STATE OF NEW YORK: COURT OF APPEALS

CAMPAIGN FOR FISCAL EQUITY, INC., *et al.*,	:	New York County Index No. 111070/93
Plaintiffs-Appellants.	:	
vs.	:	
THE STATE OF NEW YORK, *et al.*,	:	
Defendants-Respondents.	:	

Preliminary Statement

As long as a school system is "functioning," and can demonstrate that students are graduating and that a growing cohort is doing better on standardized exams, an appellate court may find it difficult to evaluate whether there is a constitutional deficiency in the level of educational opportunity offered to *all* of the children whose education has been entrusted to that school system. On a cold record, the impact of serious deficits in resources may be misunderstood. Major detriments may sound minor on paper. However, as the representative body of the tens of thousands of teachers who live and breathe the school day with their students, the United Federation of Teachers ("UFT") believes the Court should be left with no doubt regarding the painful truth that the trial court heard described to it by witness after witness: tens of thousands of New York City children are being deprived of the sound basic education guaranteed to them by the New York Constitution.

In the abstract, one might not fully comprehend how "overcrowding" can impede learning. But can any of us imagine being a student in a school system in which space is so inadequate that gymnasia, guidance offices, shop rooms, cafeterias, hallways, stairwell landings, and even bathrooms are all routinely used for classes? Or where teachers in elementary schools,

in those all-important first years of learning, routinely have more than 28 students in each class? Or where the average high school class has five students more than the average class in the rest of the state (and seven more than the average in all districts excluding the "Big Five" urban districts)?

It may be too easy for a reader to dismiss the significance of a report that shows 79% of New York City's public schools having problems with heating, ventilation, and air conditioning. But can any of us imagine being a student in December, January, or February in any of the many classrooms lacking adequate heat? Can any of us imagine being a student in District 23, where, as the trial court heard, in one school the pipes would burst if the boiler were fired to normal pressure; in another, rooms are damaged and closed on an annual basis because of roof problems; and in others, rooms become unusable because of water seepage?

The enormous trial record speaks for itself, and the UFT trusts that its voice need not be added to that of the plaintiffs in elaborating on the ways in which the First Department's decision is based on a selective and distorted view of the evidence. We cite to the above examples simply to emphasize the importance of visualizing from the record exactly what school life is like for many of the City's public school students. The schools do not provide either the environment or resources necessary to guarantee each child in the system an opportunity to receive a sound basic education.

In placing itself in the shoes of the public school children, the Court must also consider what the impact of upholding the First Department's untenable interpretation of the Education Article would be: Are the children of this State constitutionally guaranteed no more than an eighth grade education? Given the social, intellectual, and economic demands of the complex world we live in today, how can the First Department's ruling be squared with the State

Constitution's mandate that every child be provided with an up-to-date sound basic education? Indeed, the appellate court's definition of "sound basic education" is so backwards-looking that upholding the definition would render the Education Article meaningless for all foreseeable future generations of students.

But it is not just the State's students who are at risk. The State Constitution itself is at stake. Which will end up being hurt depends on how "optimistic" one is. On the one hand, if one believes that, with an affirmance of the result below, the Board of Regents would lower their standards and schools would do no more than constitutionally required, then the preposterously low threshold will doom unfortunate students to an outdated education that leaves them completely unprepared to participate meaningfully in their community. On the other hand, if one believes that the Regents would continue to require districts to provide a high school education, then the constitutional standard of an eighth-grade level would be frozen at a level so low as to have no practical application. It is not a light matter for a court to render a constitutional provision a nullity.

The very inflexibility of the First Department's standard goes against the living nature of constitutional provisions. The First Department erred not just because of where it set the constitutional minimum, but because of *how* it set that minimum—tying the standard specifically to the current eighth grade skill level. Without the flexibility to adapt to changes in society, a constitutional protection will ultimately become irrelevant. One must doubt that the Legislature of 1894 intended for its (purposely) undefined, flexible requirement that students be "educated" to become so rigidly defined by the courts as to potentially render it obsolete for future citizens.[1] It should not be forgotten that the issue in this case concerns the application of a constitution.

[1] In their report to the Constitutional Convention of 1894, the drafters of the Education Article stressed the importance that common schools would have for future generations: "[T]heir importance for the future cannot be

In addition to addressing the errors that the appellate court made in defining and applying the constitutional standard to the record before it, we address below a factual issue raised by the court's remarkable conclusions that greater spending will not improve education, and that the inadequate monies coming from the State funding mechanism are not the cause of the City's educational woes. In fact, improvement in the last two to three years has been achieved as some additional funds have been provided by the State. The sums do not meet the constitutional requirements—and with the press of current budget concerns they will not be continued absent a directive from this Court—but the positive impact they have generated is self-evident, particularly in the City's ability to recruit more certified teachers. This proof that resources can make a difference illustrates what the trial record and intuition already tell us: that reality runs counter to the First Department's insupportable conclusions that State funds are neither the cause nor cure of the City's school system failures.

Money does matter, and the City needs all the resources the Constitution requires—resources that will not be forthcoming unless the trial court's judgment in this case is restored.[2]

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overestimated. The public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before . . . ." 4 Revised Record at Constitutional Convention of 1894, at 695.

[2] The State certainly cannot take the position that its conduct here is justified by an unfavorable balance of payments with New York City. For, as determined by the New York City council, the City sends more money to Albany in taxes and fees than it receives in return.

ARGUMENT

I. THE FIRST DEPARTMENT'S DECISION IGNORES THIS COURT'S DIRECTIVE THAT THE "SOUND BASIC EDUCATION" REQUIRED BY THE CONSTITUTION MUST BE AN "UP-TO-DATE" EDUCATION

In fleshing out the definition of "sound basic education" in its prior opinion in this case, this Court explained that school children are entitled to "minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies . . . ." Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307, 317 (1995) [CFE I]. The Court's use of the phrase "up-to-date" is not surprising, since one would not have expected the Court to rule that the Constitution permits the provision of an outdated education. But that is just what the First Department has done.

A. The "Eighth Grade" Standard Must Be Rejected, Or Students Will Be Left With An Outmoded Education Education That Does Not Satisfy The Education Article

Shockingly, the First Department concluded that the State need only provide students graduating from high school with an eighth grade education. (295 A.D.2d 1, 8 (1st Dept. 2002)). The basis for the court's decision that high school education is constitutionally irrelevant was its conclusion that to "function productively" in society means simply "the ability to get a job, and support oneself, and thereby not be a charge on the public fisc." (295 A.D.2d at 8).

As an organization of teaching professionals, when we press for reforms to turn around low performing schools we constantly ask our members whether they would send their own children to those schools. As an *Amicus*, we would respectfully ask the Court a similar question: Would you send your children to a school in a district whose only constitutional obligation was to provide an eighth grade education to its students? We ask the Court to think through the ramifications of the First Department's reasoning. First, if "supporting oneself" is the

constitutional touchstone, what would happen if the State were to show that there exists in the world a significant number of jobs that do not require even an eighth grade education? Would the First Department then conclude that the Education Article requires even less than that?

Second, how can the First Department's reasoning be squared with this Court's firm statement that the Constitution requires an up-to-date education in math, science, and social studies? How can that statement have any meaning if all that is required is "the ability to get a job, and support oneself, and thereby not be a charge on the public fisc?" Surely, this Court had additional concerns in mind when it required everyone to be given the opportunity to learn math, science, and social studies. The day that public school education becomes no more than the means to keep people off welfare is the day that all of the commonly understood nobler purposes of education disappear. Thomas Jefferson's views still hold true: education is an important "engine" of government for preserving freedom and liberty, and for "ameliorating the condition, promoting the virtue, and advancing the happiness" of people. (See letters from Thomas Jefferson to C.C. Blatchly, 1822 (Washington ed., vii, 263); to James Madison, 1787 (Washington ed., ii, 332 and Ford ed., iv, 480); and to George Wythe, 1786 (Washington ed., ii, 7)).[3]

Moreover, it is crucial for the Court to see that even if one did accept—for the sake of argument—the First Department's conclusion that to "function productively" means no more than the ability to get a low-paying job, the court's application of that formulation is severely flawed. The appellate court apparently assumed that the vast majority of "low-level service jobs" (to use the court's words) are simple enough jobs that require no more than an eighth grade

[3] Jefferson was impressed with the huge sums expended on education by New York, in comparison to his own state of Virginia. "What a pigmy to this is Virginia become, with a population almost equal to that of New York! And whence this difference? From the difference their rulers set on the value of knowledge, and the prosperity it produces." (Jefferson to Joseph C. Cabell, 1820 (Washington ed., vii, 188)).

education. That rationale shows a fundamental misunderstanding of the current economic situation, both locally and globally. In New York City in particular, much of the job market revolves around the financial sector where the need to compete for even "low-level service jobs" requires a high school diploma. (PFOF ¶¶ 150-56; Mills 1146:22-1147:9, 1222:13-21; Darling-Hammond 6460:5-21).

Perhaps 50 years ago, it would be possible to conclude that an eighth grade education was adequate preparation for the bulk of the population to go out into the world and find any manner of "low-level" (again, the court's words) employment. Such is not the case today. As our state and nation have evolved, so have the requirements of "low-level service jobs." An up-to-date education is absolutely essential to keep current with those changes. Our economy is now global, and the world is a much more technologically sophisticated place today than it was decades ago. Jobs—and job requirements—similarly require far higher skills and far more sophistication at every level of the economy, including the First Department's "low-level service jobs." (PFOF ¶¶ 150-56).

For instance, 50 years ago, automobile mechanics did not need to know how to operate diagnostic computers. Bank tellers did not need to understand the current span of complicated financial transactions. Travel agents and airline counter personnel did not need to navigate numerous computerized programs to book or switch passenger flights. These and so many other developments were completely ignored by the First Department. The State Constitution is not stagnant; it does not say "a sound basic education as of the date this article was enacted." It requires an up-to-date education, and even were the First Department correct—and it is not—that public schools need do no more than prepare students for getting a job and staying off public assistance, virtually all available jobs *at all levels of the workforce* require far more than the

traditional eighth grade education provides. Thus, even under the First Department's flawed standard, an up-to-date education would require a far higher and broader skill set than what the First Department posited.

In fact, the evidence for this was right in the record for the First Department to see. In the New York State Board of Regents' proposal for state aid for the year 2000-01 and beyond, the Regents remarked on the harm done to the City's schoolchildren from the State's persistent under-funding:

> [T]he [New York City School] district has never enjoyed State Aid increases that reflect the cost of educating all students to levels accepted in the rest of the State. Student results have shown that many schools have great difficulty in meeting student needs. *The State and nation must face the exorbitant costs for public assistance, criminal justice and lost productivity that such education failure requires.*

(Px2064 at 3) (emphasis added). Perhaps the First Department decided not to equate "levels accepted in the rest of the State" with constitutional requirements. But how could it have ignored the significance of a conclusion by the Regents—the State officials entrusted with overseeing public school education—that the "education failure" caused by insufficient funding has led to increased cost for public assistance and criminal justice? Based on the data, one comes to one of these inescapable conclusions: Either the students are not being provided with even the eighth grade education the First Department would mandate (improper a standard as that is), or that "eighth grade" education is not sufficiently up-to-date to keep students from having to rely on the public fisc. However one chooses to describe the data, the ultimate conclusion from the evidence is the same: a harm of constitutional dimensions has been occurring for years.

B. The First Department's Failure To Properly Weigh The Evidence Led It To Ignore The Requirement That *All* Students Receive An "Up-To-Date" Education

There is no aspect of a student's experience in the City's public schools that goes untouched by a lack of resources. The facilities are often decrepit, the classrooms are overcrowded, there is a chronic shortage of even the most basic school supplies, and important instruments of learning are missing or inadequate. For example, although computers are an integral tool in a 21st century education, thousands of students do not benefit from their use because of a shortage of computer labs, a high percentage of outdated computers, and even buildings with electrical wiring too old to support modern computer equipment. (PFOF ¶¶ 853-53, 981-83, 1005-06).

However, the First Department minimized the significance of plaintiffs' overwhelming evidence, apparently taking the view that unless every school within an entire school system could be said to have failed, then no Education Article claim could be proven. Having no doubt satisfied itself that there were *some* students in New York City who actually had a functioning classroom with basic supplies, textbooks, and access to necessary modern educational resources (such as computers and science labs), the First Department was able to shrug off the trial evidence as anecdotal. The court's analysis not only constitutes a misreading of the record, but it marks a profound error of law. The Education Article does not require a school system to provide *some* students with a sound basic education. It guarantees a sound basic education to *all* students. The First Department ignored that constitutional mandate, failing to see that the proper inquiry is whether a failure to provide appropriate educational services was caused by a systematic problem within the school system—*not* whether any such failure resulted in harm to every school or classroom throughout the school system.

For example, in evaluating the trial evidence, the First Department stated that "[a]lthough there was evidence that some schools have no science laboratories, music rooms or gymnasia, there was no proof that these conditions are so pervasive as to constitute a system-wide failure, much less one that was caused by the school financing system, or one that can be cured only by a reformation of that system." We will address the court's statement about "causation" and "cure" below, but first we must address the court's conclusion that the plaintiffs did not demonstrate a "system-wide" failure. What could the court have meant, in the context of the evidence before it?

Here is just a small part of the evidence that the plaintiffs put forward regarding the inadequacies of science instruction, one of the areas of instruction specifically referred to in the above quote, and specifically embraced by this Court as a necessary element to a sound basic education (see CFE I, 86 N.Y.2d at 317):

- Approximately 16,600 high school children do not even have so much as a science laboratory at their disposal. (Zedalis 4750:3-4751:20, 4752:13-4754:2; Px1533);

- A 1999 report by the City Comptroller showed that 100% of 19 schools surveyed had substantial equipment deficiencies. (Px1242 at iii); and

- There was testimony that the only laboratory equipment in one district was a "skeleton standing there," and that public school students had never seen a Bunsen burner or a beaker. (Cashin 309:16-309:19; Evans-Tranumm 1390:3-12).

Faced with this evidence, how could the First Department conclude that such evidence did not amount to a systemic failure and therefore a constitutional violation? Is the court's threshold that all one million school children students must be hurt before the failure is deemed systemic? Or perhaps the First Department's threshold is 500,000 children. How many students must a school system condemn to inadequate learning opportunities before the courts will conclude that the inadequacy has risen to the level of a constitutional violation? Obviously, the

First Department was not troubled by the magnitude of the number of children who do not even have labs, even though the Regents exam that students must pass to receive a high school diploma includes a science lab component. And unless the court believes that it is sufficient for a district to have science labs even if the labs do not have any meaningful equipment, then it must have considered a survey of 19 schools—all of which are substantially deficient—to be simply anecdotal rather than representative of an obviously greater problem.

To suggest—as the First Department has—that a system cannot be deemed to have failed unless the impact of its failures is felt in every single school within a district the size of the City school district is to say that tens, if not hundreds, of thousands of individual students deprived of a sound basic education may be left with no remedy. Plaintiffs' evidence is beyond anecdotal, and the numbers of students deprived of a minimum level of science instruction is large enough that it must be attributed to a systemic failure. Indeed, how badly must a system have failed when a superintendent for a community school district has to admit in a 1998 capital budget request that she is seeking funds to create science labs for the schools under her control that lack them. (Px894 at 2, explaining the need for "a hands-on learning experience"). To think that a superintendent at the turn of the 21st century would have to submit a budget request asking for the ability to provide the most basic form of science instruction—instruction that is required in anyone's interpretation of a sound, basic education—is that not an indication of a persistent shortage of funds in the school system?

The First Department's dismissive stance towards plaintiffs' evidence reveals a sad irony. The problem with denying thousands of New York City schoolchildren even the barest of science equipment is that, as everyone with a high school education outside the City knows, schools throughout the rest of the State provide such basic science instruction to all of their

students. In 1894, when the Education Article was enacted, maybe it would not have mattered so much if thousands of City schoolchildren did not have a science lab and the science instruction that flows from that. What makes that deprivation constitutionally relevant today is the fact that students outside the City are routinely provided with such facilities. That is, the fact that a majority of schools provides its students with such equipment and that it is part and parcel of what the Regents currently expect a student to master in science is what informs the determination that an "up-to-date" education includes the performance of experiments in science laboratories.

We emphasize this point because this Court's statement that the constitutional standard is one of adequacy, and not equality, is often misapplied—as it was by the court decision below. See 295 A.D.2d at 18. True, "equality" is not the touchstone of the "sound basic education" requirement. A particular school district is free to go beyond what an "up-to-date" education requires, and as long as students are receiving an "up-to-date" education, there can be no complaint under the Constitution that other students elsewhere are receiving more. However, the definition of an "up-to-date" education must itself be informed by a consideration of what students are being taught in other school districts throughout the state. When most students statewide are being provided with a particular level of education, then such education should by definition be factored into what is considered part of an "up-to-date basic" education. If only a handful of school districts were teaching algebra and other forms of higher mathematics, perhaps the absence of such instruction would not be in derogation of a sound basic education. But if most districts have determined that their students require learning in algebra for its application to society's current needs, should not teaching in algebra become considered part of an "up-to-date" education, to be provided to *all*. Were it otherwise, then students trapped in yesterday's

curriculum could be left unable to function and compete in a world populated by the majority who receive the *de facto* up-to-date minimum education standard. And that is why the City school system's failure—in areas such as science laboratory instruction—is one of constitutional dimension.[4]

It is frustrating to note that the education article was adopted over 100 years ago as a means of implementing a statewide system that would depart from the "unsystematized delivery of instruction then in existence." Board of Education v. Nyquist, 57 N.Y.2d, 27, 47 (1982). The City is part of that statewide system. Yet, while the State has guided the development of the up-to-date minimum education now available to a majority of New York public school students—and, indeed, created an accountability system that mandated that development—the State's insufficient funding has simultaneously prevented the City from providing all of its own students with that same up-to-date education.

II. THE AMOUNT OF RESOURCES *DOES* AFFECT THE QUALITY OF THE EDUCATION, BUT THE CONSTITUTION DOES NOT REQUIRE PLAINTIFFS TO PROVE THAT PLAIN FACT

As noted above, the First Department concluded that plaintiffs lacked evidence that any educational failures (which the First Department found not to be "system-wide") were either caused by the school financing system, or could be cured by reformation of that system. (295 A.D.2d at 10-11). That conclusion is not only based on a skewed interpretation of the trial record, but it flies in the face of experience. Small successes, known widely to the public—some

[4] With a seeming mixture of sarcasm and misplaced righteousness, the First Department discounted overwhelming evidence that the City's libraries do not contain up-to-date learning materials, suggesting that a library consisting predominantly of "classics" should not be viewed as depriving students of a sound basic education. That remark reflects either a misinterpretation of the Record or a unique definition of the literary canon: So far as we are aware, books such as "The Tomorrow of New York," published in 1958, and "The Picture History of Africa," published in 1918, do not constitute "classics." (Px27). The fact is, far too many of the City's school libraries are either outdated, not functioning, lacking a certified librarian, lacking *any* librarian, or lacking appropriate facilities. (Px27). Meanwhile, the Regents have concluded (not surprisingly) that there is a strong link between access to library materials and student performance. (Px1027).

of which were even recognized by the First Department itself—have amply demonstrated that the Education Article and common sense are both right: insufficient resources cause deficient educational opportunities, and greater resources cures the defect.

The court below itself pointed to evidence that a number of "time on task" programs (specialized reading courses, tutoring, and summer school) can help at-risk students. (295 A.D.2d at 17). The court could also have taken notice of the widely publicized success that has been achieved in the lowest-performing City schools through the expenditure of significant additional monies. As part of the effort to improve such schools, a Chancellor's District was created by which lower performing schools were removed from their "home" districts, placed under the Chancellor's purview, and provided with special attention and additional resources. The record shows that those schools benefited significantly from the added resources. (PFOF ¶¶ 1635-36).

"Extended Time Schools" are another case in point. Out of the unfortunately large number of New York City public schools that were placed under registration review by the State Education Department (the "SURR" schools), the most needy were designated by the Board of Education for an experimental program in which the amount of instructional time was extended. These "Extended Time Schools" (referred to as "ETS") received additional resources that simply could not be provided to the rest of the City school system under the present State funding mechanism: lower class size; updated curricula in math and English Language Arts ("ELA"), and the professional development of staff and time to help teachers apply it; extra time for tutoring students; and tuition reimbursement and a loan forgiveness program for recruiting teachers. Those additional resources have enabled ETS schools to come off the SURR list, and to outpace non-ETS SURR schools in their student performance. See id., Affidavit of Randi

Weingarten, sworn to March 11, 2003 ("Weingarten Aff."), ¶ 7.[5] Successes like that show why the battle to cure Education Article violations is necessarily a battle to secure adequate funding. Money matters. The extra resources that the ETS schools received are resources that should be in every school. (See Px1043 at 31, noting research showing that professional development of teachers has a positive effect on student learning; PFOF ¶¶ 533-93, summarizing evidence that professional development in the City's schools is inadequate). The First Department's conclusion that the City's failures are neither caused nor cured by a lack of resources is simply insupportable.[6]

Moreover, nothing in the Education Article requires plaintiffs to prove the (obvious) connection between resources and student performance. It is one thing to say, as this Court has instructed, that plaintiffs must prove that a school system's failure to provide *educational opportunity* was caused by the State's funding system. It is quite another thing to say that a plaintiff must prove that the lack of funding caused *poor student performance*. The Education Article contains no such requirement. Nor does it require that plaintiff prove that additional funds would improve student performance (rather than student opportunity). In focusing on a perceived failure by plaintiffs to measure the "empirical effect" of school facilities on student

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[5] In fact, within the very first year of the ETS program, seven of the 12 ETS schools come off the SURR list. This past year, 18 New York City schools succeeded in coming off the SURR list, half of which were in the Chancellor's District, ETS schools, or both. See Weingarten Aff., ¶7.

[6] Perhaps to assuage its own doubts on this point, the First Department suggested that educational problems could be better handled by spending money outside the school system. (295 A.D.2d 17). Leaving aside the lack of evidentiary support for such a conclusion, that is not a policy choice permitted by the State Constitution. As the dissent eloquently explained:

> 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.

(295 A.D.2d at 34 (Saxe, J., dissenting in part)).

performance (295 A.D.2d at 10-11, quoting 187 Misc.2d at 47-9, 719 N.Y.S.2d 475), the court established an evidentiary burden that plaintiffs do not bear.

Based on this Court's framework of essentials that any sound basic education must have (adequate facilities, instrumentalities of learning, and instruction of up-to-date curricula), the lower court set forth seven required categories of resources, accepted by the First Department as well (295 A.D.2d at 9-10): sufficient numbers of qualified teachers, principals, and other personnel; appropriate class sizes; adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum; sufficient and up-to-date books, supplies, libraries, educational technology and laboratories; suitable curricula, including an expanded platform of programs to help at risk students by given them "more time on task;" adequate resources for students with extraordinary needs; and a safe orderly environment. As a matter of law, then, if a school does not provide those items, a sound basic education does not exist. To ask plaintiffs to prove that the deprivation of any of the elements of a sound basic education actually had an empirical effect on student performance not only goes beyond this Court's precedent, but it goes beyond the level of proof one could reasonably expect from any plaintiff.

The question for any court faced with an Education Article challenge is whether a school system deficiency was great enough to lead to a presumption that harm occurred and a violation occurred. As touched upon *supra*, no one would dispute that an up-to-date science education necessarily includes laboratory experience. If science laboratory facilities and equipment are not working for a day or two, a school system can be forgiven the temporary lapse. But when the evidence shows that 16,000 high school children had no science laboratory at all (Zedalis 4750:3-4751:20, 4752:13-4754:2; Px1533), how can it be that an Education Article claim must

be dismissed unless the plaintiff can provide a sophisticated enough regression analysis to establish that the lack of lab training—that is, the lack of an up-to-date science education, which is one of the fundamental criteria for a sound basic education—had a demonstrable effect on the students' performance? To the contrary, if the law did not permit a presumption of harm in such a circumstance, enforcement of the Education Article would be nearly impossible.[7]

The First Department's reasoning was no doubt influenced by its focus on educational outputs such as test results. However, in weighing Education Article claims the focus must be on educational *inputs*, and not outputs: Sufficient inputs must be provided so that *all* students have an opportunity to learn; if there are some students who have the ability to overcome inadequate inputs, that does not absolve a school system from its constitutional failure to provide sufficient inputs for everyone else. The First Department stated that "the mere fact that some students do not achieve a sound basic education does not necessarily mean that the State has defaulted on its obligation." (295 A.D.2d at 15). But the opposite is also true—a school system need not produce 0% performance out of its students before a court can recognize that insufficient inputs are being provided.

Moreover, the First Department's focus on outputs led it to adopt a standard of proof for Education Article claims that in fact will discriminate against the very students most harmed by

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[7] We have focused above on science labs, but the First Department similarly minimized the evidence of system failure and causation on every aspect of plaintiffs' case. It is difficult to see how the court satisfied itself that persistent horrendous building conditions could not have deprived students of educational opportunity when for more than a decade the experts have said the opposite. In 1989, the Board of Education explicitly recognized that the "poor conditions of our schools are limiting education opportunity and creating impediments to learning." (Px190). Nine years later, the State Department of Education admitted that many school environments throughout the State—particularly those with children in need—"work against effective teaching and learning." (Px1043). And a commission organized to study the City's school problems in 1995 concluded that learning was suffering from poor building maintenance—and that funding was inadequate to fix the problem. (Px2030).

The nature of the harm described by these education experts makes it virtually impossible to quantify—a point eloquently touched on by former schools Chancellor Rudy Crew: "The influence of the school setting on educational outcome is often subtle and difficult to measure. Virtually everyone can think of at least one occasion when they learned despite the setting." (Px108A, Message from the Chancellor). But all would agree with

the school system's failures. In satisfying itself that plaintiffs failed to show that the current state funding mechanism deprived New York City schoolchildren of the opportunity to obtain a sound basic education, the court pronounced that "the City students' lower test results in comparison with the rest of the State 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." (295 A.D.2d at 17). In other words, following the court's logic, if the students suffering from a constitutional deprivation of education inputs can be labeled as students whom one would expect to perform badly anyway, then no Educational Article claim could ever be proven. According to the First Department's thinking, the poor minority student without the science lab could never show that the lack of a science lab deprived him of an education because his bad test scores were obviously caused by his socio-economic condition.

This conclusion is fatally flawed for two reasons. First, the First Department's *unsubstantiated* causation analysis is *directly contradicted by the Record*. In fact, the State Education Department has favorably cited studies proving that *after controlling for socioeconomic status*, students in schools with substandard building conditions perform worse than those in above average conditions—and, more specifically, the age and availability of science equipment directly affects science test scores. (Px1027 at 11).

Second, in addition to ignoring the reality that at risk children *can* be helped by improved resources, the First Department's thinking is the antithesis of the constitutional requirement of educational opportunity: the court's outputs-based causation requirement denies educational opportunity to those the court deems unworthy of such opportunity—forever condemning those

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Chancellor Crew that society has a "moral obligation" to assign students to "safe and well-designed schools." And in New York, that "moral" obligation has constitutional dimensions as well.

who need the most help to an unconstitutionally small piece of the pie. None of the framers of the constitutional provision calling for New York to provide all its students a sound basic education could possibly have believed that this is how the provision would be interpreted 100 years later.

III. ADDITIONAL RESOURCES ARE NEEDED TO PROVIDE ALL CITY SCHOOLCHILDREN WITH THE LEVEL OF QUALITY INSTRUCTION THAT THE STATE EDUCATION DEPARTMENT WILL REQUIRE TO BE IN PLACE BY SEPTEMBER 2003

In his concurring opinion, Presiding Justice Tom expressed his concern that the school system's inability to recruit and retain sufficient numbers of qualified teachers could present constitutional consequences in the future:

> If the system cannot attract or retain qualified educators, then students will not receive a sound, basic education, as that standard has been constitutionally applied. . . .Hence, at some level, how the school system is funded, and where the funding is distributed, and how teacher compensation is coupled with rigorous State standards, relates to the quality of the students' education. To the extent that the adequacy of the education made available by the New York City school system, in its many parts, is impaired by the system's inability to attract and retain qualified teachers, a constitutional issue, then, may be presented.

(295 A.D.2d at 24-26 (Tom, J.P., concurring)).

Justice Tom further expressed his concern that the City would not be able to fulfill the State's mandate that no uncertified teachers be in the school system by September 2003:

> [O]n the question whether the system can attract and retain sufficient qualified teachers as to offer a sound basic education, the record demonstrates some disturbing trends. The trial court points out that uncertified teachers will be removed from the system by 2003, and that the Board of Education has not been allowed to hire uncertified teachers since 1999. Considered in isolation, this would seem to be a beneficial goal in terms of anticipated pedagogical results. Yet, what if these gaps cannot be filled by qualified teachers—with qualifications evaluated by certification plus such other factors that enhance the effectiveness of the

> teaching? The trial court's decision sets forth statistics indicating that New York City teachers have had difficulties in getting certified. The system seems to have trouble attracting competitive numbers of potential teachers who can even meet the requirement of certification. The issue then becomes not whether the system can get the best of the best, an ideal goal that is not likely achievable in the immediate future, but whether there will be adequate qualified replacements as experienced teachers retire or, in many schools, transfer.

(295 A.D.2d at 24 (Tom, J.P., concurring)).

Justice Tom's concerns are justified. For many years, the City has not been in a position to compete in the teaching job market. Past and current students have already felt the impact of this problem. And although funding received in 2002 to solve its collective bargaining impasse with *Amicus* significantly improved the City's ability to hire new qualified teachers to fill this year's vacancies (increasing the percentage of new hires from 46% to more than 90%), it did not erase the longstanding recruitment and retention problems that have plagued the system.

This year, only the SURR schools needed to have all their teachers certified. Next year, the State will require every school within the system to have all its teachers certified. As both Justices Tom and DeGrasse suggested, this is a crucial pedagogical requirement and resource to insure children receive a sound basic education. Yet the State has not provided the City with adequate resources to meet its own directive. Nor has it provided the City with adequate resources for teacher training to complement Statewide curriculum initiatives and enhanced student performance standards. Or with resources necessary to furnish teachers with sufficient facilities and materials to provide sound basic instruction to all children in the school system. And the State—as the new Executive Budget suggests, with its $1.2 billion state aid cut—will not make this a priority unless this Court upholds the trial court's findings and reinstates its judgment that the present level of funding is unconstitutional.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief for Plaintiffs-Appellants, the Order of the Appellate Division should be reversed.

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STROOCK & STROOCK & LAVAN LLP

By:_____
Alan M. Klinger
180 Maiden Lane
New York, New York 10038
(212) 806-5400

Of Counsel:
Adam S. Grace

- and -

CAROL L. GERSTL, ESQ.
260 Park Avenue South
New York, New York 10010
(212) 598-9532

Co-Counsel for *Amicus Curiae*
United Federation of Teachers