomenon.

---

[1] This brief was prepared with the assistance, for which we are grateful, of Charles A. Winters, AB, MA Syracuse University; Doctoral Candidate, Steinhardt School of Education at New York University; Associate Superintendent for Finance, Newburgh City School District, 1984-2000.

On all measures of school outcomes--test scores, attendance, graduation--students in poverty present a stark contrast to their more advantaged peers. These outcomes demonstrate a very high probability that students from poverty in New York will not attain the skills and credentials necessary to gain access to a mainstream political and economic life in this State. While resources alone may not guarantee that this problem will be solved, the lack of resources allocated to address the problem clearly contributes to its depth and persistence.

The very concentration of poverty in a few, large school districts creates a formidable political obstacle to any meaningful attempt to address these problems. Throughout the nation and in neighboring states, state legislatures have been consistently unable to muster the political will to target additional funding to high poverty districts. Thus, in state after state, the intervention of the courts has been necessary to secure the rights of children in the face of political gridlock. After court intervention, solutions were found that were not politically viable prior to intervention.

New York State presents a classic example of legislative incapacity. For over thirty years, this problem has been the subject of commissions, studies, legislation and litigation. Twenty-five years of data maintained by the State Education Department show that, while school spending rose by over 400% between 1973 and 1998, the relationship of spending in low wealth communities to high wealth communities has remained the same. In 1973, the district at the 75th percentile spent thirty-nine percent (39%) more than the district at the 25th percentile. By 1998, it spent 42% more. The steady application of any rational policy in the allocation of a 400% increase in funding over twenty-five years would have corrected these inequities long ago. The geography of power and wealth in this state simply precludes any fundamental change in the present allocation of school funding absent a court intervention.

Such an intervention does not require the courts to run the schools, or even to specify particular remedies. Nor does it require the state to abandon local control of school finances. As demonstrated by several other states confronted with nearly identical problems, the issue would most effectively be addressed with a clear mandate and a firm timetable. While the legislature may pile complexity on top of complexity in attempting to cope with the many diverse needs of the state, overall progress in this area is easily determined by the results. Schools with high concentrations of poverty should increase in resources at an appreciably faster rate than schools with low concentrations of poverty. Steady progress over time should result in a system that provides more resources, not less, to high poverty schools. Such progress has not occurred in the last twenty-five years, nor will it occur in the next twenty-five years without a clear standard of adequacy developed by the courts.

The legislative gridlock in New York is not getting better, it is getting worse. In the face of a clear showing of the system's deficiencies through extensive public testimony and a reasoned judicial opinion, New York State's political processes have been unwilling to frame any education budget at all. The poorest school districts, which are the most dependent upon state support, have received only meager school aid increases for 2001-2002 and small city school districts, which are largely dependent on Special Aid to Small City School Districts (Hurd Aid) have been cut by sixteen percent 16% or more than $12 million in that aid category alone.[2] Absent a reasonable increase, all inflationary costs consume existing resources. Simultaneously, wealthy schools have access to large and expanding property tax bases to maintain spending without a school aid increase. Thus, the problem worsens. Political geography and partisan

[2] For a description of "Hurd Aid" and the implications of its gradual phase-out, see the discussion *infra* regarding "Interest of *Amicus Curiae*."

power virtually guarantee the reelection of incumbents and the stability of leadership in the legislature. Thus, there is little hope of political solution to these problems. Never was there a clearer case for the duty of the courts to reaffirm the constitutional guarantees that the citizens of this State have given to their children.

INTEREST OF *AMICUS CURIAE*

This Brief is submitted on behalf of the New York State Association of Small City School Districts, Inc., an organization comprised of various city school districts, which seeks amicus status before this Court in connection with the instant appeal.

The New York State Association of Small City School Districts, Inc. (hereinafter "SCSD") is a not-for-profit corporation organized under the laws of New York State. The fifty-seven (57) small city districts are defined and governed by New York Education Law Articles 51 and 53. The districts are located in all the cities of the state from Long Island to Niagara Falls, excluding the largest five cities: New York, Yonkers, Syracuse, Rochester and Buffalo. The districts consist of Albany, Amsterdam, Auburn, Batavia, Beacon, Binghamton, Canandaigua, Cohoes, Corning, Cortland, Dunkirk, Elmira, Fulton, Geneva, Glen Cove, Glens Falls, Gloversville, Hornell, Hudson, Ithaca, Jamestown, Johnstown, Kingston, Lackawanna, Little Falls, Lockport, Long Beach, Mechanicville, Middletown, Mount Vernon, New Rochelle, Newburgh, Niagara Falls, North Tonawanda, Norwich, Ogdensburg, Olean, Oneida, Oneonta, Oswego, Peekskill, Plattsburgh, Port Jervis, Poughkeepsie, Rensselaer, Rome, Rye, Salamanca, Saratoga Springs, Schenectady, Sherrill, Tonawanda, Troy, Utica, Watertown, Watervliet, and White Plains.

The SCSD districts serve approximately 260,000 children and employ more than 20,000 teachers, administrators and other non-teaching staff. *See A Report to the Governor and the Legislature on the Educational Status of the State's Schools*: Submitted July 2000 [Statistical Profiles of Public School Districts] (hereinafter "Statistical Profiles") at 16 et seq. The districts are either co-terminus or inclusive of the small cities of the State which themselves are defined as those cities with populations of less than 125,000. *See* N.Y. Educ. L. § 2601. They are, unlike the five large city districts, fiscally independent of the city in which they are located (Chapter 762 of the Laws of 1950), and they set the amount to be levied for school taxes for support of their annual school budgets by district wide vote, on the third Tuesday of May of each year. *See* N.Y. Educ. L. § 2601-a. Their school boards are elected on a staggered basis for three- or five-year terms in annual elections in May of each year.[3] *See* N.Y. Educ. L. § 2602.

School districts within SCSD are urban districts which have much in common with the five large city districts. They are generally the largest or among the largest districts in their respective regions and on average are nearly two and one-half times the size of the average non-city district in student population *See* Statistical Profiles at tables 1-15. They have higher percentages of poor and minority students than their suburban counterparts. They also have higher percentages of children with special educational needs and children on the free and reduced price lunch program, and they have higher percentages of dropouts and children at risk *See* Statistical Profiles at tables 1-15.

SCSD includes a total of fifty-seven (57) school districts, sixty-one percent (61%) of which are characterized by the State Education Department as districts have the highest need, as shown by high poverty, and a low combined wealth ratio. *See A Report to the Governor and the*

[3] The Albany City School District is an exception to this general procedure.

Legislature on the Educational Status of the State's Schools: Submitted July 2000 [Statewide Profile of the Educational System] (hereinafter "Statewide Profile") at table 3 and Statistical Profile at table 1. For example, the Albany City School District, which serves 10,380 students, possesses a nearly seventy percent (70%) minority student population, with eighty-one percent (81%) of its students on the free and reduced-price lunch program, and a drop-out rate of 3.4% *See* Statistical Profile at table 1.[4] In contrast, the surrounding suburban districts have less than a six percent (6%) minority population, approximately seventeen percent (17%) of their students are on the free and reduced price lunch program, and they have a drop-out rate of 1.1%, or less than one-third of Albany's. Niagara Falls City School District, in turn, serves 9,053 students, it has a 38.8% minority student population, 65.5% of its students are on the free and reduced price lunch program, and its poverty index is 28. *See id.* at table 1. In comparison, its surrounding suburban districts have approximately 3.6% minority students, twenty-four percent (24%) of their students are on free and reduced-price lunch programs, and they have a poverty index of approximately one-third that of Niagara Falls. *See id.* at table 1. This data is only a small indication of the much more difficult challenges facing the small city school districts in educating the urban student than are encountered by their surrounding suburban neighbors.

Like non-city school districts, the financial base of small city districts is provided primarily by a combination of local revenues from real property and non-property schools taxes, state aid and federal aid. In addition to the revenue sources available to non-city districts, small city school districts have two other dubious sources of funding. First, while the districts may levy up to three percent (3%) on utility services, only nineteen (19) of the fifty-seven (57)

[4] Comparatively, in 1994–1995, the percentage of minority students was sixty percent (60%), and, during the same period, the percentage of students on the free and reduced-price lunch program was seventy-two percent (72%).

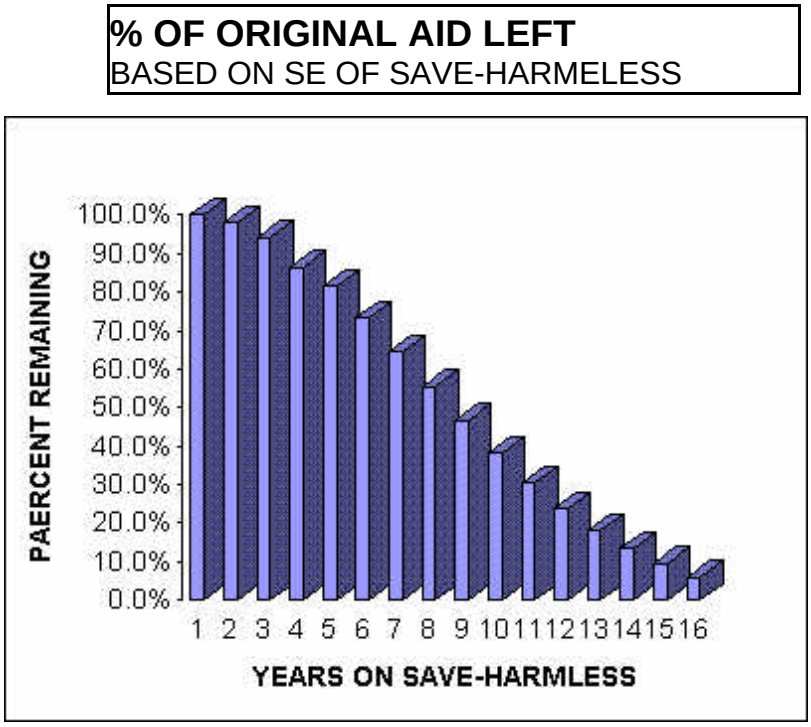
districts have utility taxes in effect *See* Tax L. § 1212. Second, special aid is available to small city districts ("Hurd Aid"), which currently provides eighty-two million dollars ($82,000,000) per year, or approximately six percent (6%) of the total of all computerized state aid to small city districts. *See* N.Y. Educ. L. § 3602(31-a). However, Hurd Aid is subject to a cumulative two percent (2%) per year reduction phase-out schedule, which took effect in 1988 and would have eliminated seventy percent (70%) of the aid for most districts on the phase-out schedule within ten (10) years had not the legislation begun to freeze this aid on a year to year basis in 1994-1995. This is the only "save harmless" category of aid that the State has allowed to diminish. In comparison, “save harmless" aids for high wealth districts have been maintained even during recent recessionary periods. The following two charts quantify the loss in Hurd Aid over a fifteen-year period that small city school districts would experience without the freeze:

AMOUNT SAVE-HARMLESS

YEAR	PAID	BASIS	PERCENT REMAINING
ORIG.	$10,000,000	100.0%	100.0%
1	$ 9,800,000	98.0%	98.0%
2	$ 9,406,000	96.0%	94.1%
3	$ 8,843,520	94.0%	86.4%
4	$ 8,136,038	92.0%	81.4%
5	$ 7,322,435	90.0%	73.2%
6	$ 6,443,842	88.0%	64.4%
7	$ 5,541,618	86.0%	55.4%
8	$ 4,654,960	84.0%	46.5%
9	$ 3,817,067	82.0%	38.2%
10	$ 3,053,653	80.0%	30.5%
11	$ 2,381,850	78.0%	23.8%
12	$ 1,810,206	76.0%	18.1%
13	$ 1,339,552	74.0%	13.4%
14	$ 964,478	72.0%	9.6%
15	$ 875,134	70.0%	5.8%

SMALL CITY AID IS 70% GONE BY 10th YEAR

SMALL CITY AID IS 90% GONE BY 14th YEAR



From 1988 to 1994, Hurd Aid to small city school districts decreased from approximately $106 million to eighty-two million dollars ($82,000,000). In addition to the steady losses in Hurd Aid, small city districts have had to cope with other adverse financial changes. From the time Hurd Aid began to decline to present, the average per-pupil expenditure in small city districts rose from $6,507 in 1987–1988, to $9,958 in 1997-1998. S*ee* Statistical Profile at table 2. Simultaneously, the state share of support for education in the small cities declined steadily, and the small cities' combined wealth ratio and, consequently, the ability to tax, declined markedly from 0.976 to 0.824. *See id.* In contrast, average combined wealth ratios for the State and suburbs increased during this period. This comparison demonstrates the enormous stress

that small city districts' finances have been placed under in recent years from inadequate and inequitably distributed state support of their programs. *See id.* The cumulative loss of approximately $280 million in Hurd Aid since 1988, the decline in wealth and the increase in costs have shifted an enormous fiscal burden to the local tax base of the small city districts through significant increases in local tax levies. In future years, if the freeze is not continued, the rate of the Hurd Aid phase-out will accelerate, adding even greater burdens to already strapped local taxpayers, and will erode any future increases in state aid to education. Total phase out of Hurd Aid, which currently amounts to $82 million, would have a severe destabilizing impact on the budgets, tax rates and programs of most small city districts. Moreover, with respect to certain districts which are heavily Hurd Aid dependent, such as Poughkeepsie City School District, Newburgh City School District, and Long Beach City School District, to name only a few, the effect would be devastating.

The burden on small cities districts is further exacerbated by the fact that their real property tax rates (based on full value) are among the highest in their respective regions. When city taxes are added to school district taxes, the combined small city tax rates are the highest overall rates in their respective counties. *See Special Report on Municipal Affairs [for local fiscal years ended in 1992], Office of the State Comptroller, New York State* at 317-405; *Overall Real Property Taxes: Tax Levy and Tax Rate Statistics -- New York State Local Governments -- Fiscal Years Ended 1991, Office of State Comptroller, New York State* [December 1991]). In addition, recent state and federal statutory and regulatory enactments have raised education standards, thereby magnifying the strain on the small city school districts. Among the statutes causing the increased burdens is the New York State Charter School Finance Reform Legislation, approved in late 1998 to address the issue of choice in education. The legislation

purported to introduce choices and options among New York schools without increasing existing costs to public schools. To the contrary, however, this legislation resulted in significant cost increases, particularly in small city school districts. Furthermore, the New York State Regents Higher Standards regulations have imposed additional burdens on small city school districts. Pursuant to these regulations, all high school graduates must pass five Regents Examinations. Although this goal is laudable, districts such as those in the small city classification are simply without the means to satisfy the heightened requirements. Likewise, the Federal Statute, referred to as the "No Child Left Behind Act," was passed with a vision of improved school quality through higher teacher qualifications, improved performance of disadvantaged students, greater safety and accountability, and increased federal aid. *See* Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-envisioning Native American Education for the Twenty-First Century*, 43 Ariz. L. Rev. 819, 890 (2001); President George W. Bush, *No Child Left Behind* (2001) available at http://www.whitehouse.gov/news/reports/no-child-left-behind.html.

As demonstrated by the foregoing, the financial support of small city schools is extraordinarily fragile, and the issue of equitable distribution of state aid is critical to the ability of these districts to meet the enormous burdens of educating our inner city youth. Without sufficient State support, students in small city districts are deprived of essential learning tools and, ultimately, they do not receive the minimally adequate education to which they are entitled.

LEGAL BACKGROUND

A. Levittown

The instant litigation is not the first constitutional challenge to New York's system of education. In *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27 (1982), the New York Court of Appeals considered a challenge to the system based upon certain inherent inequalities between the educational opportunities available in different school districts. In *Levittown*, the plaintiffs argued that the present system of school funding in this State resulted in certain school districts being better funded than others and, thereby, were able to offer better educational opportunities. *See Levittown*, 57 N.Y.2d at 35-36. According to the Levittown plaintiffs, this disparity violated the equal protection clauses of the Federal and State constitutions and was also in violation of the Education Article found in New York's constitution. *See id.* at 35. The Court of Appeals disagreed.

In its decision, the *Levittown* court recognized the following:

> [p]ublic education is unquestionably high on the list of priorities of governmental concern and responsibility, involving the expenditure of enormous sums of sums of State and local revenue, enlisting the most active attention of our citizenry and of our Legislature, and manifested by express articulation in our Constitution

Id., at 43.

Despite the above, the Court of Appeals was constrained to conclude that education is not a "fundamental right" worthy of a strict-scrutiny analysis under the equal protection clauses. *See id.*, at 44. Accordingly, the Levittown court considered only whether there exists a "rational basis" to justify the State's present system of school funding. *See id.* Finding that a rational

basis, i.e. local control of schools, does in fact exist to justify said system of funding, the plaintiffs' equal-protection claims were dismissed. *See id.* at 45-47.

The Court next addressed the *Levittown* plaintiffs' claims under the Education Article of our State Constitution. *See id.* at 45-50; N.Y.S. Const., Art. XI § 1. This article provides that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein the children of this state may be educated." N.Y.S. Const., Art. XI § 1. The Court of Appeals rejected the notion that the Education Article requires that different school districts provide educational experiences and opportunities that are "equal" or "substantially equivalent" to one another. *See Levittown*, 57 N.Y.2d at 47-48. Rather, according to the Court of Appeals, the constitutional framers intended the Education Article simply to guaranty "a State-wide system assuring minimal acceptable facilities and services in contrast to the unsystematized delivery of instruction then in existence within the State" *Id.* at 47. According to the *Levittown* court, the State's model of educational funding does not violate the Education Article absent a showing at "gross and glaring inadequacy." *Id.* at 48. Furthermore, according to the Court, determinations regarding the extent and allocation of funds toward education lie within the exclusive province of the Legislature. As a result, the Court would be loath to override the State's policies in this regard, unless the scheme of educational funding is replete with "gross and glaring inadequacy" *Id.* at 48. Insofar as the *Levittown* plaintiffs had not shown such a "gross and glaring inadequacy" in educational funding, the Court of Appeals found the State's system to be in compliance with the Education Article. *Id.* at 48-49.

Although the plaintiffs were ultimately unsuccessful in *Levittown*, the decision represents an important landmark with respect to the judicial review of our educational scheme. As stated by the Court of Appeals, the Education Article imposes a constitutional floor with respect to

educational adequacy and guarantees that every New York student receives a "sound basic education." *See id.* at 48. However, because the *Levittown* plaintiffs had failed to claim a deprivation of "a sound basic education," and relied simply upon principles of inequality, the Court of Appeals dismissed the plaintiffs' claims under the Education Article.

B. Campaign for Fiscal Equity v. State

In *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307 (1995) (hereinafter "*CFE I*"), the Court of Appeals was faced with another challenge to the State's educational system. The *CFE I* plaintiffs alleged, *inter alia*, that the State's educational system fails to provide students in New York City public schools the education to which they are entitled under the Education Article, and that said system disproportionately and detrimentally impacts upon New York's minorities in violation of various regulations promulgated under Title VI of the Civil Rights Act of 1964 (hereinafter "Title VI"). *See* 42 U.S.C. § 2000d *et seq.* The Court concluded that the plaintiffs had alleged a valid cause of action under the Education Article.[5] The Court unanimously agreed that a violation of Title VI's implementing regulations had properly been alleged.

1. Distinguishing Levittown

At the outset, it may appear that the claims made in *CFE I* were identical to those previously rejected by the Court of Appeals in *Levittown*. However, according to the Court of Appeals, the plaintiffs in *Levittown* had failed to directly allege that the existing educational system in this State fails to provide the "sound basic education" that is guaranteed by the

[5] Chief Judge Kaye recused herself from *CFE I*, leaving a panel of six judges to consider the case.

Education Article. Rather, the Court found that Levittown turned on the issue of whether the system of unequal educational funding was constitutional, as opposed to whether the system of education provides a "sound basic education." *See CFE I*, 86 N.Y. at 315. Unlike *Levittown*, such an allegation was placed squarely before the Court in *CFE I*.

2. Education Article Claim

a. A Sound Basic Education

In addressing the plaintiffs' claims under the Education Article, the Court of Appeals reiterated the holding of *Levittown*: "the Education Article imposes a duty on the Legislature to ensure the availability of a sound basic education to all the children of the State." *Id.* at 315. According to the Court of Appeals, the Legislature is duty-bound to satisfy a "constitutional floor with respect to educational adequacy" and the court is "responsible for adjudicating the nature of that duty." *Id.* at 315.

In "adjudicating the nature of [the] duty" imposed by the Education Article, the Court of Appeals set forth its tentative interpretation of a "sound basic education:"

> [s]uch an education should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury. If the physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation.

Id. at 316. The above statement provides a result-oriented guideline as to what the Court of Appeals considers to be "a sound basic education." In other words, a constitutionally acceptable education should provide resources sufficient to give students the opportunity to become citizens

who possess the literacy, calculating and verbal skills that are necessary in order to productively perform civic activities.

The Court of Appeals further offered guidelines to reflect the characteristics of an educational system which would pass constitutional muster and, thereby, "enable children to eventually function productively as civic participants capable of voting and serving on a jury." *Iid.* at 316. Although the *CFE I* Court explicitly refused to "definitively specify what the constitutional concept and mandate of a sound basic education entails," it held that certain "essentials" must be provided by the State's educational system:

> [c]hildren are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.

Id. at 317. According to the Court, the above elements constitute a "template . . . of what the trier of fact must consider in determining whether defendants have met their constitutional obligation." *Id.* at 317-18.

The Court of Appeals's decision does not define or quantify that which constitutes "minimally adequate" facilities, instrumentalities or instruction, as referenced above. The Court did, however, discuss the relevance of various standards promulgated by the Board of Regents and the Commissioner of Education in measuring the acceptability of the State's education system. Although plaintiffs argued that compliance with standards in place at that time should be synonymous with "a sound basic education," the Court disagreed: "because many of the Regent's and Commissioner's standards exceed notions of a minimally adequate or sound basic

education - some are also aspirational - prudence should govern utilization of [these] standards as benchmarks of educational adequacy." *Id.* at 317. According to the Court of Appeals, proof of noncompliance may be helpful in ascertaining the adequacy of the State education system, but such noncompliance is not independently sufficient to demonstrate a violation of the Education Article. *See* i*d.* Similarly, the *CFE I* Court cautioned against relying too heavily on proof of students' performance on standardized competency examinations, finding that such results may be probative on the issue of educational adequacy, but are not definitive of the issue. *See id.*

b. Causation

The Court of Appeals provided further insight into a proper Education Article analysis by alluding to the requisite causal link which must be established between any alleged deficiency in the educational system and some action on the part of the State. In the context of this particular case, the Court of Appeals pointed out that plaintiffs are obligated to demonstrate a causal connection between the State's system of school funding and any proven failure of New York City public schools to provide a sound basic education. *Id.* at 318. According to the *CFE I* Court, however, an extended discussion on the issue of causation "is premature given the procedural context of this case" *Id.* at 318.

Judge Simons concluded that the issue of causation was fatal to the plaintiffs' claims in *CFE I*. Judge Simons first found that the majority had improperly broadened the scope of the Education Article as originally interpreted by the Court in *Levittown*. In addition, however, Judge Simons found the requisite element of causation to be lacking, because the plaintiffs had failed to sufficiently allege that the State's financial aid to education is "grossly inadequate." *See id.* at 340 [Simons, J., dissenting]. In so finding, Judge Simons focused upon certain language in *Levittown*, which stated as follows:

> [b]ecause decisions as to how public funds will be allocated among the several services for which by constitutional imperative the Legislature is required to make provision are matters peculiarly appropriate for formulation by the legislative body . . ., we would be reluctant to override those decisions by mandating an even higher priority for education in the absence, possibly, of gross and glaring inadequacy.

Levittown, 57 NY2d at 48. According to Judge Simons, the plaintiffs' conclusory characterization of the State's funding as "grossly inadequate" was insufficient to survive dismissal. *See CFE I*, 86 NY2d. at 340 (Simons, J., dissenting). Furthermore, according to Judge Simons, there was "serious doubt" as to whether any causal connection existed between the State's scheme and the education deficiencies which plagued the New York City students in *CFE I*. *See id.* at 341. Given the fact that New York City's funding of its schools has been in steady decline, Judge Simons found that "a court could justifiably conclude as a matter of law that the shortcomings in the City schools are caused by the City's failure to adequately fund City schools, not from any default by the State of its constitutional duty." *Id.* at 341.

c. <u>Conclusion</u>

In *CFE I*, the majority of the Court of Appeals found that plaintiffs had stated a valid claim that the educational system of this State failed to provide a "sound basic education" as required by the Education Article. *See id.* at 319. The majority provided guidelines to assist the trial court in assessing the adequacy of the State's system, by referencing both the results (or "outputs") of the system, as well as the assistance provided to the State's schools (or "inputs"). *See id.* at 316-17.

C. CFE v. State: The Trial

As a result of the Court of Appeal's decision in *CFE I*, this matter was remanded for discovery and an eventual trial on the issues of whether (1) New York City's public education system violates the Education Article and (2) New York City's public school system violates the implementing regulations of Title VI.[6] *See* 34 C.F.R. § 100.3(b)(2)

Following a seven-month trial, consisting of 111 days of testimony given by witnesses and the receipt of more than 4,300 documents into evidence, the New York County Supreme Court (DeGrasse, J.) issued a 185-page decision in which it answered each of the above questions in the affirmative. The trial court decision held the present funding scheme to be unconstitutional. *See CFE II*, 187 Misc.2d 1, 115 (N.Y. Sup. Ct., New York County 2001) (hereinafter "*CFE II*"). The trial court continued by directing the defendants to "put in place reforms of school financing and governance designed to redress the constitutional and regulatory violations set forth in this opinion," and retained jurisdiction to monitor the defendants' progress in this regard. *Id.*

Despite directing that changes be made to the current system, the trial court did not specify the manner in which said system of funding should be changed. "Rather, it is the legislature that must in the first instance take steps to reform the current system." *Id.* at 99. However, the *CFE II* court provided the following description of those resources which must be provided by any acceptable educational system:

> (1) sufficient numbers of qualified teachers, principals and other personnel; (2) appropriate class sizes; (3) adequate and accessible school buildings with

[6]The issue of whether New York's education funding system violates the implementing regulations of Title VI, 34 C.F.R. § 100.3(b)(2) is not addressed herein.

> sufficient space to ensure appropriate class size and implementation of a sound curriculum; (4) sufficient and up-to-date books, supplies, libraries, educational technology and laboratories; (5) suitable curricula, including an expanded platform of programs to help at-risk students by giving them "more time on task;" (6) adequate resources for students with extraordinary needs; and (7) a safe orderly environment.

Id. at 114-15. The *CFE II* court continued by mandating that any new system of educational funding address the inherent shortcomings which flaw our present system. According to the *CFE II* court, this would be accomplished by, *inter alia*:

> (1) ensuring that every school district has the resources necessary for providing the opportunity for a sound basic education; (2) taking into account variations in local costs; (3) providing sustained and stable funding in order to promote long-term planning by schools and school districts; (4) providing as much transparency as possible so that the public may understand how the State distributes school aid; (5) ensuring a system of accountability to measure whether the reforms implemented by the legislature actually provide the opportunity for a sound basic education and remedy the disparate impact of the current finance system.

Id. at 115.

D. <u>CFE v. State: The Appeal</u>

On appeal to the First Department of the Appellate Division, Judge DeGrasse's Supreme Court decision was reversed. *See Campaign for Fiscal Equity v. New York*, 295 A.D.2d 1, 22 (N.Y. App. Div. 1st Dep't 2002) (hereinafter "*CFE III*"). The Appellate Division concluded that the plaintiffs had not proven that students in New York City were being deprived of a sound basic education. *See id.* at 8-9. Moreover, according to the Appellate Division, the plaintiffs failed to demonstrate that the infusion of additional funding was necessary to rectify any educational inadequacies that may exist in New York. *See id.* at 16.

The *CFE III* analysis began by setting forth a restrictive definition of a "sound basic education." *See id.* at 8-9. According to the Appellate Division, a "'sound basic education'

should consist of the skills necessary to obtain employment, and to competently discharge one's civic responsibilities." *Id.* at 8. As determined by the *CFE III* court, the "skills required to enable a person to obtain employment, vote and serve on a jury, are imparted between the grades 8 and 9 . . . ." *Id.* Continuing through the analysis, the *CFE III* court provided a limited review of the evidence presented at trial and determined that the plaintiffs had provided insufficient evidence to demonstrate that New York City students are deprived of a "sound basic education." *See id.* at 11. Finally, the Appellate Division evaluated the necessary element of causation and noted that the "constitutional question is not whether more money can improve the schools, but whether the current funding mechanism deprives students of the opportunity to obtain a sound basic education." *Id.* at 16. In addressing the plaintiffs' arguments that more money is needed to ensure a constitutionally adequate education, the *CFE III* court suggested possible alternative solutions and declared that "more spending on education is not *necessarily* the answer." *Id.* (emphasis added). According to the Appellate Division, the plaintiffs were responsible for demonstrating that the reallocation of funds and student placement would not resolve educational inadequacies. The *CFE III* court concluded that plaintiffs had not met their burden and, consequently, held that the causation element was not satisfied. *See id.* at 17-18. Based on its low standard for constitutional adequacy and its dismissal of Plaintiffs' causation evidence, the Appellate Division reversed Judge DeGrasse's decision and held that New York's education funding system comports with constitutional requirements.

ARGUMENT

POINT I

THE STATE EDUCATIONAL SYSTEM IS UNCONSTITUTIONAL FOR FAILURE TO PROVIDE ALL CHILDREN THE OPPORTUNITY FOR A SOUND BASIC EDUCATION

The Plaintiffs have successfully demonstrated that the present New York State education system does not provide all students with the opportunity for a sound basic education, and, consequently, the education system violates the New York State Constitution. The framework for determining the constitutional adequacy of the state education system was set forth by the Court of Appeals in *CFE I*, 86 N.Y.2d 307. With the guidance set forth by the Court of Appeals in *CFE I*, Judge DeGrasse heard and evaluated pertinent evidence over a seven-month period in *CFE II*, 187 Misc.2d 1. Reviewing the volumes of evidence against the legal template laid by the Court of Appeals, Judge DeGrasse concluded that the New York education system was unconstitutional because it did not provide all students with the opportunity for a sound basic education. On Appeal, the Appellate Division inappropriately reversed Judge DeGrasse's conclusions based on an infirm and unsupported analysis. *See CFE III*, 295 A.D.2d 1. Because the Plaintiffs have demonstrated that New York fails to provide all students with the opportunity for a sound basic education, they have achieved the standard set forth by the Court of Appeals in *CFE I* and, as a result, have shown the New York education system to be unconstitutional.

A. ***CFE I***

The Education Article of the New York Constitution "requires the State to offer all children the opportunity of a sound basic education." *CFE I*, 86 N.Y.2d at 316. According to the Court of Appeals:

> [s]uch an education should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury. If the physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation.

Id. In setting forth the fundamental criteria for a constitutionally adequate education system, the Court of Appeals further specified that:

> [t]he State must assure that some essentials are provided. Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.

Id. at 317. Upon reviewing Plaintiffs' allegations in the context of this legal framework, the *CFE I* decision concluded that Plaintiffs' allegations of "gross educational inadequacies, . . . if proven, could support a conclusion that the State's public school financing system effectively fails to provide a minimally adequate educational opportunity." *Id.* at 319.

B. ***CFE II***

Upon the legal foundation laid by *CFE I*, Judge DeGrasse undertook the task of hearing and evaluating the extensive evidence presented by both sides and concluded in the *CFE II* decision that the State education financing system was unconstitutional. *See CFE II*, 187

Misc.2d at 113. Moreover, he noted that, although the focus in *CFE* was on New York City schools, the remedy for the flawed education system "will necessarily involve the entire State." *Id.* The *CFE II* decision first reviewed the legal foundation laid by *CFE I*. Judge DeGrasse rejected the argument that the Court of Appeals intended to establish a comprehensive constitutional standard in its *CFE I* decision. As *CFE II* noted, *CFE I* expressly stated that its purpose was to serve as a template and that the issue could only be fully evaluated and resolved after the development of a factual record. *See CFE II*, 187 Misc.2d at 13. Based on his conclusion that *CFE I* required the further development of the "sound basic education" definition, Judge DeGrasse developed his decision using a realistic interpretation of civic participation. As stated in his decision, Judge DeGrasse viewed *CFE I*'s invocation of voting and jury service as "synecdoches for the larger concept of civic participation." The *CFE II* decision realized the scope of the responsibility entrusted to jury members and voters and it fixed that level of responsibility as the standard by which to measure New York's basic education.

The *CFE II* interpretation of civic participation comports with the language of *CFE I*. Specifically, the Court of Appeals expressly stated that the New York education system "[s]hould consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." *CFE I*, 86 N.Y.2d at 316. Its use of the words "civic participation" and "capable" evidence the Court of Appeals's understanding of a "sound basic education" as an expansive, rather than limited, concept. For example, "civic participation" implies involvement with matters pertaining to citizenship. *See* RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 248-49 (1992). Participation in civic matters could, therefore, conceivably involve a number of activities and responsibilities incident to New York citizenship. Likewise, in choosing to assert that New

York's civic participants are equated with individuals "capable" of voting or serving on a jury, the Court of Appeals acknowledged its understanding that civic participation in New York requires substantially more than simply occupying a seat in a jury box or pulling a lever behind a curtain. By its use of the word "capable," the Court of Appeals showed that it perceives the need for jury members and voters to be "able to do things well," to be "skilled," and to be "competent." WEBSTER'S NEW WORLD DICTIONARY 207 (3d college ed. 1988). By reading the Court of Appeals's language to connote "civic engagement" and the need for voters and jury members to serve "capably and knowledgeably," Judge DeGrasse set forth an interpretation which is a direct and logical extension of the legal foundation laid in *CFE I*. *See CFE II*, 187 Misc.2d at 14.

Only after a thorough evaluation of the evidence presented at trial, did Judge DeGrasse conclude that many students were not receiving an education which would adequately prepare them for their responsibilities as productive civic participants. The *CFE II* decision produced a careful, reasoned analysis of the volumes of evidenced presented at trial. Among the evidence received by the Court was testimony and documentary evidence on the lack of sufficient numbers of certified teachers. *See CFE II*, 187 Misc.2d at 39. The trial court also received evidence regarding the lack of sufficiently experienced teachers and the Regents' mandate to use only certified teachers by the year 2003. *See id.* at 42. Specifically, the trial court received evidence that teachers with less than 2 years' experience are not fully competent *See id.* at 45. Further evidence was presented on the difficulty experienced by New York City in competing for qualified teachers due to significantly higher salaries in surrounding non-city districts, on the underfunding of arts and physical education programs which are necessary to a sound basic education, on underfunding through the wealth formulas which misstate the wealth of New York

City, on the extreme age of many school buildings in New York City, on overcrowding of classrooms and the negative effect that overcrowding has on student performance, on graduation and drop out rates where substantial numbers of children drop out before the 11th grade and of those that remain, many do not graduate, on graduation figures which are based upon most children receiving only a local diploma by passing the Regents Competency Test ("RCT") which demonstrates reading comprehension at the eighth to ninth grade level and math competency at a sixth grade level, and on numerous other indicia of the inadequacy of resources and results.[7] *See id.* at 52-53, 61, 141, 72, 78, 97, 98-99. The *CFE II* court also found that passage of the RCTs is not evidence that a child has received a sound basic education because the Regents have decided to phase out the local diploma as of 2004. According to Judge DeGrasse, the RCT does not provide evidence that a student has obtained the basic literacy calculating and verbal skills required of high school graduates. The *CFE II* court concluded that thirty percent (30%) of children entering the ninth grade in New York City of public schools do not receive a high

[7] In the small cities the measurement of wealth especially hurts poor urban districts. State aid apportionments rely heavily on various measures of the local capacity to raise funds to support education. For decades local capacity was defined as the value of property behind each student to be educated, which was appropriate, since the property tax is the source of local revenue, and public school students represent the major cost driver. However, in the 1970's the concept of using local taxable income in addition to property wealth was also introduced on the theory that higher levels of income represented a higher ability to pay property taxes. Unfortunately, both the calculation and the measures were flawed. The calculation is flawed in that the two wealth measures are averaged. Thus, a district that is poor in both property and income but much poorer in property, will have much higher taxes than an identical income community with a better tax base. This would not occur if the ratios were multiplied rather than averaged. The income measure in itself is flawed. The income per pupil measure was intended to represent the typical income of the community, and it is an acceptable proxy for most districts with normal demographics. However, when there is a large older population with low income but no children in school, and where there is a large segment attending nonpublic schools, this statistic is badly distorted by including all the income in the numerator, but only public school students in the denominator.

These are both characteristics common to many cities. Thus, they are frequently measured as being wealthier in income than in property, and their state aid is reduced as a result. With regards to raising funds, however, small city school districts, unlike New York City, only have access to property, and will require a higher tax effort to reach the same spending level. For a district with high property wealth but even higher income, these distortions are relatively insignificant. For a low wealth district, however, they could be very pronounced.

school diploma of any kind, ten percent (10%) receive a general equivalency diploma ("GED"), and forty-eight percent (48%) receive a local diploma. Therefore, eighty-eight percent (88%) of children in New York City Schools have not demonstrated that they have received a sound basic education. *See id.* at 101. The trial court then fulfilled the Court of Appeals's requirement of finding the causal link between the State's public school funding system and the educational opportunity afforded New York City public school children. Justice DeGrasse held that increased funding can provide better teachers, better school buildings, better instrumentalities of learning and that such improvements or the lack thereof directly impact the performance of city public school children. He rejected the defendant's argument that additional resources do not have an effect on student outcomes and found that, among other things, effective teachers and administrators, small class sizes and improved school facilities can substantially improve student performance. *See id.* at 122-23.

As the foregoing examples demonstrate, the CFE II decision is the product of the trial court's careful and meticulous evaluation of the extensive evidence presented at trial. The result of the arduous process at the trial level was a well-reasoned conclusion that New York State is not providing all of its students with the opportunity to obtain a sound basic education.

C. ***CFE III***

On appeal, the First Department of the Appellate Division performed a mere superficial review of the underlying evidence before rendering its historically restrictive decision regarding New York's constitutional obligation to educate its children. The most disturbing element of the Appellate Division's decision is its response to the Court of Appeals's requirement that children

be educated to "function productively as civic participants capable of voting and serving as jurors." *CFE I*, 86 N.Y.2d at 318. According to the Appellate Division, the evidence at trial established that the skills necessary for voting and serving as jurors are imparted between grades eight and nine. *See CFE III*, 295 A.D.2d at 8. Consequently, the Appellate Division's rationale suggests that the provision of an eighth or ninth grade education is constitutionally adequate.

The Appellate Division's rationale is flawed and results in an unacceptable conclusion. First, the suggestion that jury charges are generally imparted at a grade level of 8.3 ignores the reality that jury participation does not always involve simple and straightforward civil actions. To the contrary, jury participation often requires the processing and evaluation of complex evidence. For example, a juror might be asked to review medical records, sophisticated corporate transactions or environmental regulatory reporting requirements. To suggest that New York need equip its potential jurors with nothing more than an eighth or ninth grade education is not only an injustice to its students, it is an atrocious disservice to the judicial system. In order to ensure that its jurors are intellectually prepared for the demands of civic duty, New York requires that those serving on juries be at least eighteen years of age. The idea that jurors need only be educated at an eighth or ninth grade level is nearly laughable, given that the average age of an eighth or ninth grade student is thirteen or fourteen. The Appellate Division's conclusion that an eighth or ninth grade education could prepare an individual for jury participation ignores the significant and necessary intellectual development that must occur in order for jury participation.

A similarly inadequate rationale is used by the Appellate Division to justify its conclusion that an eighth or ninth grade education adequately prepares New York citizens to vote. According to the *CFE III* decision, newspaper articles on campaign and ballot issues range from grade level 6.5 to 11.7. *See id.* The level at which newspaper articles are written, however,

is not necessarily the standard for determining an appropriate age for voting. The *CFE III* decision fails to establish a connection between the ability of an individual with an eighth or ninth grade education to read a campaign related newspaper article and his fitness for processing the information for application in voting. For example, one aspect of the voting process is the evaluation of complicated language pertaining to certain referenda. An ability to read a campaign article bears no significance with respect to the need to understand and evaluate the language of a referendum. Moreover, the Appellate Division has failed to establish a correlation between the age of eighteen and the achievement of an eighth or ninth grade education. Generally, every New York citizen, age eighteen or older, is legally entitled to vote. The Appellate Division's arbitrary designation of eighth or ninth grade as the level at which an individual is adequately educated to vote fails to account for the discrepancy between the average age of an eighth or ninth grade student and the age of eighteen, which is the age that the legislature has determined to be appropriate for voting.

The *CFE III* decision also misconstrues the literal language which served as the foundation of *CFE I*. The express language of *CFE I* stated that a sound basic education "[s]hould consist of the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants . . . ." *CFE I*, 86 N.Y.2d at 316. Specifically, the Court of Appeals named "calculating" among the skills deemed "necessary" for civic participation. In choosing to require "calculating" skills" the Court of Appeals sought to enable students to make "determin[ations] by using mathematics" and to "reckon or determine by reasoning [and] evaluating . . . ." WEBSTER'S NEW WORLD DICTIONARY 197 (3d college ed. 1988). The Court of Appeals also stated that "[c]hildren are . . . entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as . . . mathematics . . . ." *Id.* at 317.

"Mathematics" is defined as the "group of sciences dealing with quantities, magnitudes and forms, and their relationships [and] attributes . . . by use of numbers and symbols." *Id.* at 835. In contrast, however, the *CFE III* decision defined a "sound basic education" as including the instruction in "arithmetic," which is "the science or art of computing by positive real numbers, specif[ically] by adding, subtracting, multiplying and dividing." *Id.* at 74. When the Court of Appeals used the words "calculating" and "mathematics," it intended to imply a set of skills broader than mere arithmetic skills. The Appellate Division's use of "arithmetic in its definition of a "sound basic education" is, therefore, a fundamental misreading of the Court of Appeals's template for a "sound basic education."

Finally, the conclusions reached by *CFE III* also contravene the express language of the Constitution's education clause. Article XI, § 1 of the New York State Constitution requires that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all children of this state may be educated." By mandating that the legislature provide for a system of common schools, the framers of Article XI, § 1 established a constitutional requirement for the provision of both primary and secondary levels of education. *See* Charles Z. Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK 475 (Lawyers Co-Operative Publ'g Co., vol. III, 1906) (stating that "[b]y the new education article the people have solemnly declared in favor of maintaining elementary [and] secondary . . . education at public expense within limitations to be prescribed by the legislature"); *see also* BALLENTINE'S LAW DICTIONARY 229 (3rd ed. 1969) (defining "common schools" as "[t]he public schools as established in the United States; grade schools, grammar schools and high schools"). As Justice Saxe explained in his dissenting opinion to the *CFE III* decision, "[i]f the State's constitutional mandate under the Education Article is satisfied by providing students with, low-level arithmetic

and reading skills, then logically, it has no meaningful obligation to provide any high school education at all." *CFE III*, 295 A.D.2d at 33 (Saxe, J., dissenting). Because the Appellate Division concluded that the legislature was responsible for providing nothing more than the most basic education, *CFE III* effectively dismissed New York's responsibility to provide for a high school education. This result directly violates the express language of the Constitution, and consequently it ought not be enforced. *See People ex rel. Bockes v. Wemple*, 115 N.Y. 302, 308 (1889) ("[i]f the words [of a constitution] embody a definite meaning**,** which involves no absurdity . . . then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed").

As the foregoing analysis demonstrates, the Appellate Division's literal and implausibly restrictive interpretation of the standards set forth in *CFE I* resulted in a counterintuitive conclusion. Despite the panoply of evidence provided to the judiciary, the Appellate Division arbitrarily focused on information regarding jury charges and campaign-related newspaper articles. In *CFE I*, the Court of Appeals stated its intent for its decision to serve as a template for the development of a comprehensive legal standard. In Judge DeGrasse's *CFE II* decision, the template established in *CFE I* appropriately evolved into a legal definition of "civic participation," and the New York City education system was determined to be unable to prepare its students for their civic responsibilities. In contrast, *CFE III* refrained from expounding upon the *CFE I* language and, consequently, failed to develop a legal standard appropriate for application under the circumstances herein. Based on the appropriately articulated legal standard in *CFE II*, Judge DeGrasse correctly concluded that the New York is not providing all students with the opportunity for a sound basic education. As a result, the New York State education system is in violation of the State Constitution.

POINT II

THE EDUCATION ARTICLE OF THE STATE CONSTITUTION WHICH REQUIRES THE LEGISLATURE TO PROVIDE FOR A SYSTEM WHEREIN ALL CHILDREN MAY BE EDUCATED MEANS THAT ALL CHILDREN MUST HAVE A MEANINGFUL OPPORTUNITY FOR A SOUND BASIC EDUCATION, AND THAT SYSTEM, IN ORDER TO PROVIDE A MEANINGFUL OPPORTUNITY, MUST COMPENSATE FOR THE VARYING EDUCATIONAL, PHYSICAL, EMOTIONAL, MENTAL, AND SOCIOECONOMIC DISADVANTAGES THAT CHILDREN HAVE

In his Supreme Court decision, Judge DeGrasse devoted substantial attention to individuals qualifying as "at-risk" students, and he repeatedly referenced the need for educational funding to correlate to the varying special needs of individual students. Citing the New York State Board of Regents, Judge DeGrasse defined "at-risk" students as:

> those students whose social, economic or personal circumstances are not supportive of successful schooling. . . . They are at-risk of not completing high school, and, as a result, will be denied future opportunities for future participation in and contribution to the economic, social, cultural and civic life of their communities.

CFE II, 187 Misc.2d 1. After setting forth this general definition of students at-risk of academic failure, the *CFE II* decision proceeded to detail the profound and direct relationship between impoverished, or otherwise disadvantaged students, and the overall inability to acquire remedial skills in fundamental subject areas. *See id.* at 22-23. Significantly, after describing the tendency of poverty, race, ethnicity and immigration status to depress academic achievement, the *CFE II* decision concluded that "[t]he evidence introduced at trial demonstrates that these negative life experiences can be overcome by public schools with sufficient resources well deployed." *Id.* at 23. Moreover, in evaluating the inadequacies of the present education funding system, Judge DeGrasse noted that the system's failure to account for the needs of "at-risk" children "is one of

the greatest failings of the State school financing system." *Id.* at 32. Evidencing his recognition of the serious need for corrective action, Judge DeGrasse's decision required the employment of seven measures in order for New York City public schools to ensure at least a minimal opportunity to obtain a sound basic education. *See id.* at 40. One of the seven factors was devoted to the provision of "[s]uitable curricula, including an expanded platform of programs to help at-risk students by giving them 'more time on task.'" *Id.* at 41.

On appeal, the First Department of the Appellate Division acknowledged that lower test results "are largely the result of demographic factors, such as poverty, high crime neighborhoods, single parent or dysfunctional homes, homes where English is not spoken, or homes where parents offer little help with homework and motivation." *CFE III*, 295 A.D.2d 1. In its refusal to conclude that additional funding is a necessary ingredient to an adequate educational system for disadvantaged children, the *CFE III* decision simply stated that "more spending on education is not *necessarily* the answer." *Id.* at 16 (emphasis added). The Appellate Division failed to provide the requisite justification for its apparent conclusion that at-risk students need no additional funding. Rather, the decision engaged in a discussion of alternative solutions, including the elimination of the socio-economic conditions underlying the disadvantages and the reallocation of resources by the Board of Education. *See id.* at 16-17. By its focus on alternative suggestions, the Appellate Division conspicuously avoided the need for a genuine analysis regarding additional funding for at-risk students. *See id.* at 34 (Saxe, J., dissenting) ("It is the job of the schools to provide all students with the opportunity to obtain at least a basic education, and it is the responsibility of the State to provide enough funding for it to do so. It is irrelevant that other, and perhaps greater accomplishments could be achieved by investing the same funds to provide other kinds of support to those children's families").

In addition to the Appellate Division's failure to satisfy the need for a discussion regarding adequate funding, its alternate suggestions lack meaningful support for their ability to enable schools with disadvantaged children to provide a sound basic education. More specifically, *CFE III* purported to find support in language set forth by *CFE II*. The language relied on, however, was taken out of context and was incomplete. For example, *CFE III* cited *CFE II* as supportive of the suggestion that "tens of thousands" of students are currently improperly placed in special education programs, and the return of such students to the general education public would yield "hundreds of millions of dollars," for application toward the needs of at-risk students. *See id.* at 17. This reliance on *CFE II* is misplaced, and it ignored the reasons why students are improperly placed in special education programs. As explained in *CFE II*, inadequate funding for general education programs results in large class sizes, devoid of individualized attention for students. *See CFE II*, 187 Misc.2d at 95. Frequently, students who do not perform well in the general education system are placed in special programs where they can receive the personal attention they need. *See id.* at 96. Although some of these students are not actually learning disabled, they may be treated as such pursuant to New York State's liberal definition of "learning disability." *See id.*

As *CFE II* concluded, the overpopulation in special education programs of students who are actually able to be educated in the general public system is a direct consequence of inadequate funding to the public school system. *See id.* at 95. Consequently, "[a]dditional preventive resources would be necessary to staunch the flow of inappropriate referrals to special education." *Id.* at 97. Based on the *CFE II* analysis, the infusion of proper funding into public schools would facilitate a reduction in the average class size and would enable the employment of individualized instruction. Additional funding would also enable "time on task" programs to

benefit at-risk students. As a result, qualified students could be relocated from special education programs to the general school population. Moreover, as a direct benefit of this maneuver, the strain on special education funds would be relieved, and those students who are truly "learning disabled" would regain access to the additional resources that their education requires.

The Appellate Division's suggestion that the problems facing public school financing could be remedied by redirecting misplaced students into the general school system ignored the foundational flaw. Without the allocation of additional funds to the general public school system, class-sizes will remain large and unwieldy, and necessary "time on task" programs for at-risk students will continue to be inadequate. Additional funding is a prerequisite to halting the flow of able students to special education programs. The failure of the *CFE III* decision to address the substantive problem causing the improper placement of students into special education programs renders the Appellate Division's analysis incomplete. *See CFE III*, 295 A.D.2d at 35 (Saxe, J., dissenting) ("[the majority's] approach fails to recognize that redirecting the already allocated funds from one program to another would simply create other problems caused by underfunding to spring up elsewhere"). In contrast, the *CFE II* decision thoroughly contemplates the factors causing overpopulation in special education programs and concludes that the problem could only be alleviated through the addition of public school funding.

The Appellate Division's decision appears to ignore the rationale of *CFE II* as well as significant decisions in other states where the needs of at-risk students have been acknowledged and a financial commitment to address those needs has been made. For example, the special needs of at-risk students were given thorough consideration by the Wyoming Supreme Court in *Wyoming v. Campbell County Sch. Dist.*, 2001 WY 19 (2001), *reh'g granted*, 2001 WY 90, 32 P.3d 325 (2001). Although the *Campbell* decision contemplated the constitutionality of its

school funding system pursuant to a strict scrutiny, equal protection analysis, its treatment regarding students with special needs is congruent with the matters at issue herein. The *Campbell* decision examined procedures in place for allocating aid related to the education of at-risk students. *See id.* at 74-81. The analysis of the Wyoming Supreme Court relied on the principle that "[t]he primary need of schools with concentrations of [at-risk] students is increased adult attention in the school setting." *Id.* at 74. In its review of school funding procedures, the *Campbell* decision focused on the absence of a relationship between Wyoming's methods for funding allocation and the actual needs of the schools based on their population of at-risk students. *See id.* at 77. According to the *Campbell* decision, "[n]o one can argue the urgent need our society faces to minimize the failure of students and the increased social costs that unavoidably follow." *Id.* at 81. Based on its conclusion that the procedures for addressing the special needs of at-risk students were arbitrary and inadequate, the Wyoming Supreme Court directed the state to fund the actual and necessary costs of at-risk students. *See id.*

Significantly, the *Campbell* decision relied on *CFE II*'s analysis regarding at-risk students. *CFE II* noted the few New York school funding procedures that are based, in some measure, on populations of at-risk children. *See CFE II*, 187 Misc.2d at 87. According to the *CFE II* decision, however, the procedures cited "do not accurately account for the costs of education caused by large numbers of at risk students in a single district." *Id.* In *Campbell*, the Wyoming Supreme Court quoted this language in support of its conclusion that arbitrary funding policies do not adequately provide for students with special needs.[8] *See Campbell*, 2001 WY at

[8] During the period from 1996-1997 through 2002-2003, state aid to education increased by 44.07% overall and 7.35% per year on average. However, during that same period, education aid to small city school districts, which are poorer by twenty percent (20%) than the average district, increased by 33.93% or 5.66% per year. Because per pupil spending in poorer districts is low, if the state aid formulas accounted for poverty and student need, these poorer districts would be receiving more, not less, than state average increases in aid. The State system of funding is

77 n.27. The *Campbell* decision's reliance on *CFE II* is evidence of the substantial soundness of Judge DeGrasse's analysis.

As in the *Campbell* decision, when the issue of school funding constitutionality has been raised before other state courts, resulting decisions have repeatedly acknowledged that schools with large populations of disadvantaged students require greater access to resources in order to truly have the minimum required opportunity for education. Among those decisions is *Serrano v. Priest*, 18 Cal.3d 728 (1976). The *Serrano* decision noted the argument that "[w]here there is widespread poverty, disadvantaged youth, and bilingualism in a district, . . . not only do purely education costs rise due to the necessity for increased effort to overcome motivational and adaptive problems, but costs related to matters like vandalism rise as well." *Id.* at 759. To combat the discrimination that results from the disproportion of disadvantaged students among varying school districts, the California courts envisioned a "fiscally neutral system." *See id.* at 760. According to the *Serrano* decision, a fiscally neutral system "would make the individual district's ability to meet its own particular problems connected with providing educational opportunity depend upon factors other than the wealth of the district, and thus dissipate the discrimination which characterizes the [present] system." *Id.* Although the substantive analysis in *Serrano* is inapposite to that in the *CFE* cases, the discussion regarding disadvantaged students' greater need for educational funding supports the argument that at-risk children in New York State require the dedication of greater funding in order to have a true opportunity for a minimally adequate education. *See McDuffy v. Sec'y of Executive Office of Educ.*, 415 Mass. 545 (1993) (noting parties' stipulation to fact that "low level of guidance offered in the . . . .

becoming less equalized, it is growing more unfair to poor districts and students with the greatest needs. Moreover, the present system appears, at the very least, to be irrational and arbitrary.

public schools is inadequate to meet the needs of even an adequate suburban system, let alone the extreme needs of [the system at issue therein], with its unusually diverse population and large percentage of at-risk students"); *Abbott v. Burke*, 100 N.J. 269 (1985) (stating that "in some cases for disadvantaged students to receive a thorough and efficient education, the students will require above-average access to education resources"). Even providing the same funding levels for students with average needs and students from poor districts with special needs does not provide students in poor districts a meaningful and equal opportunity for a sound basic education.[9] S*ee Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . .").

As demonstrated by the foregoing analysis, New York schools that are responsible for educating a disproportionately high number of disadvantaged children are not financially able to offer their students a sound basic education. Without the infusion of additional funding, schools with large numbers of at-risk students will continue to operate at a level below that required as a New York State constitutional minimum. The Appellate Division has offered alternative suggestions, purporting to alleviate the strain on education funding. While such proposals may, perhaps, provide added relief for schools with inordinately large numbers of at-risk students, they do not replace the need for an ultimate remedy to the substantive problem. Without the

[9] As with *Jenness v. Fortson*, the U.S. Supreme Court held in *Lau v. Nichols*, 414 U.S. 563 (1974) that children with differing needs ought not be treated alike. *Lau* involved Chinese speaking children in California schools which only conducted instruction in English. The plaintiffs sued pursuant to the Civil Rights Act of 1964 § 601 (42 U.S.C. § 2000d), and the U.S. Supreme Court held that skills in English were at the very core of our school curricula and that failure to provide these basic skills renders the education provided a mockery. *See id.* at 566; *see generally Johnson v. Robison*, 415 U.S. 361 (1974) (holding that different treatment of veterans and alternative service workers was justified by substantial differences between the groups); *Matter of Patricia A.*, 31 NY2d 83 (1972) (finding unconstitutional a statutory provision which discriminated between males and females without justification); *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512 (1949) (holding that private redevelopment company was not prohibited from discriminating in selecting tenants and aid afforded by State to town was not enough to transmute discrimination to State), cert denied, 339 U.S. 981 (1950).

fortification of additional funding, schools with large populations of at-risk students will remain unable to provide a sound basic education and, consequently, will continue to be unable to meet the standards of the New York State Constitution.

POINT III

REGARDLESS OF HOW HIGH OR LOW THE BAR IS SET BY THE COURTS FOR THE CONSTITUTIONAL "MINIMAL ADEQUATE EDUCATION," THE STATE EDUCATIONAL SYSTEM IS UNCONSTITUTIONAL FOR FAILURE TO PROVIDE CHILDREN IN POOR URBAN SCHOOL DISTRICTS A SOUND BASIC EDUCATION BY NOT COMPENSATING FOR SOCIOECONOMIC DISADVANTAGES

A. The State Funding System Provides No Additional Resources for Poorer Districts with High Numbers of Students with Socioeconomic Deficits

Of the sixty-two (62) poorest districts in the State, representing ten percent (10%) of the total districts state-wide, four are large city school districts and twenty-four (24) are small city school districts. A review of the student performance and demographics for these districts demonstrates that they have the lowest test results on the English Language Arts (ELA) tests in the fourth and eighth grades, the highest drop out rates and the highest ratio of classification for special education. In addition, the base measure of poverty, which is the percentage of children on the free and reduced price lunch program, accounts for over sixty-one percent (61%) of the differences among districts on the ELA tests. This indicates a systemic failure of New York's education system with children in poverty.

The following chart and discussion support the conclusions and facts cited herein and are derived from the Chapter 655 Report, Statistical Profiles of Public School Districts, 1999, for the 624 major K-12 school districts outside New York City. Six Hundred Twenty-Four major K-12 school districts outside of New York City were sorted according to the percent of children eligible for free or reduced-price lunch.

Performance Indicator	**Highest Poverty 10% or 62 Districts**	**Lowest Poverty 20% or 125 Districts**	**Average District of 625**
Free And Reduced Lunch Rate	65.6%	6.4%	31.8%
ELA 4 Mean Score 1999	638	659	649
ELA 4 Mean Score 2000	649	676	662
ELA 8 Mean Score 1999	694	715	704
ELA 8 Mean Score 2000	690	716	702
ELA 8 Level 1 2000	16	3	7
ELA 8 Level 2 2000	50	28	42
ELA 8 Level 3 2000	29	49	40
ELA 8 Level 4 2000	5	20	11
Suspension Rate	8.0	2.5	4.2
Pct Classified > 60%	5.6	2.8	3.4
Dropout Rate	3.3%	0.9%	2.1%

The Education Department considers level 1 to be far below standard and level 2 to be below standard, level 3 is meeting standards and level 4 is considered mastery.

Resource Indicators	**Highest Poverty**	**Lowest Poverty**	**Average District**
Property Wealth Ratio	.640	1.962	1.169
Income Wealth Ratio	.545	1.910	.928
Expenditure (AOE/TAPU)	6,552	8,745	6,852
Tax Rate	19.68	19.81	18.33
Percent of Teachers with MA + 30	18	37	21
Pupil/Teacher Ratio	14.2	14.2	14.1

Afro-American Students	**Highest Poverty**	**Lowest Poverty**	**All Districts**
Percent of Enrollment	20.6	2.3	4.9
Afro-American Students Outside NYC	66.6% or 119,300	5.8% or 10,403	100% or 179,024

First, as of the first testing of 630 K-12 districts outside of New York City, the statistical relationship between poverty and English/Language Arts test results was astounding. Sixty percent of the variance in test scores was described by the district's free and reduced-price lunch percentage. That is appalling. Second, the relationship between the total spending of the school districts, including federal and state grants and adjusted for regional cost differences, and the percentage of poverty in the district is very slightly less than zero. Again, this is appalling. Despite all State grants, Federal Title I money, Hurd-Aid, and all other supposedly supplemental resources combined, high-poverty schools in New York have no additional resources to address differences in family background. With the second fact known, the first fact is less of a shock, but no less shameful. These two facts together describe the State system in which we compete and in which we are held accountable.

B. Small City School Districts

The small city school districts show a exceptional diversity on all characteristics. However, on balance they serve a population with a significantly higher level of poverty with 48.3% of their students eligible for free or reduced price lunches, compared to 31.5% in all districts outside of New York City. They are also relatively large districts averaging 4,537 students, with limited local resources, represented by a wealth ratio of only 82% of the state average. The State of New York characterizes most small city schools as "high need to resource" indicating that, relative to other schools, small cities have a high educational burden but few financial resources. Small cities spend slightly less than the average in absolute dollars, but very

slightly more (1.8%) when spending is adjusted for regional costs. Thus, the total educational resources including state, local and federal funds do not provide supplemental funding overall to account for drastic differences in socioeconomic factors.

C. Performance on the English/Language Arts Examinations

In the initial administration of the fourth and eighth grade English/Language Arts examinations, small city district average mean scores were slightly lower than the state average (-.8%). Moreover, sixty percent (60%) more students scored in the lowest ranking (level 1), while twenty percent (20%) fewer students scored in the highest ranking (level 4) than in the average district in the state on both tests. Based on the absolute scores, this would put these districts in the lower range of the state distribution in these areas.

Other districts in New York showed a very strong inverse relationship between the percentage of free and reduced lunch students in the district and the student performance on these tests. Measured against this trend line, the performance of small city students was very consistent. Out of seven small cities with relatively low poverty, five scored higher than the average for this group. At the high poverty level, however, twenty-one (21) small cities scored below the prediction, while twenty (20) scored above. The average deviation of all small city schools from the prediction was very close to zero.

D. Characteristics Related to High Performance

In the overall study of performance on these tests, certain other district statistics were associated with higher performance, while others were not. The small city schools' relative standing on these characteristics followed the general pattern. Regarding classifications of

students with disabilities, the small city rate of classification was 13.4%. This is ten percent (10%) higher than the average. In addition, small cities show a forty-five percent (45%) higher rate of classification for students in separate settings sixty percent (60%) or more of the school day. In other words, a greater percentage of students are placed in high intensity settings. A low rate of classification in settings more than sixty percent (60%) of the school day was typical of the higher performing districts, both among small cities and among all schools. Regarding suspension, absence and dropout rates, small city rates are significantly higher than the average. As with all schools, the higher performing small cities had lower rates of suspension, absence and dropping out than the average small city. These statistics show significant inverse correlations with success in out-performing the relationship between poverty and test scores. In other words, high rates of classification, suspension, absence and dropping out correlated with a low degree of success against poverty.

E. Resources

The results of relevant studies consistently reveal that schools districts responsible for educating large populations of disadvantaged students must implement various "Time on Task" programs, which require greater funding allocation than programs designed for the general student population. Ironically, however, New York State's present education funding system functions in favor of those districts whose student populations are characterized by relatively advantaged socioeconomic backgrounds.[10]

[10] The School Tax Relief (STAR) Program, which is now being phased-in, has extremely regressive effects. As a result of this program, the wealthier a district is the more STAR it receives. "This represents a reversal in the goals of state aid to school districts." Educational Priorities Panel, *State Funding Equity, available at* www.edpriorities.org/Info/StateFunEqui/STAR_Print.html. "In the past state aid had been designed to reduce inequalities between school districts by giving more aid to the less wealthy districts." *Id.* "But, STAR gives more

As demonstrated by a study of the U.S. Department of Education National Center for Education Statistics ("NCES"), children from disadvantaged backgrounds consistently enter school at a lower level of mental development than their counterparts from relatively wealthier districts. *See* H. Carl McCall, *Higher Standards for All: New York State's Educational Performance Gap and Necessary Reforms*, at 13 (July 2000) [hereinafter "*Higher Standards for All*"], *available at* http://www.osc.state.ny.us/reports/schools/2000/perfgap.pdf. This developmental difference is only exacerbated through the students' formal education because schools located in wealthier districts have greater access to necessary educational resources. *See id.* For example, most children enter kindergarten knowing the alphabet and numbers, well behaved and in good health. *See id.* In contrast, children living in poverty or from non-English speaking homes are less likely to count to ten, know the alphabet or be in good health. *See id.* "The strong correlation between socioeconomic conditions and educational performance does not mean that students from disadvantaged backgrounds cannot succeed, but often these students need additional support to achieve results equivalent to those achieved in better off communities." *Id.*

In recent years, the New York State Board of Regents has implemented certain measures to improve the standard of education throughout the State. One consequence of the State's efforts is a disparity between current levels of achievement and the level of performance required by the new standards. This disparity is referred to as a "performance gap." *See Higher Standards for All*, *at* 1. While the performance gap essentially exists throughout the State, it is

---

money to wealthier districts in the form of tax relief." *Id.* "Thus STAR makes it easier for wealthy districts to maintain the differential between their expenditure and expenditures in other districts." *Id.* For example, a comparison of fully-phased-in STAR (2001-2002) to Operating Aid (1999-2001) on a per pupil basis reveals that in the wealthiest quintile, $549 was spent per pupil through Operating Aid, while $1,271 was spent per pupil through STAR. *See id.* In contrast, in the least wealthy quintile, $3,530 was spent per pupil through Operating and, while only $659 was spent per pupil through STAR. *See id.*

most prominent in lower-wealth and urban districts. *See id.* The disparities among performance levels of students in various districts are rooted in inequitable funding and economic differences among communities. *See id.* Although New York nominally employs various need-based funding programs, in reality annual manipulations are designed to effect a predetermined agreed-upon distribution. *See* H. Carl McCall, *A $3.4 Billion Opportunity Missed: Despite Four Years of Large Increases State School Aid Formulas Still Don't Provide Equitable, Predictable or Efficient Funding*, at 17 (November 2000) [hereinafter "*A $3.4 Billion Opportunity Missed*"] *available at* http://www.osc.state.ny.us/reports/schools/2000/34bill.pdf. "The long term result of these constant manipulations is a rigged formula that does not effectively target aid to need, and also produces wide swings in aid from year to year for individual districts." *Id.* While the school aid formulas do incorporate measures of need, the impact of the need measures in overall aid is actually very small. *See id.* at 19. This is the result of many exceptions, controls, caps and other devices contained in the formulas, as well as the spend-to-get nature of much of the aid system. *See id.* "Under a reimbursement-oriented system, often the aid is directed more heavily to those districts which can afford the expenditures in the first instance, which tend to be less in need of funding." *Id.* Significantly, relevant data show that districts with relatively low funding need received six percent (6%) more aid than those with relatively high needs between 1996-97 and 2000-01. In particular, the SCSD received an average increase of only 27.5%, which was the lowest average funding increase for all district groupings.[11] *See id.* at 21.

[11] In comparison, New York City's percentage increase was 37.3%, the Big 4 Cities' average was 33.8 % and the State average was 32.7%.

F. Conclusions

As a result of the information available, several conclusions may be drawn. First, there is no evidence of additional funding overall in small cities. Thus, there is no evidence of supplemental resources available to students in high-poverty urban districts in upstate New York. Since special funding is targeted by the legislature through the state aid formula and from federal aid, and since these districts are required to utilize these revenues for supplemental programs, the fact that it does not show up either in spending or in lower taxes means that it is offset by other inadequacies of the aid system. Second, the implications of the lack of additional funding for improving educational opportunity for students in high-poverty districts are severe. For every dollar spent on additional time, remediation, special education or class-size reduction, another dollar must be cut out somewhere else. In order to increase spending overall to provide additional programs, most high-poverty schools would have to raise school taxes far above those in suburban districts, even though they already bear a far greater tax burden from municipal services. In small cities, where voters must approve budget increases, it is unlikely that residents would do so. Funding charter schools at the expense of these districts will exacerbate these problems. Additionally, there is evidence to support some additional spending burdens in cities as a result of mandated tuition costs, property tax refunds and higher health insurance costs. There is also evidence to demonstrate that higher federal aid to cities is offset by inadequate State funding such that no additional instructional resources are provided to children. Likewise, there is evidence to show that the measurement of income in cities is distorted and improperly used in the aid formula. There is no evidence to indicate inefficiencies in spending on non-instructional areas. Finally, on balance, there is substantial evidence that the overall finance

system does nothing to assist high poverty schools in raising performance, but continues to support higher spending in higher wealth districts.

The Chapter 655 Report data show a positive correlation between additional resources and student success and show that the Small City Schools do not receive additional aid to compensate for their students special needs. Failure of the State to maintain a system which provides those additional resources to small city students with socioeconomic disadvantages denies those students the opportunity to receive a sound basic education.

POINT IV

IN ORDER TO SATISFY THE INTENTIONS OF THE FRAMERS OF THE NEW YORK STATE CONSTITUTION'S EDUCATION CLAUSE, THE JUDICIARY'S INTERPRETATION OF A SOUND BASIC EDUCATION MUST COMPORT WITH THE REALITIES OF CONTEMPORARY EDUCATION IN NEW YORK STATE

The education clause of the New York State constitution was added in 1894. At that time, the practice of providing a public education was, in some measure, already in place. As indicated by historical documents, certain members of the 1894 constitutional convention saw no need for the inclusion of an explicit education provision because the concept of providing a system of free common schools was so fundamental a tenet of New York State government that the addition of an express education clause was thought to be superfluous. *See* Charles Z. Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK 554 (Lawyers Co-Operative Publ'g Co., vol. III, 1906). In rejecting the concern that an express education clause was unnecessary, the education committee recommended the explicit direction to the Legislature to "provide for a system of free common schools wherein all children of this State may be educated." New York State Constitutional Convention Committee 1938, PROBLEMS RELATING TO THE BILL OF RIGHTS AND GENERAL WELFARE 234 (J.B. Lyon Co. Printers 1938). According to the education committee:

> [t]his requires not simply schools, but a system, not merely that they shall be common, but free, and not only that they shall be numerous but that they shall be sufficient in number so that all of the children of the State may, unless otherwise provided for, receive in them their education.

Id. The report of the education committee further emphasized the "adoption of an enactment declaring in the strongest possible terms 'the interest of the State in its common schools….'" *Id.* (citing the *Documents of the 1894 Constitutional Convention*, No. 62). Significantly, the

committee's report also noted that, "in the future the State would find it necessary to provide higher education and the common school was the essential base therefore." *Id.* Further, the committee's report stated that "[t]here seems to be no principle upon which the people of this commonwealth are so united and agreed as this, that the first great duty of the State is to protect and foster its educational interests." State of New York, In Convention, Document No. 62, *Communication from the Secretary of State in Reply to the Resolution of Mr. Van Denbergh, Reported Favorably by the Judiciary Committee of Date July Tenth* p.3. Finally, the education committee anticipated societal evolution in New York and the need for the education system to adapt to the continually changing needs of the State.

> Whatever may have been [the] value [of common schools] heretofore, and language has been strained to the utmost in applying to them terms of praise, their importance for the future cannot be overestimated. The public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before . . . .

Charles Z. Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK 555 (Lawyers Co-Operative Publ'g Co., vol. III, 1906).

The committee's understanding of the need for New York education to evolve is a reflection of the social environment at the time the education clause was added. The late nineteenth century and early twentieth century marked the age of American education known as the Progressive Period. Robert N. Barger, *History of American Education Web Project*, *available at* http://www.nd.edu/~rbarger/www7/ (Last Revised on December 3, 1999). During that time, the long-established agricultural based economy began to recede in favor of an industrial economy. Renee M. Newman, *A History of Formal Education* (1998) *available at* http://www.shianet.org/~reneenew/HUM501.html. With an increasingly industrialized society followed a school system which prepared students for factory work and industrial labor. *See id.*

The system of education was also directly influenced by, and patterned after, the efficiency movement and the collective goal of productivity. *See* Tonjia Miller, *History of American Education Web Project; Impact of Business and Industry, available at* http://www.nd.edu/~rbarger/www7/impbusin.html (Last Revised on December 3, 1999). Frequently, parents wanted to send their children to work in factories, rather than enrolling them in schools, because the money earned by working children was a significant, and often necessary, addition to the family income. *See* Tonjia Miller, *History of American Education Web Project; Impact of Business and Industry, available at http://www.nd.edu/~rbarger/www7/impbusin.html* (Last Revised on December 3, 1999). The Progressive Period was also an era of significant immigration, requiring the assimilation of foreign children in both language and culture. *See id.* When the education clause was added to the New York Constitution in 1894, the unofficial system for education was a vastly different creature than that employed in New York today. Likewise, the social, legal and economic environment in which New York schools existed in 1894 contrasted markedly from the realities of society today. Unlike a century ago, laws against the employment of child labor exist today and, consequently, eliminate the argument that children should not be in school because their income is needed for family support. In addition, schools presently exist in a world where an understanding of sophisticated technology has become an indispensable tool of survival. For example, computers and the Internet now function as fundamental components of American education, business and leisure activity. They are no longer synonymous with specialized fields in which only a marginal percentage of the population is engaged. Also, automobiles today are indispensable and travel by airplane is accessible to the masses. Cellular telephones and palm pilots are commonplace among professionals, and medical advances in

recent years have destroyed the boundaries of imagination. As a result of continuing progress throughout the past century the reality of education for New York students has rendered traditional education fundamentals insufficient to prepare children for even simple tasks associated with public participation.

New York is undoubtedly a different place today than it was in 1894. The framers of the constitution's education clause anticipated the evolution of life in New York, and they expressly conveyed their collective intention to create a malleable provision which would conform to the changing needs of the education system. The reports by the education committee for the 1894 constitutional convention provide ample evidence that children in New York are entitled to an education which prepares them to participate in the constantly evolving public realm and enables them to engage in contemporary society. In this regard, the language excerpted from the education committee's report cannot be understated: "[t]he public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before . . . ." Charles Z. Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK 555 (Lawyers Co-Operative Publ'g Co., vol. III, 1906).

As expressed at the time the education clause was added to the Constitution, education is the cornerstone for the preparation of young adults to operate in contemporary society. The framers of the education clause anticipated that time would constantly bring changes to the lives of people in New York and the education system would be required keep pace in order to satisfy the State's constitutional duty. According to the language set forth by the framers, education must continually grow more advanced in order to adapt to changing times. Based on this language, the Appellate Division's literal reading and rigid application of the constitutional language is a disservice to the framers of the education clause and, ultimately, to the children of

New York. Moreover, even before the existence of a state university system, the education committee of the 1894 constitutional convention understood the purpose of primary and secondary education to be preparation for higher education. As the committee's report indicated, "in the future, the State would find it necessary to provide higher education and the common school was the essential base therefore." New York State Constitutional Convention Committee 1938, PROBLEMS RELATING TO THE BILL OF RIGHTS AND GENERAL WELFARE 234 (J.B. Lyon Co. Printers 1938) (citing the *Documents of the 1894 Constitutional Convention*, No. 62). When measured against these express words used by the education committee themselves, the Appellate Division's *CFE III* conclusion appears incredulous. Over a century ago, common school education was understood to be an "essential" basis for higher education, yet, according to the Appellate Division, the New York Constitution does not now require this State to prepare all of its students for college matriculation. The language of the framers and the conclusion of the Appellate Division are irreconcilable as to each other. It is respectfully submitted that the constitutional intent should control.

As explained hereinabove, the Appellate Division's restrictive reading of the education clause's concise language is a disservice to the intent underlying the education clause; the framers' repeated and emphatic references to the need for education to be commensurate with societal changes explains their choice of a succinct education clause, which has the ability to adapt to a changing public environment. As the Supreme Court of New Jersey has aptly explained, "[a] constitution does not resolve all policy problems. Rather, it establishes the framework of government with such specific restraints as are thought to be of eternal value and hence worthy of immunity from passing differences of opinion." *Reilly v. Ozzard*, 33 N.J. 529, 539 (1960). Several state court decisions have addressed the issue of constitutional interpretation

and have concluded that the passage of time brings changed circumstances and constitutional provisions must be read in a fashion which comports with present-day society. The Supreme Court of Appeals of West Virginia has stated that "[r]easonable construction of our Constitution does not require static doctrines but instead permits evolution and adjustment to changing conditions as well as to a varied set of facts. Because it is a framework for governmental structure, a constitution is necessarily general to allow for needed flexibility." *Randolph County Bd. Educ. v. Adams*, 196 W. Va. 9, 22 (1995). Likewise, according to the Supreme Court of Texas, "[t]he meaning of the [Constitution's] literal text is derived with the 'understanding that the Constitution was ratified to function as an organic document to govern society and institutions as they evolve through time.'" *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 557 (1992) (citations omitted). Quite simply, the Supreme Court of Alaska has stated that it "subscribe[s] to the doctrine that [its] constitution is not a static document and that [the Constitution's] provisions must be construed in light of changing social conditions." *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 804 (Alaska 1975).

In addition to the consensus among high courts throughout the country regarding the general interpretation of state constitutions, state courts have specifically addressed the issue of constitutional construction in the context of their respective constitutional provisions for education. In evaluating its constitutional duty to provide an education, the Massachusetts Supreme Court stated that "[t]he content of the duty to educate which the Constitution places on the Commonwealth necessarily will evolve together with our society." *McDuffy v. Secretary of the Executive Office of Educ.*, 415 Mass. 545, 620 (1993). The *McDuffy* court continued to warn that "[o]ur Constitution, and its education clause, must be interpreted 'in accordance with the

demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning.'" *See id.* (quoting *Seattle Sch. Dist. No.1 v. State*, 90 Wash.2d 476, 516 (1978). Likewise, the New Hampshire Supreme Court has set forth a convincing recital of reasons for affording its education clause a contemporary interpretation:

> [g]iven the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing, and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas. A constitutionally adequate public education is not a static concept removed from the demands of an evolving world. It is not the needs of the few but the critical requirements of the many that it must address. Mere competence in the basics – reading, writing, and arithmetic – is insufficient in the waning days of the twentieth century to insure that this State's public school students are fully integrated into the world around them. A broad exposure to the social, economic, scientific, technological, and political realities of today's society is essential for our students to compete, contribute, and flourish in the twenty-first century.

Claremont Sch. Dist. v. Governor, 142 N.H. 462, 474 (1997).

As demonstrated by the foregoing, state judiciaries have expressed their understanding of their respective education clauses as templates for public education to be applied in appropriate conformance with societal advances. The Appellate Division's *CFE III* decision improperly interprets the language of the education clause in a literal and impractical manner. The authors of the Constitution's education provision deliberately employed reserved language in order for the words to acquire a meaning appropriate with the times. In *CFE III*, the Appellate Division failed to give the words in the education clause a meaning sufficient to satisfy today's education needs. This failure is a direct contravention of recent decisions of other states' highest courts as well as a patent disregard for the intent expressed by the framers of the education clause.

POINT V

THE CONSTITUTIONAL MANDATE OF ARTICLE XI §1 IS NOT SATISFIED WHERE THE LEGISLATURE DELEGATES ITS RESPONSIBILITIES TO A POLITICAL SUBDIVISION WHICH FAILS TO FULFILL THAT MANDATE

The constitutional mandate of Article XI §1 is not satisfied where the Legislature delegates its responsibility to a political subdivision which fails to fulfill that mandate. The *CFE III* decision is replete with references to the failure of New York City Board of Education, or the City itself, to properly allocate education funds. *See CFE III*, 295 A.D.2d at 16-17. This so called "pointing fingers" argument has been expressly rejected by the trial court in *Levittown*. *See Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 94 Misc. 2d 466, 527-28 (N.Y. Sup. Ct., Nassau County, 1978). The trial court there adopted the language of the original plaintiffs which stated "whether the Legislature chooses to run a centrally mange system out of Albany, or to delegate responsibility to artificially created school districts well may be a permissible option. What cannot be delegated by the Legislature, however, is responsibility for the end product." The Court also buttressed its argument by stating that it is the State's "[o]bligation to maintain and support a thorough and efficient system of free public schools, [and] the State must meet that obligation itself or if it chooses to enlist local government it must do so in terms which will fulfill that obligation." I*d.* (quoting *Robinson v. Cahill*, 62 N.J. 473, 509 (1973)).

According to the rationale of *CFE III*, if the State provides what purports to be adequate levels of state education aid to New York City, its obligations under the Education Article of the State Constitution are satisfied. If the Education Article of the State Constitution required only

sufficient state funding of education, the State would not be in violation of the Constitution if the City accepted state education aid but failed to spend any of it on education. This is a patently absurd result. *CFE III* fails to recognize that the Education Article requires the Legislature to provide for the maintenance of a "system" of common schools. The word "system" connotes obligations broader than merely providing funding, and connotes the responsibility to ensure that system provides all children the opportunity for a sound basic education. The implication by the Appellate Division that it the State not the exclusive guarantor of a sound basic education ignores the clear intent of the Education Article and the Court of Appeals Decisions in *Levittown* and *CFE I*. Finally, giving the State the ultimate responsibility for providing all children with the opportunity for a sound basic education does not eliminate the stewardship function of local school boards. It only requires that the State be ultimately responsible for whether the local schools are providing the minimum adequate education required by the Constitution.

CONCLUSION

Based on the foregoing, it is respectfully requested that the Decision and Order of the Appellate Division, First Department, dated June 25, 2002, be reversed and Judge DeGrasse's Supreme Court Decision and Order, dated January 31, 2001, be reinstated.

Dated: March 20, 2003

By: _____

Robert E. Biggerstaff,
DeGraff, Foy, Holt-Harris, Kunz & Devine, LLP
Attorneys for New York State Association
of Small City School Districts, Inc.
90 State Street
Albany, New York 12207
(518) 462-5300

of Counsel:

Robert E. Biggerstaff, Esq.
Amy F. Quandt, Esq.