

To be Argued by:
Mark Gimpel

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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

Plaintiffs-Respondents, :

-against- :

THE STATE OF NEW YORK, et al., :

Defendants-Appellants. :

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: New York County
: Index No. 111070/93
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BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT Defendants-appellants the State of New York, Governor George E. Pataki, and Commissioner of Taxation and Finance Arthur Roth (“the State” or “Defendants”) appeal from a decision and order of Supreme Court, New York County (DeGrasse, J.), entered on January 31, 2001, holding that the State’s educational funding mechanism, in its allocation of education aid to New York City, violates the Education Article of the New York State Constitution and has a disparate impact on minority public school students in violation of the implementing regulations of Title VI of the Civil Rights Act of 1964. Campaign for Fiscal Equity, Inc. v. State of New York, 187 Misc. 2d 1 (Sup. Ct. N.Y. Co. 2001) (“CFE Trial”).

The decision below must be reversed. The State of New York ranks third in the nation in education spending, and the New York City Board of Education (“BOE”) has more money per pupil than almost any other urban school district across the nation. Even though New York City contributes less than its fair share to its own public schools and some of BOE’s resources are wasted through mismanagement and fraud, certain City schools provide an exemplary education on less than the amount available on average to New York City’s public schools. While other schools have been adversely affected by the City’s underfunding and BOE’s mismanagement, the City’s school system satisfies the Constitution’s guarantee of a “minimally adequate educational opportunity.” Yet, in the face of these facts, plaintiffs ask this Court to hold the State responsible for all of the many factors affecting student performance and to assume judicial control over the complex array of education policy decisions that shape New York City’s schools.

Plaintiff-appellant Campaign for Fiscal Equity, Inc. (“CFE”), representing various advocacy groups, community school boards, and individual plaintiffs, commenced this action in 1993, claiming that the State’s

educational funding mechanism violated the Education Article of the State Constitution (Art. XI, § 1); the Equal Protection Clauses of the Federal and State Constitutions; the Anti-Discrimination Clause of the State Constitution (Art. I, § 11); and Title VI of the 1964 Civil Rights Act and its implementing regulations. Simultaneously, the City of New York (“City”) and the New York City Board of Education commenced an action against the State and other defendants alleging virtually identical claims. The trial court dismissed the City’s and BOE’s action in its entirety, and also dismissed certain plaintiffs and all of the claims from the remaining action, except those brought under the Education Article, the Anti-Discrimination Clause, and Title VI’s implementing regulations. Campaign for Fiscal Equity, Inc. v. State of New York, 162 Misc. 2d 493, 500 (Sup. Ct. N.Y. Co. 1994). On appeal, this Court dismissed all of plaintiffs’ claims for failure to state a cause of action. Campaign for Fiscal Equity, Inc. v. State of New York, 205 A.D.2d 272 (1st Dept. 1994).

The Court of Appeals affirmed the dismissal of all claims, except those brought under the Education Article and the Title VI regulations. Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307 (1995) (“CFE I”). On remand, plaintiffs were permitted to proceed with only two claims: (1) that the State’s mechanism for funding public education, in its allocation of aid to New York City, does not satisfy the minimal obligation imposed by the Education Article to “provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated”; and (2) that the State’s education funding mechanism has a disparate impact on minority students in New York City, in violation of Title VI’s implementing regulations. The latter claim must now be dismissed because the United States Supreme Court has held, subsequent to the trial court’s decision, that Title VI’s regulations do not create a private right of action.

As to the remaining claim, the Court of Appeals gave the trial court explicit instructions. It first directed the court to determine whether New York City’s public schools provide an opportunity for a “sound basic education,” as the Court of Appeals has held the Education Article mandates. CFE I, 86 N.Y.2d at 315. The Court held that this standard is one of “minimal acceptable facilities and services,” id. (quoting Board of Educ., Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 27, 47 (1982) (“Levittown”)) -- not a question of how schools can or should best serve their students. Rather, the Constitution requires that the schools provide “minimally adequate teaching of reasonably up-to-date basic curricula,” “minimally adequate physical facilities and classrooms,” and “minimally adequate instrumentalities of learning,” so that students can have the opportunity to

learn “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 316-17 .

While plaintiffs identified discrete problems in certain aspects of the City’s educational services, the education available in the City’s schools plainly exceeds these constitutional standards. The City’s schools have one of the lowest pupil-teacher ratios among large school districts nationwide, and according to the City’s own evaluation system, almost all of its teachers are at least “satisfactory.” Its educational materials and supplies rank at or near the “exemplary” level. School facilities are in fair condition or better, and are sufficient to permit children to learn, as required by the Education Article.

The performance of New York City’s students confirms that these educational resources more than satisfy constitutional requirements. Ninety-two percent of the City’s eleventh-graders demonstrate graduation competency in basic skills. New York City students also score near or above the national average in tests comparing their achievement in reading and math to that of students throughout the nation -- exceptionally good performance in light of the burdens faced by the City’s students. The New York City school system, despite its flaws, is widely acknowledged as one of the best large urban public school systems in the nation.

The trial court disregarded this evidence that the State’s public school financing system “provide[s] for a minimally adequate educational opportunity” for the City’s public school children. See CFE I, 86 N.Y.2d at 319. Instead, the trial court measured the constitutional adequacy of New York City’s schools, in particular the quality of its teachers, against the resources and performance of wealthy neighboring suburban school districts, even though the Court of Appeals has twice held that this type of comparative evidence has no relevance to an Education Article claim. See Reform Educational Financing Inequities Today v. Cuomo, 86 N.Y.2d 279, 284 (1995) (“REFIT”); Levittown, 57 N.Y.2d at 48. The trial court concluded, in effect, that the State was in violation of the Constitution if it was possible to improve the City’s schools. That standard has no anchor in the Education Article.

In answering the second question posed by the Court of Appeals -- whether any failure to provide a constitutionally adequate education was caused by the State’s education funding mechanism -- the trial court sidestepped several critical considerations. It did not seriously examine whether the total funding available to the City’s schools was sufficient to provide a sound basic education (even if it was not actually being used to that effect), whether available resources are squandered due to local mismanagement, or whether any shortfall in funding

is attributable to the City's failure to make an adequate local contribution. Instead, it held that "[t]he short dispositive answer to . . . the [] arguments [that current funding is sufficient to support a constitutionally adequate education and the City's mismanagement and underfunding is the cause of any deficiency] is that the State Constitution reposes responsibility to provide a sound basic education with the State . . ." CFE Trial, 187 Misc.2d at 80.

When these key factors, which were overlooked by the trial court, are taken into account, the answer to the Court's second question is an unequivocal "no." New York City spends more than almost all other urban school districts across the country -- \$9,500 per student (based on FY2000 data), or almost \$240,000 per classroom. Many schools in New York City, including those in Community School District ("CSD") 2 and local Catholic schools, provide excellent education with significantly less funding. And even if these resources were not sufficient, responsibility for any deficits in the City's educational services lies solely with BOE and the City, not with the State's funding mechanism. Indeed, since this lawsuit was commenced, the State Legislature has dramatically increased education funding for New York City of its own accord. By comparison, while supporting this lawsuit, the City has dramatically decreased the

proportion of the cost of public education in New York City that it absorbs. At the same time, BOE has wasted vast sums through mismanagement and corruption.

The trial court's decision is flawed and must be reversed. The ruling disregards the Court of Appeals' explicit instructions about the legal standard applicable to plaintiffs' Education Article claim, and ignores persuasive evidence that New York City's public schools provide at least the "minimally adequate educational opportunity" required by the Education Article. Moreover, the trial court's conclusion rests on the assumption that the State is solely responsible for the resource allocations, mismanagement, and fraud of all its localities -- an assumption that would turn the principle of local control over education on its head. Contrary to the trial court's ruling, plaintiffs failed to demonstrate that New York City's public schools do not offer their students the opportunity to acquire a sound basic education as required by the Constitution. Any shortcomings in the schools are due to the City's unwillingness to contribute its share of funding and BOE's failure to manage its resources wisely.

This court should reject plaintiffs' effort to use the Education Article as a tool for transforming the State's courts into the exclusive arbiters of education policy. As the Court of Appeals observed in Levittown, [The question presented in this appeal] is not whether education is of primary rank in our hierarchy of societal values; all recognize and support the principle that it is. . . . The ultimate issue before us is a disciplined perception of the proper role of the courts in the resolution of our State's educational problems, and to that end, more specifically, judicial discernment of the reach of the mandates of our State Constitution in this regard.

Levittown, 57 N.Y.2d at 50 n.9. Plaintiffs' claim, and the trial court's decision, extend far past any plausible interpretation of the Education Article. Accordingly, the trial court's decision should be reversed and judgment entered for the defendants.

ISSUES PRESENTED

1. Where the Court of Appeals has established that providing the opportunity for a sound basic education, within the meaning of the Education Article, demands only “minimally adequate” educational resources that allow students to acquire “basic literacy, calculating, and verbal skills,” did the trial court apply an erroneous standard when it found that public education is constitutionally insufficient unless it enables students to meet standards that far exceed basic aptitude and develop high-level intellectual and occupational abilities?

The trial court implicitly held that it did not.

2. Did plaintiffs establish at trial that New York City’s public schools do not provide a sound basic education, as defined by the Court of Appeals, despite overwhelming evidence demonstrating that the City’s educational resources and its student performance are more than “minimally adequate”?

The trial court held that they did.

3. If New York City’s schools are not providing students with a sound basic education, is the State’s educational funding mechanism the cause of this deficiency, where the evidence demonstrated that current funding is more than sufficient to support such an education, the Board of Education has mismanaged available resources, and the City has decreased its local contribution to its own public schools, and where plaintiffs failed to establish a correlation between increased spending and higher performance?

The trial court held that it is.

4. Can plaintiffs obtain relief through a private cause of action brought pursuant to Title VI’s implementing regulations, where the United States Supreme Court recently has held that Title VI does not create a private cause of action?

The trial court held, prior to issuance of this decision by the United States Supreme Court, that they can.

5. Even if the trial court’s determination of liability is upheld, is the remedy imposed by the trial court impermissibly overbroad, in violation of separation of powers principles, where it usurps the Legislature’s authority to allocate resources and choose among policy options for addressing any educational deficiencies that might exist?

The trial court held that it is not.

STATEMENT OF FACTS

The factual background of this case -- the structure of New York State's school system, the mechanisms for funding education at the local and state level, and the path of this litigation through New York's courts -- is complicated. But the story is straightforward. New York City's public schools, like those in other communities across the State, are governed largely at the local level. As with other school districts, the State supplements New York City's local funding of public education with state educational aid. Unlike most other places in the State, however, New York City provides less funding for education than would be expected based on its relative wealth.

Against this backdrop, plaintiffs alleged that the State's mechanism for funding its public schools results in education opportunities in New York City so deficient as to violate the Constitution's Education Article. The Court of Appeals, in considering the State's motion to dismiss, gave the trial court clear directions regarding how to determine whether New York City's public schools give their students the opportunity to obtain a sound basic education as required by the Constitution. Rather than adhere to the Court of Appeals' standard of "minimally adequate educational opportunity," the trial court measured the City's public education against a much higher standard that reflected its own vision of what public education ought to be. Having concluded that the City does not meet the standard it created, the trial court ignored overwhelming evidence that decisions by BOE and the City itself are the cause of any deficiencies that may exist.

1. THE STRUCTURE OF NEW YORK STATE'S SCHOOL SYSTEM

_____ Local communities play a critical role in the operation and funding of New York State's public schools. Because this role is central to the legal issues in this case, a brief overview of the structure of the public school system and the process for allocating education funding is useful.

A. Local Control Is the Hallmark of New York's Public School System

Local control over public education has characterized New York's public school system for more than 200 years. Since at least 1795, localities have exercised authority to divide themselves into school districts, raise funds for the establishment and operation of public schools, make curriculum decisions, and elect local school

commissioners and inspectors charged with supervising schools in each district and examining and certifying teachers. See L. 1795, c.75; see also 1894 L.N.Y. c. 556; L.1874, c. 421, ch. 242. Today, each local community continues to wield substantial control over the operation of its own public schools.

Structure and Powers of the Board of Education. New York City’s public school system is the largest in the United States, comprising approximately 1,189 schools, with a student population of 1.1 million. DTEV¹

Plaintiffs’ and defendants’ exhibits are denoted as “PX” and “DX”, respectively. Numbers preceded by “T.” refer to pages in the trial transcript. The name of the witness follows the relevant page number(s) (e.g., T.1234 Jones). “J.A.” denotes citations to pages in the four- volume Joint Appendix submitted to the Court. **Tab 1, ¶ 1; PX3149 (J.A. 494);** PX1167 (J.A. 492). During the 1999-2000 school year, it employed over 135,000 people, including approximately 78,000 teachers, 19,000 teacher aides, and 13,000 other administrators and pedagogical employees. DTEV Tab 1, ¶ 1; PX3149 (JA. 494).

In New York City, as in other communities, overall supervision of the public school system is vested in a local Board of Education (“BOE”). BOE is charged with the management and control of all aspects of educational affairs in New York City. N.Y. Educ. Law § 2552. Unlike almost all other localities, New York City appoints, rather than elects, the members of BOE. Compare Educ. L. § 2590-b(1)(a) (providing for appointment of New York City BOE) with Educ. L. §§ 2502, 2553(2), (10) (providing for election of boards of education in other localities). Of BOE’s seven members, the president of each of the five boroughs of New York City has one appointment, and the remaining two members are appointed by the Mayor. Educ. L. § 2590-b(1)(a). BOE in turn appoints a Chancellor (currently Harold O. Levy), who is responsible for the school system’s operation. Educ. L. § 2590-h;

¹Citations to “DTEV” are to the Defendants’ Trial Evidence Volume, which was submitted to the trial court after the conclusion of the trial. This 308-page volume, which is included in the Joint Appendix on Appeal, contains a detailed recitation of what defendants believe are the relevant evidentiary facts in this case and the legal conclusions that flow from them. (Defendants also submitted after trial a pared-down version of the evidence volume, labeled Defendants’ Requests for Findings of Fact and Conclusions of Law, and a post-trial brief.) Plaintiffs’ counterpart to the DTEV is their 1112-page Plaintiffs’ Proposed Findings of Fact and Conclusions of Law (“PPF”), also made part of the Joint Appendix.

DTEV cites are to tab and paragraph numbers in that volume. While the DTEV contains citations to the trial transcript and exhibits, all such primary sources relied on in this brief are cited in the brief itself. Of course, the Court may refer to the DTEV, as well as the PPF, in its discretion. For the Court’s convenience, the version of the DTEV on the CD-ROM portion of the Joint Appendix contains hyperlinks, which allow the user to go directly from the text of the DTEV to the transcript page or exhibit cited by clicking on that cite.

PX1167 (J.A. 486).

BOE has broad powers, duties, and responsibilities, which encompass teacher hiring; maintenance of school property and facilities; curriculum selection; and provision of equipment, books, and other instrumentalities of learning.² Specifically, BOE is empowered to:

- appoint superintendents, examiners, directors, principals, teachers, and nurses, Educ. L. § 2554(2);
- create, abolish, and maintain positions, divisions, boards, and bureaus, id. § 2554(2);
- take care, custody, control, and safekeeping of all school property and dispose of and sell all property, id. § 2554(4), (5);
- lease property for school accommodations, id. § 2554(6);
- purchase and furnish equipment, books, textbooks, furniture, and other supplies as may be necessary for the use of children, id. § 2554(7);
- establish, maintain, and equip libraries and playgrounds, id. § 2554(10); and
- authorize the general courses of study in public schools and approve the content of such courses, id. § 2554(11).

The New York City school district is subdivided into smaller community school districts (“CSDs”), each of which enrolls approximately 9,000 to 40,000 students. DTEV Tab 1, ¶ 2; DX19021 (see district summary report #2, numbers 1-32). Each CSD has its own elected community school board and selects its own superintendent. Educ. L. §§ 2590-c, 2590-d; T.2041 Spence. The CSD boards play a significant role in setting education policy for the system’s elementary and middle schools. They also issue annual “school district report cards” that measure the district’s academic performance on a school-by-school basis and the district’s fiscal

²The City’s Chancellor shares these powers and duties. See Educ. L. § 2590-h(17).

performance as a whole. Educ. L. § 2590-e(8). The CSD boards, however, no longer exercise any executive or administrative authority. Id.

BOE's internal assessment tools. In managing the City's public school system, BOE relies on its own set of internal rating tools to evaluate the quality of individual schools and teacher performance. These include the "PASS" review system and teacher performance reviews (also referred to as "U-ratings"). BOE has also conducted an in-depth assessment of the condition of school facilities (the "BCAS" survey).

To assess school quality, BOE employs a comprehensive system known as Performance Assessments in Schools Systemwide ("PASS") reviews. Under the PASS review system, schools are evaluated in a variety of categories, including quality of curriculum and instruction, professional development, and instructional resources. DX19269. PASS reviews are usually conducted over two days, and consist of reviews of school documents, such as school plans; an entry conference with the school leadership team; classroom observations; and an exit conference. DX10661, pp.9-17. Schools are rated using a five-point scale. A "5" indicates that the school fully meets the standard of an exemplary school; a "3" indicates that the school approaches the standards of an exemplary school; and a "1" indicates that a school is below acceptable standards. DTEV Tab 3, ¶ 40; DX10661, pp. 21-22. Hundreds of schools have been evaluated under the PASS review system since its inception in the 1996-1997 school year. DTEV Tab 3, ¶ 41; DX15140, p.1; DX10303, pp.2-3.¹ An analysis of the PASS reviews by defendants' expert witness showed that the average score for New York City public schools was a "4", demonstrating that these schools were close to meeting the standard of an exemplary school. DX19267; DX19269; T.16739-42 Rossell.²

BOE also prepares annual performance reviews of all teachers, conducted by principals and other teacher supervisors. DX10398; T.3087-89 Tames. These teacher performance reviews measure a range of qualities,

¹Following an independent evaluation of the PASS system by Bank Street College of Education, the PASS review was revised to use a five point-rating scale, rather than a three-point rating scale. T.16726-16729 Rossell. This rating system was used for all PASS reviews done during the 1998-1999 school year. According to an evaluation by BOE's Division of Assessment and Accountability ("DAA"), this change countered any rating inflation that might have existed under the prior scaling method. DX2375, p.14; T.16734 Rossell.

²Although plaintiffs' expert Robert Tobias, Director of BOE's DAA, testified that the PASS surveys were subjective, T.10119-20 Tobias, these assertions were flatly contradicted by his prior assertions and statements in BOE materials that the PASS review system was an objective and comprehensive assessment of schools, T.10595, T.10625-29 Tobias. Moreover, school superintendents called by plaintiffs testified at trial that they relied on the PASS reviews as an accurate portrayal of schools and a valuable tool in assessing how schools are doing. T.9873 Ward; T.7391-21 Zardoya.

including teacher punctuality, professional attitude, professional growth, resourcefulness and initiative, the teacher's effect on the character and personality growth of pupils, control of class, and maintenance of classroom atmosphere. T.3087-88 Tames. They also measure overall performance, with an "S" rating indicating satisfactory teacher performance, and a "U" rating indicating unsatisfactory performance. T.3088 Tames.

This rating system consistently indicates satisfactory performance by an overwhelming percentage of New York City's public school teachers. From 1995-1998, less than one percent of the teaching force has been rated "unsatisfactory" by those educators actually charged with the responsibility of observing and reviewing the teaching taking place in classrooms. DX11111, BOE008126; DX12739; DX19182, BOE008130; DX12739; DX19182; PX1167; T.17559-60 Podgursky; PX1167 (J.A. 485-92); PX1222.

BOE has also conducted an exhaustive survey of the condition of school buildings throughout the New York City school system for its own operational and planning purposes. This survey, called the Building Conditions Assessment Survey ("BCAS"), was completed in 1998 by independent consulting engineers retained by BOE. Two of plaintiffs' witnesses, Harry Spence (BOE Deputy Chancellor of Operations) and Patricia Zedalis (Chief Executive, BOE Division of School Facilities), identified the BCAS as providing the best information currently available about the system-wide conditions in New York City public schools. T.4247-8, 4252 Spence; T.4866-68 Zedalis.

The BCAS survey established that New York City's school facilities are generally in reasonable condition. The survey scored 251 different architectural, mechanical, and electrical components at each building on a scale of one through five, with "1" representing "good", "3" representing "fair", and "5" representing "poor." T.4400-4401 Zedalis; T18801-02 O'Toole. The BCAS data showed that 210 of the 251 components, or about 84%, received an average rating of fair ("3") or better. DX19706; T.18809-12 O'Toole. Of the remaining 41 components, 36 scored a "4" or above -- or closer to fair ("3") than poor ("5"). Id. Less than 2 percent of the components received an average score of more than "4." Id.

Mismanagement and Corruption at BOE. BOE's administration of New York City's public schools has been characterized by repeated instances of mismanagement, waste, and corruption. BOE's mismanagement is particularly marked with respect to its oversight of school facilities. The Chief Executive of BOE's Division of School maintenance testified at trial that BOE's maintenance budget has neglected preventative maintenance

altogether. T.4861 Zedalis; DTEV Tab 10, ¶ 445. Rather than spending available capital funds on keeping its facilities in good repair, BOE has spent a substantial portion of its available capital funds on upgrading BOE staff offices, educational enhancements and upgrades, and system expansion that has included unnecessarily expensive construction projects. DTEV Tab 10, ¶ 453; T.18741-50 O'Toole.

Extensive fraud and corruption in the City's school system have also been well-documented by a series of public commissions created to investigate these problems. For example, the Gill Commission, formed in 1988, identified three main areas of corruption: (1) theft (in the form of actual stealing or unnecessary patronage jobs); (2) lack of integrity in local school board elections; and (3) the failure to discipline teachers and principals who should be removed from their posts. T.19987, 19972-73 Stancik; DX12492, p.vi. The Commission's final report, submitted in April 1990 to the Mayor, the President of BOE, and the Chancellor, found "serious corruption or impropriety almost wherever we looked," including "millions squandered on unneeded patronage positions" and "thousands of dollars wasted through gross financial mismanagement." T. 19985, 19887-88 Stancik; DX12492, p.vi.

Likewise, the Stancik Commission, formed in 1990 by a Mayoral Executive Order and a resolution of BOE, and headed by Special Commissioner Edward Stancik, investigated and issued reports documenting the corruption and criminal activity in the City schools. T.19959-19962 Stancik; DX19574. Stancik testified at trial that he conducted major investigations of fraud and corruption in local school board elections in 1992 and 1996, and found that "[e]nforcement of the rules is so lax or unevenly applied as to be an invitation to commit fraud; and [a]t the same time,

politics too often invades the classroom and dictates educational decisions.” T.19993, T.20033-34 Stancik; DX10025-28, p.116.³

One of the Stancik Commission’s reports details the consequences of such fraud and corruption. A 1996 report documented the “misuse of school dollars and personnel” at CSD 9, where the board had been suspended twice in eight years. DX10025-34, p.2; T.20125 Stancik. Among numerous other instances of mismanagement, the Commission found that board members had voted to spend up to \$27,000 to hire a private attorney who had politically supported them, even though free legal services were available through Corporation Counsel and BOE’s legal services offices. T.21476-77 Stancik; DX10025-34, pp.13-19. The report concluded that rampant corruption took its toll on the 31,000 students in the district, and remarked that District 9 ranked “at the absolute bottom of citywide math and reading scores.” DX10025-34; p. NYS000628.

The situation in District 9 was just one of the many examples of corruption presented at the trial. Other examples presented through the testimony of BOE witnesses and investigative reports involved the selection of unqualified principals and other school personnel for patronage reasons, DX10025-38, pp.7, 91-92; T.20082-83 Stancik; wasting of money on expensive perks, T.20105 Stancik; failure to discipline or otherwise hold accountable teachers and principals, T.19987 Stancik; and outright theft and bribery, DX10025-39; T.20092-93 Stancik.

B. The State’s Role in Setting Education Policy and Standards

Although operation of the State’s public schools is largely the province of local boards of education, certain education policies and standards are formulated at the state level.

Board of Regents and State Education Department. Primary authority for the supervision of the State’s schools is vested in the Board of Regents. Educ. L. §§ 101, 201, 207. The Board of Regents is composed of 16 individuals (one from each of the State’s 12 judicial districts, and four from the State at large), each of whom is elected to a five-year term by concurrent resolutions of both houses of the state legislature. *Id.* § 202(1). The Regents are charged with overseeing the State Education Department (“SED”) and choosing the State’s

³The Chancellor responded to the Stancik report by removing the CSD 12 Board members and by nullifying the appointments of nine principals and one assistant principal. T.21827 Stancik; DX19568, p.7.

Commissioner of Education. Id. §§ 101, 207.

SED is the Regents' administrative arm, and is charged with the general supervision of the State's public schools. Id. § 305(2). The Commissioner's authority includes the power to examine and inspect the school facilities and curricula, and to advise and guide school officers and other public officials in all districts and cities in the State with regard to their duties and the general management of the schools. Id.

The Commissioner also plays a significant role in a statewide process for identifying and improving low-performing schools. The Commissioner is directed by regulation to evaluate the quality of schools, according to benchmarks that include statewide student performance standards in reading, writing, and mathematics, as well as a measure of student drop-out rates. See 8 NYCRR 100.2(p). The Commissioner may place under review those schools or districts that fall the "farthest" below these benchmarks statewide or otherwise have "conditions that threaten the health, safety, and/or educational welfare of students." 8 NYCRR 100.2(p)(5),(8). These schools, called "schools under registration review," or "SURRs schools," receive assistance from the Commissioner in conducting a resource, planning, and program audit of the SURRs district or individual school. See 8 NYCRR 100.2(p)(6)(i).

If the Commissioner determines that the school or district has not improved within three years, he "shall recommend to the Board of Regents that the registration be revoked," id., or reorganize the school under a corrective plan overseen by the State, id. at 100.2(p)(10)(ii). To assist schools in avoiding revocation, the Commissioner must appoint a team to undertake a resource, planning, and program audit of the school or district. In extreme cases of district-wide failure, the Regents Low-Performing Schools Advisory Council may recommend, and the Legislature may enact, special legislation designed to effect a temporary State take-over of that district's fiscal resources and educational programs, in order to protect the interests of district students.⁴

Citywide and statewide student competency tests. Several citywide and statewide performance indicators are used to measure student achievement. These include both achievement tests that are administered periodically as children progress through school, and competency tests that

⁴ See e.g., McKnight v. Hayden, 65 F. Supp.2d 113 (E.D.N.Y. 1999) (describing SURR process leading up to, and upholding constitutionality of, legislation, providing for comprehensive intervention by the Regents and Commissioner in the Roosevelt Union Free School District).

are a prerequisite for high school graduation.

For the past decade, New York City BOE has administered citywide reading and math tests to students in grades three through eight. T.10450 Tobias. The citywide reading test (“CTB-R”) is designed to “show what students understand about what they read,” and documents how New York City students compare to their peers in classrooms nationwide. DX10103, p 2. The citywide math test (“CAT5”) focuses on nationally-accepted achievement goals and “stresses higher order mathematics, including conceptual understanding, problem solving and realistic content, and multi-step logical reasoning.” T.10543 Tobias; DX10109; DX10108, p.2.

These tests are used in more than one-third of the school districts across the United States. T.10450 Tobias; T.18457-61 Mehrens. They are nationally normed, which means that the performance of New York City students can be compared with the performance of students from a national sample. BOE annual reports show that New York City’s students (grades 3-8) have scored at close to or above grade level for the years 1996-97, 1997-98, and 1998-99.⁵

Two sets of standardized tests are administered statewide to measure student performance at the elementary school level: the Pupil Evaluation Program (“PEP”) and the Program Evaluation Test (“PET”). The PEP test measures individual achievement in reading and math, while the PET test measures the general effectiveness of a school in teaching science and social studies. PX9, 140-141.

In 1999, the State also administered an English Language Arts (“ELA”) exam to fourth and eighth graders. This test is designed to measure students’ readiness to take the more rigorous Regents’ exams. Seventy-nine percent of City students performed at level 2 (“basic proficiency”) or above on the 4th grade ELA. PX875B; DX10202, T.10566 Tobias. While this score does not indicate performance at the skill level required by the demanding Regents Learning Standards (“RLS”) (described infra at 22), more New York City students (33 percent) display proficiency at the RLS skill level (i.e., performance level 3 (“proficient”) or better) than students in the State’s other four largest urban school districts (28 percent). DX10129; T.1740-42 Kadamus; T.10568-69 Tobias. Statewide, 48 percent of students scored at performance level 3 or above.

⁵Reading scores were 47.3 percent, 49.6 percent, and 48.5 percent for each of these years, respectively. Math scores were 60.4 percent, 63.1 percent, and 50.0 percent respectively. The tests were re-normed in 1999. PX2366; DX10103, p.2; DX10109, p.2; T.10559, 10566 Tobias.

A different battery of tests is used to determine whether students are eligible to graduate from high school. To obtain a high school diploma, students must demonstrate at least “basic” competency in various subjects. PX9, p. 141. Historically, students have had two options for satisfying this requirement. Those students participating in advanced “Regents” courses can take the “Regents Examination” and are eligible for a “Regents diploma” if they pass these tests. Students can also demonstrate competency by passing the “Regents Competency Tests” (“RCTs”) and receive a local diploma. PX9, p. 140; T.1847-54 Sobol.⁶ (Students may also receive a “high school equivalency diploma,” commonly referred to as a “GED”. See 8 NYCRR 100.7.)

The RCTs were developed by the Regents expressly for the purpose of allowing students who do not take Regents courses or exams to demonstrate competency in reading, writing, mathematics, science, global studies, and United States history and government. PX9, p. 140. The RCT in reading measures basic reading skills. T.1579 Kadamus. The RCT in math requires students to show competency in basic mathematical areas, including the “core areas of integers and rational numbers; graphing; measurement of geometric figures; ratio, proportion, and percent; probability and statistics; and consumer and job-related mathematics.” PX9, pp.140-41. Other RCT tests require students to demonstrate competency in writing, science, global studies, and United States history and government. PX9, pp. 140-141.

The majority of New York State’s high school graduates have obtained their diploma by passing the RCTs. During the past five years, for example, about 60 percent of all high school graduates in the State demonstrated competency on the RCTs, rather than passing the Regents examinations.⁷ T.16868 Rossell; DX19289; PX2064, p.13.

The Board of Regents has indicated its intent to gradually phase out the RCTs over a nine-year period, and replace them with Regents’ exams that test for achievement of the “Regents Learning Standards” (“RLS”). PX1032, p.13; T.1578 Kadamus. The RLS were adopted by the Board of Regents in 1996, as part of a sweeping education reform initiative that is still in its early stages. The RLS, which require students to pass five difficult Regents’

⁶Alternative tests are used to measure graduation competence for students with disabilities, who may obtain an individualized education program diploma. See 8 NYCRR 100.5,100.9.

⁷The total number of graduates on which this figure is based does not include students who obtain a high school equivalency diploma (a GED).

examinations, have been described as “rigorous” and “demanding” standards. T.1249; T.1727 Kadamus; DX1405A, p.2; PX1588, 4. In fact, Deputy Commissioner James Kadamus testified that the RLS are “beyond the standard of basic literacy, calculating and verbal skills” and “significantly beyond basic competency standards.” T.1715 Kadamus.

The RLS have yet to be fully implemented, and there are no plans to do so until at least 2005. At present, the Regents are attempting to develop a scoring system that provides a suitable transition from the State’s longstanding reliance on the RCTs. See PX1, p.5. In 2001, students are required to pass the English Regents’ exam, and passage of an additional Regents’ exam will be required in each of the following four years. See 8 NYCRR 100.5(a)(5); PX1, p.5. During this phase-in period, students may continue to receive a local diploma by scoring “55” or higher on any Regents’ exam they are required to take, even though students must score a “65” or above to receive a Regents diploma. Id.; see also 8 NYCRR 100.5(a)(5). According to the Regents, more than half of the districts in the State will require additional resources to achieve at the level required by the RLS. T.11275-76 Levy.

C. Funding of New York City’s Public Schools

Enormous sums of money are spent on educating New York City’s public school students. In FY2000, BOE received more than \$10.4 billion dollars from all sources to operate the City’s schools -- approximately \$9,500 per student. DTEV Tab 10, ¶ 292; T.1.5455-57 Donahue; T.16234-35 Murphy. If funding were spread evenly across the school district, a classroom of 25 students would have had approximately \$240,000 to spend during the 1999-2000 school year. DTEV Tab 10, ¶ 292; T.16234-35 Murphy.

This spending is equal to or exceeds that of almost all other large city school districts nationwide. For example, in the 1995-96 school year, New York City had the highest per pupil expenditures of the 10 largest school districts in the country. DX19118. In the 1998-99 school year, New York City ranked second in spending among districts nationwide with enrollments over 100,000 students. DX19038.

As detailed below, funds for education historically have come primarily from locally-generated revenues, supplemented by state and federal contributions.⁸ This reliance on local education financing has a long history. Not

⁸Federal contributions constitute only 4 percent of total education funds statewide. State Educ. Dep’t, State Aid to Schools: A Primer 1 (Dec. 2000) (“Primer”).

only have localities long been authorized to raise taxes for education, they have dedicated substantial funds to this end in order to receive State education financing assistance. See L. 1795, c.75 ; L.1812, c. 242, An Act for the Establishment of Common schools; L. 1814, c. 242; c. 1912. In the past, New York City's support of its public schools comported with this tradition; local funds constituted a greater proportion of education spending than did State funds. Yet as explained below, the proportion of funds New York City contributes to its own public school budget has declined over recent years -- despite indications that the City could provide additional resources -- while the proportion contributed by the State has increased.

State contribution. The amount of the State's supplemental contribution to education funding is decided each year by the Legislature and the Governor through the budgetary process, with input from the Board of Regents and SED.⁹ DTEV Tab 10, ¶¶ 283-84; T. 22127-29 King. The total amount of education aid appropriated by the Legislature is substantial. For example, the Legislature appropriated \$13.6 billion for public education statewide in the 2000-2001 school year. DTEV Tab 10, ¶ 284, DX19740. This figure included a record-breaking increase of \$1.1 billion over the prior year's amount. DX19740. In both FY1999 and FY2000, the Legislature actually appropriated more money for education aid than the amount requested by the Board of Regents. DTEV Tab 10, ¶ 284; T.1217-18 Mills; DX17219, p.704241. The combination of this considerable State funding with local and federal contributions makes New York State the third highest-spending state in the nation. CFE Trial, 187 Misc. 2d at 79, 90.

State education aid is allocated among various localities pursuant to a series of funding formulas. These formulas represent a legislative balancing of multiple and sometimes competing policy values, and are necessarily complex. Id. at 83-86; T.20171-75 Guthrie; T.12674-75 Berne. A key factor in the distribution of State aid is the capacity of each school district to raise local funds. DTEV Tab 10, ¶ 287; T.17963-64; T.18037 Wolkoff. Local revenues are raised primarily through property taxes. Because property wealth -- the local tax base -- varies substantially among school districts, the ability to generate local funding for education also varies significantly from community to community. To offset these disparities, the State aid formulas are highly "wealth-equalizing." DTEV Tab 10, ¶ 286; T.20181-82 Guthrie. That is, districts with a larger tax base (more property wealth) receive less aid

⁹New York City, which has more seats in the Legislature than any other city, county, or school district, is well-represented in this process. T.22119-20 King.

than districts with a smaller tax base (less property wealth). In fact, the poorest districts in the State receive over four times the aid given to the wealthiest districts. DTEV Tab 10, ¶ 287 PX2027, p.9. For example, in the 1997-98 school year, the lowest-wealth districts received \$4,949 per pupil, as compared with \$1,053 received by the highest-wealth districts. State Educ. Dep't, State Aid to Schools: A Primer 9 (Dec. 2000).

The formulas used to distribute State education aid generally fall into three categories. The bulk of state aid is termed “operating aid.” Id. at 14. It is distributed according to two factors: a district’s capacity to raise local funds and the number of pupils in the district. Id. at 12. The pupil counts used in these formulas reflect the number of students in average daily attendance, and they are also weighted for certain categories of students that may have additional or special needs (e.g., pupils with special educational needs). Id. at 12, 21; DTEV Tab 10, ¶ 288; T.17949-50 Wolkoff; DX17274, pp. 1-4. The second category of aid is “expense-based aid,” which is based on actual approved spending by a district and also incorporates a wealth-equalizing factor. Primer at 12. State funding for buildings and transportation services are both expense-based aid. Id. The third category is a flat grant per pupil, which distributes an equal amount of aid per pupil to every district in the State. Id.

Local education funding provided by New York City. The New York City school district is one of five “fiscally dependent” districts across the State. These districts have no independent taxing power of their own, and must rely on the City government to determine the overall level of local funding devoted to support public education. See CFE Trial, 187 Misc. 2d at 80-81.

The total amount of funds available from all sources to New York City’s BOE has increased over recent years, from \$8.2 billion in FY1997 to more than \$10.4 billion in FY2000. DX10014-40; T.15472 Donahue. But even as BOE’s total budget for the City’s public schools has increased, the City has decreased its share of education spending. Although in the past, the City provided a greater proportion of funds for education than did the State, the State’s contribution now exceeds the City’s. From FY1994-95 to FY1999-2000, the State’s share of New York City’s combined state and local education funding increased from 47 percent to 51 percent, while the City’s share decreased from 53 percent to 49 percent. DTEV Tab 12 ¶ 562; T.22221-24 King; DX19737; see also CFE I, 86 N.Y.2d at 334 (Simons, J., dissenting in part).

New York City, however, has a much greater capacity to raise local revenues than the rest of the State.

DTEV Tab 12, ¶ 545; T.18139-43 Wolkoff. This is reflected in the City's Combined Wealth Ratio ("CWR"). Designed to measure a school district's capacity to raise local funds for education relative to other districts in the State, the CWR – which is the "wealth-equalizing" component of the State's school aid formula -- is based on two factors: the actual value of taxable real property in a district, per pupil, and adjusted gross income in a district, per pupil. The evidence at trial showed that, as measured by the CWR, the City is a wealthy jurisdiction compared to most other districts in the State. DTEV Tab 12, ¶¶ 548-557; T.18041-46 Wolkoff. For example, in 1995-96, the City had a CWR higher than 446 of the State's 683 districts; in other words, it was wealthier than 62% of the school districts in the State with respect to its ability to raise education funds. T.18044 Wolkoff.

But New York City's funding of education does not correspond to its relative wealth. For example, in 1996-97, New York City raised only about \$4,000 per pupil from local resources, as compared with the State average of \$6,200 per pupil -- a shortfall of approximately \$2.4 billion for that year. DTEV Tab 12, ¶ 560; T.18108 Wolkoff; DX19399. If New York City had devoted the same percentage of the full value of its property tax base to educational purposes as did the rest of the State on average, its local contribution to education would have increased by about \$1.4 billion. DTEV Tab 12, ¶ 559; T.18128-29 Wolkoff; DX19407. These figures are representative of the City's funding practices during the period at issue in this case.

Another measure of the City's substantially under-average education funding is its "lost levy" -- the "amount of local tax revenue lost because a district didn't tax itself at the state . . . median . . . tax rate." T.19275 Kadamus. In 1999-2000, the City's lost levy was \$841 million out of a total lost levy of \$1.73 billion statewide. T.11231 Levy; T. 19726 Kadamus. More revealing, though, is the City's "effective lost levy," which is derived by considering only the lost levy of districts that spend less than the State average per pupil and have relatively low test scores, *i.e.*, below 645 on the English Language Arts exam. T.19276 Kadamus. Compared to these similarly situated districts, the City's \$841 million lost levy represented 95% of the total of \$878 million. T.11232 Levy.

Not only could New York City raise substantially greater funds for education if it matched the contributions of other localities, but the City already has additional funds in its coffers. During each of the last several years, the City has run budget surpluses in excess of \$2 billion. DTEV Tab 12, ¶ 544; T.11731 Rubenstein. The surplus was estimated at \$2.9 billion for 2000. PX13816, p.4.

Even BOE itself has run substantial budget surpluses over recent years. It had surpluses of \$226 million,

\$259 million, \$212 million, respectively, for the 1996-97, 1997-98, and 1998-99 school years. T.15482-83 Donahue.

2. HISTORY OF THE PRESENT LITIGATION

A. Brief Overview of New York State’s Education Article

The Education Article, enacted in 1894, requires the Legislature to “provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. Const. art. XI, § 1. Its framers had a limited purpose: to guarantee the continued existence of the system of “common schools” then in place, and thereby to ensure that all children who were not otherwise receiving an education would be able to attend and receive free instruction at a common (i.e., public) school.

Significantly, by 1894, the Legislature had already enacted such a system to provide for the maintenance and financial support of public schools in every locality in the State. Those laws: (a) authorized localities to divide themselves into school districts, raise additional monies for the establishment and operation of common schools, determine their own course of study in those schools (in addition to the subjects that the State required to be taught), and elect school commissioners who were charged with supervising and managing schools in each district and school inspectors who were charged with examining and certifying district teachers; (b) required every child between the ages of eight and sixteen to regularly attend a school in which reading, spelling, writing, arithmetic, English grammar, and geography were taught, or receive equivalent instruction by a competent teacher elsewhere; and (c) authorized the State to raise by tax “such sum as the legislature shall annually determine necessary for the support of common schools in the state,” and use these funds to supplement local education funding according to a formula using population, actual attendance, and other stated criteria. See 1894, c. 556; L. 1874, c. 421; L. 1812, c. 242; L. 1795, c. 75.

In approving the Education Article, the members of the Constitutional Convention of 1894 sought to ensure the continuation of the existing public school system, rather than to require creation of a new system or impose new obligations on the Legislature. See Judd v. Board of Educ., 278 N.Y. 200, 210 (1938) (“While the provisions of article XI of the Constitution formally establish the public policy of the State, . . . they merely crystalize into fundamental law in mandatory form earlier decisions made by the people and recognized by the Legislature since

the organization of the State and the adoption of the first Constitution.”). Until that point, the “common school system [had] rest[ed] simply on statutory law, easily abrogated by any capricious legislature.” 3 Revised Record at Constitutional Convention of 1894, at 695. In addition, it was anticipated that enactment of the Article would help to ensure that public schools were available in localities that had faced difficulties in establishing schools, particularly in rural areas of the State. See id.

Far from requiring increased State funding or oversight of education, the Education Article embraced the widely accepted concept of local control of education -- including the right (and obligation) of local communities to utilize local tax revenues to meet diverse local education needs -- a principle that both the United States Supreme Court and the Court of Appeals have found not only rational but essential for effective delivery of public education. See Rodriguez, 411 U.S. at 49-50; Levittown, 57 N.Y.2d at 45-46. Accordingly, it was expected that the Legislature would fulfill its obligation under the Education Article by continuing to rely on local school districts to administer local schools and provide all or most of the funding necessary to support public schools, and by supplementing local funding with State subsidies where necessary.

Two seminal Court of Appeals cases construing the scope of the Education Article confirm this historical perspective. In Levittown, the Court of Appeals considered the claim of property-poor school districts contesting disparities in education funding that resulted from reliance on local funds to finance education. Then, as now, districts with high property values could more readily raise greater revenue for education than property-poor districts. The Levittown plaintiffs alleged that these funding disparities led to unequal educational opportunities, in violation of both the Education Article and the Federal and State Equal Protection Clauses.

The Court acknowledged the existence of “significant inequalities in the availability of financial support for local school districts, ranging from minor discrepancies to major differences, resulting in significant unevenness in the educational opportunities offered.” Levittown, 57 N.Y.2d at 38. It held, however, that the Education Article provided no guarantee of equal educational opportunities:

What appears to have been contemplated when the education article was adopted at the 1894 Constitutional Convention was a State-wide system assuring minimal acceptable facilities and services in contrast to the unsystematized delivery of instruction then in existence within the State. Nothing in the contemporaneous documentary evidence compels the conclusion that what was intended was a system assuring that all educational facilities and services would

be equal throughout the State. The enactment mandated only that the Legislature provide for maintenance and support of a system of free schools in order that an education might be available to all the State's children. There is, of course, a system of free schools in the State of New York.

Id. at 42 (internal citations omitted).

The Court also explained its understanding of the constitutional obligation imposed on the Legislature. The Education Article required only the opportunity to obtain a “sound basic education,” which was satisfied “[i]f what is made available by this system . . . may properly be said to constitute an education.” Id. at 48. Moreover, a violation of the Article could be demonstrated only by establishing a “gross and glaring inadequacy” in the school financing system. Id. at 49.

The Court of Appeals affirmed this interpretation of the Education Article in REFIT v. Cuomo, 86 N.Y.2d 279 (1995), a case decided on the same day as CFE I. Like the Levittown plaintiffs, the plaintiffs in REFIT claimed that severe disparities in education funding violated the Education Article. The Court held that “even a claim of extreme disparity cannot demonstrate the ‘gross and glaring inadequacy’ we referred to in Levittown.” 86 N.Y.2d at 284. In rejecting this claim, the Court noted that “the primary aim of [the Education Article] was to constitutionalize the established system of common schools rather than to alter its substance. . . . Clearly, equal educational opportunity was not the intended result of the amendment -- an adequate education was.” Id.

B. The Court of Appeals’ Decision in CFE I

In its 1995 decision denying a motion to dismiss in this case, the Court of Appeals considered plaintiffs’ claims and reaffirmed the narrow construction of the Education Article set forth in Levittown and REFIT. CFE I, 86 N.Y.2d 307 (1995).¹ CFE I provided clear guidance to the trial court about the circumscribed meaning of the term “sound basic education,” how to evaluate whether New York City’s public schools in fact satisfied this constitutional standard, and, if not, how to determine whether the State properly can be held liable for any inadequacies.

¹At that time, the Court of Appeals also affirmed the dismissal of all claims brought by the Community School District plaintiffs, as well as the claims asserted by CFE and individual plaintiffs under the Equal Protection Clauses of the State and Federal Constitutions, the Anti-Discrimination Clause of the State Constitution, and Title VI itself. Id. at 312.

The Court of Appeals gave the trial court a template for defining a “sound basic education” -- the sole adequacy requirement imposed by the Article. According to the Court, a constitutionally sufficient education must offer students the opportunity to learn:

the basic literacy, calculating, and verbal skills necessary . . . to function productively as civic participants capable of voting and serving on a jury. . . .

The State must assure that some essentials are provided . . . [including] minimally adequate instrumentalities of learning such as desks, chairs, pencils, and . . . 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.

CFE I, 86 N.Y.2d at 316-17.

The Court of Appeals also observed that to prevail on an adequacy challenge, plaintiffs must show that any deficiencies in New York City’s public school system are so patent and debilitating as to clearly raise an inference that students are actually being denied an “opportunity to obtain such fundamental skills as literacy and the ability to add, subtract and divide numbers.” Id. at 319. The Court explicitly instructed the trial court not to rely exclusively on the Regents’ and Commissioner’s standards as benchmarks of educational adequacy, for the reason that “many of [those] standards exceed notions of a minimally adequate or sound basic education -- some are also aspirational.” Id. at 317 (emphasis added). The Court was referring to the standards reflected in the Regents Competency Tests (“RCTs”) -- as opposed to the Regents Learning Standards, relied on by plaintiffs as the benchmark for a sound basic education, which were not adopted until a year later.

Finally, the Court of Appeals emphasized that the trial court had an obligation to determine whether a “causal link” existed between any failure to provide a sound basic education and the State’s mechanism for funding public schools. Id. at 317-318.

3. THE TRIAL COURT’S DECISION

On remand, a lengthy trial was held in Supreme Court, New York County before Justice Leland DeGrasse. The two issues at trial were: (1) Has the State failed to ensure that New York City’s public school students receive adequate funding to afford their students the sound basic education guaranteed by the Education

Article of the New York State Constitution?; and (2) Does the State’s funding mechanism have an adverse disparate impact on the City’s minority public school students in violation of Title VI’s implementing regulations? CFE Trial, 187 Misc. 2d at 3.²

On January 9, 2001, the trial court issued a decision holding that the education provided to New York City students falls below the constitutional floor set by the Education Article of the New York State Constitution, and that the State’s education funding mechanism has caused this violation. CFE Trial, 187 Misc. 2d at 4. The court also held that the State’s school funding system has an adverse and disparate impact on minority public school students in New York City in violation of the implementing regulations of Title VI of the Civil Rights Act of 1964. Id.

A. The Trial Court’s Definition of a “Sound Basic Education”

Plaintiffs had sought to persuade the trial court that for purposes of the Education Article, a sound basic education should be deemed equivalent to the educational resources necessary to enable students to satisfy the Regents’ Learning Standards (“RLS”), even though this standard had not yet been implemented as the basis for the statewide student competency test (and still has not been fully implemented today).

In response, defendants noted that the Court of Appeals had defined the constitutional standard as one of “minima[l] adequacy.” The trial court could not rely on attainment of the RLS to measure compliance with the Education Article, defendants contended, given that the State still permitted students to demonstrate the minimum competency required for graduation by passing the RCTs, and that the Court of Appeals had regarded the RCTs themselves as perhaps “aspirational.” Defendants further argued that because 90 percent of the City’s eleventh graders achieved graduation competency status by passing either the RCTs in reading and math or the more difficult Regents exams in these areas,³ New York City’s school system could not be

²Plaintiffs’ claims under the implementing regulations of Title VI must now be dismissed in light of the Supreme Court’s recent decision in Alexander v. Sandoval, 121 S. Ct. 1511, 1523 (2001), which held that there is no private right of action under Title VI’s implementing regulations. See infra, Point IV. Therefore, the evidence at trial discussed below will be limited to a description of plaintiffs’ and defendants’ evidence on the Education Article claim. For a full discussion of the facts relating to plaintiffs’ Title VI regulations claim, see Defendants’ Post-Trial Brief, pp. 68-89; Defendants’ Proposed Findings of Fact and Conclusions of Law (“DFF”) at 55-68; DTEV Tab 13, ¶¶ 264-296.

³This figure also includes students with disabilities who pass alternative tests designed to measure graduation

deemed to have a “gross and glaring” inadequacy in school “inputs” essential for a sound basic education. DTEV Tab 2, ¶ 34; PX2, p. 11; T. 17221 Walberg.

The trial court stated that it agreed with defendants that the Education Article requires a “sound basic education,” not a “state of the art” education, CFE Trial, 187 Misc.2d at 11, and acknowledged that the Court of Appeals had defined this term to mean those “minimally adequate” services, facilities and instrumentalities of learning needed to “provide[] the opportunity to acquire the basic literacy, calculating and verbal skills necessary to enable them to function as civic participants capable of voting and serving as jurors.” CFE I, 86 N.Y.2d at 316. Nevertheless, the trial court expanded this definition by substantially elevating the achievement and ability levels contemplated by the Education Article and the decisions of the Court of Appeals, thus augmenting the resource and funding requirements that had to be met to satisfy the constitutional standard.

First, the trial court suggested that being “capable” of voting and serving on a jury is not just a matter of basic competence, but requires sophisticated knowledge of complex issues such as global warming, DNA evidence, and statistical analyses. CFE Trial, 187 Misc. 2d at 13-14. Further, even though the Court of Appeals’ definition included no mention of employment whatsoever, the trial court concluded that a “sound basic education” must be defined with reference to the projected needs of New York City’s local labor market, and suggested in particular that students needed to acquire the “high-level academic skills” required to “compete successfully for good jobs” in the “high technology sector.” Id. at 17.

Second, even though the court had previously disclaimed reliance on the RLS, noting that “some of the [new Regents’] standards require work that exceeds a sound basic education,” id. at 12, the trial court found that a sound basic education requires the opportunity to obtain these high level skills. See id. at 13-18. Based on this assumption, the trial court defined the services, facilities, and instrumentalities of learning (“inputs”) required for a sound basic education to include resources that it had previously acknowledged went beyond what was “minimally adequate” and beyond what the State itself required. Thus, for example, the court concluded that a sound basic education required that all or most teachers in New York City’s public schools be certified rather than only temporarily licensed, id. at 25, that teachers hold qualifications beyond state certification, id. at 25, and that students

competency. See supra at note 8.

receive comprehensive arts instruction and physical education as well as the most advanced instructional technology available, id. at 37-39.

B. The Trial Court’s Evaluation of the Adequacy of New York City’s Public Schools

Having set forth its own definition of a “sound basic education,” the trial court proceeded to evaluate various educational inputs and student outcomes according to this elevated standard, to determine whether New York City’s public schools provide students with an opportunity for a sound basic education. Specifically, the court examined teacher quality, school facilities and classrooms, instrumentalities of learning, and student graduation rates and test scores. Id. at 23-68. Although the Court of Appeals had recognized the need to evaluate the City’s public schools for a systemic “gross and glaring inadequacy” in essential inputs, the trial court sought to determine only whether one or more public school inputs are “inadequate” in the sense that they could affect student learning -- without considering whether the input involved was essential to education. See id. at 68-99.

Moreover, in finding various inputs “inadequate,” the court relied upon plaintiffs’ evidence that compared New York City’s public school resources and student outcomes with those of other districts.

The trial court also criticized the City’s public school system in areas where there was no evidence of non-compliance with State requirements.

1. Teacher Quality

In assessing the quality of New York City’s teachers, the trial court relied primarily on comparative evidence. It contrasted New York City’s resources to those of other districts in the areas of teacher certification, teacher experience, teacher educational background, teacher salaries, and other alleged measures of teacher quality. Id. at 24-33.

For example, even though the overwhelming majority of New York City teachers (87 percent) are certified by SED, see PX1222 -- and thus deemed competent to teach -- the trial court criticized the quality of the City’s teachers. Based on expert witness testimony regarding data collected in Texas in the 1980s, the court found that teachers’ passage rates on certification exams were predictive of teacher performance, and concluded that there was “some evidence that New York City teachers are in general less qualified than those in the rest of the State.” CFE Trial, 187 Misc. 2d at 27-29 (emphasis added). The court further concluded that New York City teachers have

fewer years of experience and a higher attrition rate than those in the rest of the State, crediting plaintiffs' evidence that inexperienced teachers are assigned disproportionately to schools with the greatest number of at-risk students (although BOE is itself responsible for teacher assignments, in accordance with collective bargaining agreements negotiated by the City), id. at 29, and that the average New York City teacher attended a less competitive college than teachers in the rest of State, id. The court rejected defendants' data to the contrary, which showed that New York City teachers are more likely to have a Master's Degree plus thirty credits, on the grounds that defendants failed to show that these additional thirty credits affect teacher quality. Id. at 30. The court also stressed its finding that New York City cannot compete with nearby suburban districts for quality teachers because of salary differentials and teaching conditions. Id. at 33-35.

Moreover, at the same time that the court relied upon comparative evidence, it disregarded defendants' systemic evidence regarding teacher quality. Defendants offered evidence based on BOE assessments of teacher performance ("U-ratings" and "PASS" reviews). Id. at 31. These reviews established that almost all New York City teachers are rated satisfactory by those charged with observing them in the classroom, and that on average, New York City's public schools are rated as close to being exemplary or model schools in terms of their quality. Id. at 31-32. In discrediting this evidence, the court cited the testimony of current and former BOE personnel who contradicted these internal reviews on the grounds that unsatisfactory ratings are rarely given to teachers and that the PASS reviews are too rosy. Id. at 32-33.

2. School Facilities and Classrooms

In assessing the condition of New York City's public school facilities and classrooms, the court relied on BCAS data and capital plans. Id. at 39-45. Although the BCAS data showed that 84 percent of the building components in the entire New York City public school system were in "fair" condition or better, see supra at 15, the trial court focused on discrete structural deficiencies identified in this report. Id. at 42-44. Determining that it was required to assess the effect of physical conditions on students' ability to learn, the court found that certain poor conditions had some negative effect on student performance, but acknowledged that plaintiffs' evidence did not establish the magnitude of this effect. Id. at 46.

The trial court also found that New York City public school classrooms are overcrowded, id. at 49-56, even though New York City's pupil-teacher ratio in the 1999-2000 school year was one teacher for every fourteen

students -- one of the *lowest* pupil-teacher ratios in the country among districts with more than 25,000 students.

DTEV Tab 4, ¶¶ 58, 59; Tab 10, ¶ 338; T. 20393-94 Smith; DX19048; T. 16242 Murphy. Moreover, even if class size, rather than actual number of teachers, is the relevant inquiry, New York City's class sizes -- ranging from 26-29 -- are consistent with the provision of a sound basic education and with prevailing class sizes nationwide. DTEV Tab 4, ¶¶ 68-69; PX1167; T.20421 Smith; T.16160 Murphy.

3. Instrumentalities of Learning

The trial court interpreted the Court of Appeals' directive calling for "minimally adequate instrumentalities of learning, such as desks, chairs, pencils, and reasonably current textbooks" to be non-exhaustive. CFE Trial, 187 Misc. 2d at 56. Defendants' evidence had demonstrated that over the past four years, there has been sufficient funding to provide every student with current textbooks in the four basic subject areas of reading, math, science and social studies, with enough money left over to buy an additional set of four textbooks for every student. DTEV Tab 5, ¶¶ 116-19; PX3114, p.9; PX1169, pp.51-52, 75.

Despite its finding that the quantity and quality of textbooks was adequate, the court found that this "cannot remedy the negative effects of past shortages." CFE Trial, 187 Misc. 2d. at 57. The court credited plaintiffs' evidence that schools' library books are inadequate in number and quality, and that funding was insufficient despite SED requests for more money. Id.

The court acknowledged that plaintiffs presented only anecdotal evidence of lack of classroom supplies and equipment, and therefore, the court could not make a finding as to their adequacy. Id. at 58. Despite defendants' evidence of a favorable computer-student ratio, the court concluded that many computers are obsolete and that "an additional number of aged '486s' and Apple computers were too weak to power recent operating platforms, Internet or CD-ROM applications." Id. at 59-60.

4. Outputs: Graduation/Dropout Rates and Test Scores

The court gauged student performance by looking at the results of several standardized tests. Despite the court's initial observation that it would not rely on the RLS -- the more rigorous, aspirational standards that require passage of the Regents' exams -- as the standard for gauging a "sound basic education," id. at 12, the court effectively did so when it found that the RCTs, which measure basic competency in reading and math, embodied standards too low to be probative of school adequacy, id. at 61. In defense of this conclusion, the court cited the fact

that the SED has indicated it will phase out the local diploma option (which relies on the RCTs) by 2005, at which point students will be required to pass the Regents exam. Id. at 62.

At the same time, the court declined to rely on evidence that 90 percent of New York City’s eleventh-graders achieve graduation competency status. See supra, at 34. The court also refused to accord any weight to evidence that New York City students score at the 50th percentile nationwide on nationally-normed tests, on the ground that these tests do not assess performance according to fixed criteria. Id. at 66-67.

As to drop-out rates, the court found that 30 percent of New York City students drop out, and of those who graduate, many take more than four years. Id. at 60-61. In reaching this conclusion, the court ignored SED’s own data regarding the City’s drop-out rates, instead relying on plaintiffs’ statistics. Plaintiffs’ assertion was derived from data provided by BOE, which acknowledged that it identified as “drop-outs” any students who did not graduate within seven years, even if they were “still enrolled,” including the “many” students who might “ultimately complete their education, probably by obtaining a GED.” PX3777, p. 17. The GED requirements, in the trial court’s opinion, were too minimal to prepare students for productive citizenship. CFE Trial, 187 Misc. 2d at 61.

C. The Trial Court’s Determination Regarding Causation

The trial court acknowledged the Court of Appeals’ instruction that plaintiffs had to show a “causal link” between the present funding system and any proven failure to provide a sound basic education. Id. at 68 (quoting CFE I, 86 N.Y.2d at 318). However, the court then proceeded to analyze the issue as though defendants, rather than plaintiffs had the burden of proof on this issue. Moreover, the court’s analysis either ignored or minimized a number of central considerations and drew fallacious conclusions regarding those it did examine in detail.

First, the trial court criticized defendants’ extensive expert testimony and data showing that there was no link between the higher funding and higher student achievement in New York City. CFE Trial, 187 Misc. 2d at 69-79. Defense experts, Drs. Armor and Hanushek, had found that increased spending and resources do not correlate with improved student performance, in general, and in New York City schools in particular. The court found that the experts’ studies were flawed by a decision to “level the playing field” by adjusting for socioeconomic factors.

Id. at 70-72.¹ Defendants had argued that this methodology, uniformly employed in analyses of this sort, was necessary to fairly evaluate the effect of resources on City students' performance, given the universally-recognized fact that factors outside the school significantly affect student performance. The trial court, however, rejected this premise, implicitly ruling that schools were constitutionally required to compensate for any external factors that might affect student performance. See id. at 71-72. The court further criticized both witnesses' studies for employing single-year resource data; focusing on the effect of overall spending on student achievement, rather than tracking the effect of resources provided to individual students; failing to adequately account for certain variations in school costs and resources; and selecting certain resource variables the court viewed as insignificant. Id. at 71-75.

Notwithstanding these critiques, the court concluded that Dr. Hanushek's studies cast "some doubt" on the link between spending and outcomes. Id. at 75. But the court still held that additional resources can boost student achievement, relying on its prior conclusions that effective teachers and administrators can boost performance, that smaller class sizes can help performance, and that New York City's at-risk students require an "expanded platform" to increase academic achievement, especially literacy programs and summer school. Id. at 75-76.

The court then outlined the potential costs of increased educational resources. Id. at 77-79. While maintaining that the choice of measures to remedy a violation of the Education Article lies with the Legislature, the court nevertheless gave examples of what would be required to meet school needs. Id. The court concluded that better teachers and administrators would require salary increases totaling at least \$390 million; enhanced professional development would cost (conservatively, in the court's view) \$34.1 million; improved school buildings would cost at least \$327 million annually for maintenance, plus \$11.2 billion for capital costs; and other resources would also be required to boost the performance of at risk students. Id.

Despite these calculations, the court failed to consider whether the resources currently available to the New York City BOE were sufficient to provide a sound basic education. The court rejected the State's statistics showing that New York City spends more per pupil than most urban school systems, and found that gross spending is not relevant because it does not account for local costs or show where money is spent. Id. at 90. The court also

¹ The trial court specifically articulated this criticism only in connection with Dr. Armor's studies. It can be assumed, though, that the court meant it to apply equally to the analyses conducted by Dr. Hanushek, who also used the "leveling" method.

rejected defendants' comparisons to City Catholic schools, which spend less and produce better student performance than their public school counterparts, and certain CSDs within the City that are national models for urban education despite operating on less money. Id. at 91. Nor did the court give any weight to defendants' evidence indicating that BOE's spending is inefficient and that New York City's local contribution is significantly lower than the statewide average. Id. at 92-99. The court further found that BOE surpluses are signs of good budgeting, not abundance. Id. at 91.

The court also criticized the State's education aid formulas for failing to adequately align resources with need -- even though the majority of aid formulas specifically account for a district's capacity to raise local revenues for education. Id. at 82-90. The court took issue with the political process for allocating education aid and other budgetary items, on the ground that it was, according to the court, decision-making by "three men in a room." Id. at 83, 88.

Finally, the court concluded that the Constitution imposes on the State the responsibility to provide for a sound basic education on the State, and if the State's subdivisions impede delivery such as education, the State must remove such impediments. Id. at 80-81. Therefore, according to the court, even if the City's and BOE's failures were not the "ultimate responsibility" of the State, the funding mechanism would still be the cause of any violations. Id. at 82, 92.

1. The Trial Court's Holding Regarding Plaintiffs' Title VI Regulations Claim

The court upheld plaintiffs' Title VI regulations claim and found that the funding system created a disparate impact on minority students in New York City. Id. at 115. The court concluded that plaintiffs set forth a prima facie case of discrimination by showing that 73 percent of the state's minority public school students are enrolled in New York City schools; minority students comprise 84 percent of the City's public school enrollment; and New York City receives less funding per capita than districts in the rest of the State. Id. at 101-09. The court also found that the State had presented no substantial legitimate justifications for this funding system even though New York City gets more money than other districts with comparable wealth. Id. at 109-13.

2. The Trial Court's Remedy and Order

While the court acknowledged that it must give the Legislature "the first opportunity to reform the current system" because the Court of Appeals instructed it to do so, id. at 113, the trial court proceeded to give the

Legislature a detailed prescription for how to reform the system. Id. at 114-16. The court first instructed the Legislature to ascertain the cost of providing a sound basic education. Id. at 115. The court then found that a new system of financing school funding should address the shortcomings of the current system and prescribed a lengthy list of required reforms in the City’s public schools that the Legislature must effect. Id.

For example, the trial court ordered that the Legislature’s reforms must achieve “[s]ufficient” numbers of qualified teachers, “[a]ppropriate class sizes,” “[a]dequate and accessible school buildings to ensure appropriate class size and implementation of a sound curriculum,” and “an expanded platform to help at risk students by giving them ‘more time on task.’” Id. at 114-15.

The court further ordered the Legislature to ensure that school districts have the resources to comply with these requirements, and that a system of accountability is established to ensure a sound basic education to New York City public school students. Id. at 115. The court also directed defendants to examine the effects of racial isolation on many of the City’s school children. Id.

Finally, the court ordered defendants to put in place these reforms and gave the parties until September 15, 2001 to implement them. Id. at 116. The court instructed the parties to appear before it on June 15, 2001 to report on the progress of these reforms and retained jurisdiction over the matter for “as long as necessary to ensure that the constitutional and statutory/regulatory violations set forth herein have been corrected.”² **Id.**

²The trial court’s order, including its directive to report on the progress of reforms by June 15, 2001 and to implement reforms by September 15, 2001, was stayed pending appeal pursuant to CPLR § 5519(a). See Order, dated April 5, 2001 (J.A. 2436).

SUMMARY OF ARGUMENT

Despite the far-ranging and complex nature of the evidence presented at trial, plaintiffs’ constitutional claim can be reduced to two central issues that must be resolved on appeal. First, this Court must determine whether students in New York City’s public schools receive the opportunity to acquire a sound basic education. Second, should the Court find that the City’s public schools do not offer a sound basic education, it must determine whether the State’s education financing mechanism is legally responsible for any proven deficiencies.

To answer the first question, this court must both define the contours of a sound basic education and determine whether the City’s public schools make such an education available to their students.

Point One of this brief sets forth the legal standard for evaluating an Education Article claim. While the text of the Education Article itself does not mandate any particular quality of educational services, the Court of Appeals has construed this provision of the Constitution to require that students have access to a “sound basic education.” See Levittown, 57 N.Y.2d at 48; CFE I, 86 N.Y.2d at 315. That is, students must be “provided the opportunity to acquire the basic literacy, calculating, and verbal skills necessary to enable them to function as civic participants capable of voting and serving as jurors.” CFE I, 86 N.Y.2d at 318.

The trial court’s holding that the Legislature was not fulfilling its obligation to guarantee all students access to a sound basic education was predicated upon a misunderstanding of the meaning of the Education Article and the limited duty it imposes on the Legislature. In the name of “dynamic interpretation,” CFE Trial, 187 Misc. 2d at 16, the trial court ignored the bedrock interpretive principle of fidelity to clear constitutional intent and abandoned the standard of “minimally adequate educational opportunities” established by the Court of Appeals in favor of its own vision of the public good. The trial court disregarded the text of the Education Article, the historical context surrounding its enactment, and binding precedent of the New York Court of Appeals construing its meaning. As a result, the standard by which the court evaluated New York City’s educational services far exceeded the standard of “minimal adequa[cy]” established by the Education Article and the Court of Appeals.

Point Two of the brief establishes that when the correct standard is applied, this Court must conclude that New York City’s public schools provide an opportunity for a sound basic education and accordingly, the trial court’s ruling on plaintiffs’ constitutional claim must be reversed. Whatever public officials, educators, and concerned citizens might conclude about the type of education that ought to be provided as a matter of policy, as a matter of

constitutional law, the Education Article requires only “minimally acceptable” teaching, instrumentalities of learning, and facilities that give students an opportunity to acquire “basic literacy, calculating, and verbal skills.” CFE I, 86 N.Y.2d at 316.

As defendants proved at trial, the New York City schools provide the minimum educational requirements set forth in the template of the Court of Appeals in CFE I, with respect to the educational resources (“inputs”) provided to students, and with respect to student performance (“outputs”). Because plaintiffs did not and cannot show that New York City’s schools display a systemic inadequacy in providing these services, the trial court erred in failing to reject their constitutional claim. Instead, the trial court inflated the set of skills that students receiving a “sound basic education” must have an opportunity to acquire. The court also unduly focused on disparities between New York City and other districts rather than focusing on the adequacy of the City’s public education system itself. Further, it relied extensively on anecdotal testimony by plaintiffs’ witnesses instead of focusing on empirical evidence relating to the City’s system as a whole. Additionally, the trial court erroneously assumed that it was the State’s responsibility to fully compensate for all socioeconomic disadvantages of the City’s student population rather than simply provide the opportunity for all students to learn basic skills.

Point Three of this brief establishes that the trial court essentially sidestepped the second main issue in this case -- whether the State’s education funding system caused any proven failure to provide a sound basic education - - framing the question of legal causation in a manner sure to yield an affirmative answer. In short, the court reasoned that so long as increased funding could improve educational inputs, causation would be established. This truncated standard simply ignores all of the factors that might demonstrate that the State is not responsible for any deficiency in the City’s educational services.

Chief among the factors given short shrift by the trial court is the limited, legislative nature of the State's duty under the Education Article and the State system's valid reliance on the principle of local control of education. The trial court also failed to examine whether the actual funding available in New York City is sufficient to support a sound basic education, even assuming that funding did not translate into such an education in practice because of local failures. Instead of considering whether the State's funding formulas allow New York City to provide an adequate education, the court engaged in a largely irrelevant dissection of the inner workings of the legislative process. The trial court thus ignored the dramatically low financial contribution made by the City itself, in light of its relatively high wealth and the prevailing funding practices of districts across the State, and the mismanagement and waste of available funds by local school administrators. Finally, the trial court erred in finding that plaintiffs had established a substantial relationship between increased funding and superior student performance.

Careful examination of these factors makes clear that even if New York City public schools do not make a sound basic education available to their students, the State is not the cause of such deficiencies. While remedying such shortcomings -- if the Court finds them to exist -- should obviously be a top priority, simply assuming that more State money will improve education while turning a blind eye to the role of local actors will not achieve this result.

Point Four of the brief addresses plaintiffs' claim under the implementing regulations of Title VI. Following the trial court's decision, the United States Supreme Court held that Title VI does not confer a private right of action under these regulations. Accordingly, the trial court's ruling for plaintiffs on this claim must be reversed.

Finally, Point Five addresses the enormous breadth of the remedy imposed by the trial court -- without even a single day of hearings. The measures set forth by the trial court are overbroad and impermissibly intrude on the powers of the Legislative Branch. Should the Court find that the State has not fulfilled its obligations under the Education Article, the Court should modify the order by limiting any relief, in the first instance, to a declaratory ruling and an injunction that any deficiencies be addressed by the Legislature.

STANDARD OF REVIEW

On appeal from a judgment of Supreme Court, the Appellate Division reviews questions of law and fact de novo. See N.Y. CPLR. § 5501(c). The Appellate Division’s “authority is as broad as that of the trial court and that as to a bench trial it may render the judgment it finds warranted by the facts, taking into account in a close case the fact that the trial judge had the advantage of seeing the witnesses.” Northern Westchester Prof’l Park Assocs v. Town of Bedford, 60 N.Y.2d 492, 499 (1983) (citations and internal quotation marks omitted).

Moreover, “where the findings in a non-jury trial are based upon considerations other than the credibility of witnesses, such as documentary evidence, then the appellate court is equally empowered to draw inferences and make findings of fact based upon evidence in the record.” Abrahami v. UPC Constr. Co., 224 A.D.2d 231, 233 (1st Dep’t 1996) (citations omitted).

The education funding laws at issue here are “entitled to a presumption of constitutionality, which will only be rebutted by a showing of the statute’s unconstitutionality beyond a reasonable doubt.” Pringle v. Wolfe, 88 N.Y.2d 426, 431 (1996) (citation omitted); see Schultz v. State, 84 N.Y.2d 231, 241 (1994) (“[E]nactments of the Legislature--a coequal branch of government--enjoy a strong presumption of constitutionality. In particular, we give deference to public funding programs essential to addressing the problems of modern life, unless such programs are ‘patently illegal.’”) (citations omitted); Matter of Claim of Klein v. Hartnett, 78 N.Y.2d 662, 666 (1991) (“[T]he constitutionality of a statute is presumed, and while this presumption is rebuttable, the heavy burden of establishing the contrary beyond a reasonable doubt rests upon the challenger.”) (citation omitted); Trump v. Perlee, 228 A.D.2d 367, 367 (1st

Dep’t 1996) (“The statute and regulations . . . are presumed constitutional, which presumption was not rebutted by petitioner beyond a reasonable doubt.”) (citations omitted).

In determining whether a violation of the Education Article has been established beyond a reasonable doubt, a court may not use constitutional interpretation to expand an affirmative legislative duty beyond what would be necessary to give effect to the provision’s actual text or purpose. See New York Pub. Interest Research Group, Inc. v. Steingut, 40 N.Y.2d 250, 257 (1976). While the State Constitution should not be read so as to render it meaningless in light of contemporary developments, courts may not use constitutional interpretation to circumvent

the democratic lawmaking process, by binding future generations to a course of action not clearly intended by the provision's framers or by the electorate that approved it.³

Further, the historical context and purpose of a constitutional provision may significantly limit its scope. A court must examine the “apparent objectives of the provision in which the questioned phrase appears” and look “to circumstances and practices which existed at the time of passage of the constitutional provision.” Steingut, 40 N.Y.2d at 258; see also Anderson v. Regan, 53 N.Y.2d 356, 363-64 (1981) (concluding that “an analysis of the intent of the framers of the Constitution in adopting the predecessor of section 7 of article VII does serve to shed light upon the proper application of the provision,” where “[a]lthough the framers of the Constitution obviously could not have anticipated the massive role that Federal funds were to play in the composition of future treasuries, the concerns they expressed at the time that the appropriation rule was adopted remain of equal concern today.”); Tucker v. Toia, 43 N.Y.2d 1, 8 (1977) (reviewing legislative history of 1938 Constitutional Convention in analyzing meaning of “aid to the needy” clause).

³See Matter of King v. Cuomo, 81 N.Y.2d 247, 253 (1993) (“When language of a constitutional provision is plain and unambiguous, full effect should be given to ‘the intention of the framers . . . as indicated by the language employed’ and approved by the People. . . . ‘[I]t would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms. . . . That would be pro tanto to establish a new Constitution and do for the people what they have not done for themselves.”) (quoting Settle v. Van Evrea, 49 N.Y. 280, 281 (1872)); People v. Rathbone, 145 N.Y. 434, 438 (1895) (“As adopted by the People the intent is to be ascertained, not from speculating upon the subject; but from the words in which the will of the People has been expressed. To hold otherwise would be dangerous to our political institutions.”).

POINT IIN DETERMINING WHETHER NEW YORK CITY’S SCHOOLS PROVIDE A “SOUND BASIC EDUCATION,” THE TRIAL COURT IGNORED BOTH THE STANDARD OF MINIMAL ADEQUACY SET FORTH BY THE COURT OF APPEALS AND ALL OF THE WELL-ESTABLISHED PRINCIPLES THAT GOVERN THE APPLICATION OF THAT STANDARD

A. The Trial Court Rejected the Court of Appeals’ Definition of a “Sound Basic Education” -- Which Is Satisfied If Students Have an Opportunity to Acquire Basic Literacy, Calculating, and Verbal Skills That Would Enable Them to Function as Voters and Jurors -- and Substituted a Far Higher Standard of its Own Making. ” \1 2

The trial court ruled that the public school finance scheme enacted by the Legislature has denied the City’s students a meaningful opportunity to obtain a minimally adequate public school education. The trial court’s most fundamental error in arriving at this finding of educational inadequacy was its refusal to accept the established core meaning of the Education Article: that it requires only “minimally adequate” -- not ideal, or even above average -- education, and leaves anything above that level to the sound discretion of the Legislature and localities.

The Court of Appeals has defined the scope of the constitutional obligation very narrowly, which comports with the Education Article’s text and purpose. The Article itself directs the Legislature to “provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. Const. art. XI, § 1. The complete absence of any qualitative standard in the text of this provision is not surprising, since the Article’s framers intended only to guarantee that free public schools were available across the State, even in rural areas where they had proven difficult to establish, and that the Legislature continue its longstanding practice of helping to support these schools.¹ See supra at 28-30. The Court of Appeals, however, recognizing that the Article’s purpose would be thwarted if the academic resources made available in each local district’s schools were so utterly inadequate as to essentially deprive students of any education at all, has construed the phrase “may be educated” to mean “may receive a sound basic education.” Levittown, 57 N.Y.2d at 48.

¹Because the Education Article was motivated not by concerns about the quality of education but rather by concerns about ensuring the existence of free public schools in all communities, it does not explicitly impose a minimum standard of educational quality that the State school system must provide, in contrast to education clauses in other states. See William E. Thro, Note, To Render Them Safe: The Analysis Of State Constitutional Provisions In Public School Finance Reform Litigation, 75 Va. L. Rev. 1639, 1661-70 & n.109 (1989) (describing four categories of such clauses, with “Category I” clauses like New York’s Education Article imposing the most “minimal educational obligation on a state” because they “provide for a system of free public schools and nothing more”).

In its 1995 decision on defendants’ motion to dismiss, the Court of Appeals explained to the trial court what it meant by the phrase “sound basic education.” The Court of Appeals held that the Education Article requires “minimal[ly] acceptable” pedagogical services, facilities, and other resources required for development of basic literacy, verbal, and math skills. “Basic” skills are those necessary for children to eventually “function productively as civic participants capable of voting and serving on a jury.” CFE I, 86 N.Y.2d at 316; see also Levittown, 57 N.Y.2d at 47, 48; Rodriguez, 411 U.S. at 37 (“absolute denial of educational opportunities” occurs only where state education system fails to “provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process”).

The Court of Appeals specified the resources that schools must provide to comply with the Constitution:

- (1) minimally adequate facilities and classrooms which provide enough light, space, heat, and air to permit children to learn;
- (1) minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks; and
- (1) 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.

CFE I, 86 N.Y.2d at 317.

As the Court’s language makes plain, the constitutional threshold is truly “minimal.” See id. at 319 (“failure to provide the opportunity to obtain such fundamental skills as literacy and the ability to add, subtract and divide numbers would constitute a violation of the Education Article”). The central question in determining whether the public schools provide a sound basic education is whether they are minimally adequate, not whether they could be improved. Only in the face of a “gross and glaring” systemic deficiency in educational resources is the Legislature’s constitutional obligation breached. See REFIT, 86 N.Y.2d at 284; Levittown, 57 N.Y.2d at 48. That is, courts may not find a denial of an opportunity for a sound basic education unless the program provided by a school has deficiencies so debilitating that it is tantamount to no education at all. Levittown, 57 N.Y.2d at 48 (“If what is made available by this system . . . may properly be said to constitute an education, the constitutional mandate is satisfied.”); cf. Rodriguez, 411 U.S. at 23 (plaintiffs did not show that they were effectively deprived of education); Lau v. Nichols, 414 U.S. 563, 566 (1974) (students who do not understand English and are placed in all-English classes without appropriate remedial instruction “are effectively foreclosed from any meaningful

education”).

The trial court disregarded the Court of Appeals’ standard of “minimal adequacy” -- a long-established standard that the Court of Appeals had reaffirmed this very case. Instead, the trial court crafted its own vision of what an educational system should provide, a vision that requires schools to provide resources, and students to perform, at a level well beyond what the Legislature itself has prescribed. The court then concluded that a constitutionally cognizable deficiency exists whenever the City’s schools failed to reach this high bar. For example, the court found the fact that some of the City’s public schools’ computers -- models using an Intel “486” processor -- were allegedly out-of-date to be an indicator that the schools did not provide a “sound basic education.” See CFE Trial, 187 Misc. 2d at 59-60. While the most effective teachers and the most modern equipment and facilities might be laudable as a policy goal, they are not required as a matter of constitutional law.

The trial court’s departure from the Constitution’s benchmark of “minimal adequacy” is most starkly reflected in the achievement and skill requirements it grafted onto the concept of a sound basic education. For example, according to the court, the constitutional adequacy of public schools must be measured by a performance standard -- the RLS -- that is extremely rigorous. After initially professing to embrace the view, commanded by the Court of Appeals’ decision in CFE I, that the RLS “*a fortiori* cannot constitute the definition of a sound basic education,” id. at 12, the trial court ended by concluding that the City’s schools are inadequate because only 12 percent of students graduate with a Regents’ diploma -- the only “diploma that actually demonstrates that they have received a sound basic education,” in the trial court’s opinion, id. at 62. In the court’s view, students obtaining a local diploma by virtue of passing the RCTs and students obtaining a GED cannot be said to have received a sound basic education. While it is too early to predict exactly how many New York students will pass the Regents’ exams once the RLS are fully implemented (or what score the Board of Regents will define as “passing”), if the tests designed to predict readiness for these exams are accurate, then more than half of New York public school students across the State will have difficulty achieving proficiency on them. See supra at 20-21; DX10129 (only 48 percent of students statewide demonstrate proficiency on the English Language Arts (“ELA”) test, which measures readiness to pass the Regents’ exams).

The trial court also redefined what a sound basic education encompasses with regard to skills related to voting and jury service, in a manner that clearly exceeds those deemed essential by the Court of Appeals. The Court

of Appeals defined a constitutionally sufficient education as providing the opportunity to acquire skills necessary to “function productively as civic participants capable of voting and serving on a jury.” CFE I, 86 N.Y.2d at 316. By contrast, the trial court expanded the voter/juror capability requirement to include skills necessary “to determine questions of fact concerning DNA evidence, statistical analyses, and convoluted financial fraud, to name only three topics” and “to evaluate complex issues, such as campaign finance reform, tax policy, and global warming, to name only a few.” CFE Trial, 187 Misc. 2d at 14.

While jury trials certainly may present complex issues, the trial court’s discussion suggests that to comport with the Education Article, juror capability must go beyond the ability to follow the substance of expert testimony (which is allowed precisely because the subjects of such testimony fall outside the day-to-day experience and knowledge of lay jurors), the arguments of attorneys geared at boiling down this testimony to its essential elements, and the related instructions of judges, and instead consist of a sophisticated understanding of, or expertise in, these areas. Similarly, the standard articulated by the trial court appears to incorporate a higher-level set of “voting skills” than was ever contemplated by the Court of Appeals’ template -- substituting mastery of complex legislative and policy issues for a basic ability to choose between candidates based on their positions and information obtained from the media and other sources.

The trial court also added an entirely new category of skills to those required by the Court of Appeals: the ability to obtain high-level employment in the City’s local labor market, and in particular, the high-technology sector. CFE Trial, 187 Misc. 2d at 16-18. The trial court’s specification of the types of jobs that graduates must be able to obtain is a particularly marked departure from the Court of Appeals’ template. Despite the court’s acknowledgment that “the greatest expansion in the local labor market” is “composed of low level service jobs,” it found that “[a] sound basic education would give New York City’s high school graduates the opportunity to move beyond such work,” *id.* at 16 -- even though the local job market might not include enough higher-paying jobs for all of them. See T.12205-06 Levin (noting that despite new technologies, “69% of all [future] job openings would require an education of zero to 12 years,” and “most new jobs or job openings will be in occupations that require relatively low skills and education”). However, provision of a minimally adequate education does not imply a requirement that all students be able to obtain jobs that are maximally sophisticated -- intellectually, technologically, or otherwise. Moreover, in tying the definition of a sound basic education to the “local labor market,” the court

suggested that the education to which students are entitled under the State Constitution will vary from community to community -- a result that poses obvious problems in administration and is supported by neither the text and history of the Education Article nor the precedent interpreting it.

Significantly, the trial court did not even purport to be searching only for “gross and glaring” inadequacies in the education offered by New York City’s schools. See Levittown, 57 N.Y.2d at 48; REFIT, 86 N.Y.2d at 284; CFE I, 86 N.Y.2d at 319 (motion to dismiss denied because complaint alleges “gross educational inadequacies” (emphasis added)). Although the trial court itself had recognized this standard in 1994 when it upheld plaintiffs’ pleadings as legally sufficient, see Campaign for Fiscal Equity, Inc. v. State of New York, 162 Misc.2d 493, 498 (Sup. Ct. N.Y. Co. 1994), the court’s long opinion does not contain a single reference to that standard. This absence is not surprising, because the trial court clearly did not consider itself obliged to determine whether the quality of education in New York City’s schools is so debilitating as to equal no education at all. See Levittown, 57 N.Y.2d at 48 (“If what is made available by this system . . . may properly be said to constitute an education, the constitutional mandate is satisfied.”).

The Court of Appeals has recognized that the narrow duty imposed on the legislature by the Education Article does not give the judiciary license to craft a constitutional standard that would impose the court’s own ideals on the State’s education system or require far-reaching changes in educational policy -- thereby circumventing the political process itself. A judicial determination that the existing system is imprudent or less than exemplary is simply no basis for finding a violation of the Education Article. As demonstrated in Point II, infra, the Legislature has done far more than guarantee the State’s children “minimally adequate educational opportunities,” which is all that the Education Article requires it to do.

B. The Trial Court Ignored Four Major Principles That Govern an Analysis of Whether Education in a Local School District Meets the Standard of Minimal Adequacy Embodied in the “Sound Basic Education” Requirement.

In addition to the well-established qualitative standard for constitutionally acceptable education, i.e., minimal adequacy, this Court’s inquiry into constitutional adequacy is governed by four longstanding principles, articulated by the Court of Appeals in CFE I and its prior Education Article decisions, that are inherent in that standard. The trial court disregarded, almost entirely, each of

these four fundamental rules.

First, to prevail on an Education Article claim, plaintiffs must show that any deficiencies in school resources or performance are the result of a systemic problem affecting all or most of the district’s schools; they may not rely on isolated instances or anecdotal observations regarding particular schools. See CFE I, 86 N.Y. 2d at 316 (question for trial court is whether what is made available “by this system” may properly be said to constitute an education (emphasis added)). The trial court acknowledged this rule in one context, see CFE Trial, 187 Misc. 2d at 58 (stating that it could not make a finding regarding adequacy of school supplies based on plaintiffs’ presentation of “little except anecdotal evidence”), but then ignored it almost entirely in the rest of its analysis.

Second, the “sound basic education” requirement is a standard of adequacy, not parity. Evidence of even an “extreme disparity” among districts in resources, expenditures, and student performance is not relevant to whether education in a particular district is constitutionally inadequate. CFE I, 86 N.Y.2d at 314 (Education Article was not “intended to ensure equality of educational offerings throughout the State”) (citing Levittown, 57 N.Y.2d at 47). See also Levittown, 57 N.Y.2d at 45-46; REFIT, 86 N.Y.2d at 284.

Third, deficiencies in student performance that are attributable to socioeconomic conditions extrinsic to the education system are not relevant, or at least not centrally relevant, to assessing whether schools are meeting constitutional standards. As the Seventh Circuit recently observed, socioeconomic circumstances that bear on student outcomes include, for example, poverty; parental education, employment, and attitude; child health care; and peer-group pressures. People Who Care v. Rockford Bd. of Education, 246 F.3d 1073, 1076-77 (7th Cir. 2001) (Posner, J.). See also Levittown, 57 N.Y.2d at 41 (“[I]nequalities existing in cities are the product of demographic, economic, and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction.”).

The Education Article requires the Legislature to provide for the opportunity to obtain basic skills, CFE I, 86 N.Y.2d at 316, 316 n.4, not to guarantee high results, on tests or other indices, no matter the influence of factors at work outside the education system. As the Court of Appeals observed, “[p]erformance levels on such examinations are helpful but should also be used cautiously as there are a myriad of other factors which have a causal bearing on test results.” Id. at 317.

Finally, the Court of Appeals has recognized, in effect, a presumption that what the Legislature provides for

in terms of “State-wide minimum standard[s] of educational quality and quantity” is sufficient to meet the constitutional floor set by the Education Article. As the Court stated in Levittown, and reiterated in CFE I:

The Legislature has made prescriptions (or in some instances provided means by which prescriptions may be made) with reference to the minimum number of days of school attendance, required courses, textbooks, qualifications of teachers and of certain nonteaching personnel, pupil transportation, and other matters. If what is made available by this system (which is what is to be maintained and supported) may properly be said to constitute an education, the constitutional mandate is satisfied.

Levittown, 57 N.Y.2d at 48 (quoted in CFE I, 86 N.Y.2d at 316).

It is essential to understand that this presumption -- that meeting statewide minimums in resources and performance demonstrates constitutional adequacy, in the absence of a showing that these minimums are so glaringly deficient that what they require cannot properly be called “an education”-- does not imply that any deviation below a statewide standard proves a constitutional violation. In other words, while courts will not usurp the Legislature’s judgment by pronouncing statewide minimum standards to be too low as a matter of constitutional law (except, perhaps, in extraordinary circumstances), state agencies charged by the Legislature with oversight of the State’s education system cannot simply “ratchet up” the constitutional floor by proclaiming higher standards. This is precisely the point the Court of Appeals made in noting that “many of the Regents’ and Commissioner’s standards exceed notions of a minimally adequate or sound basic education,” and counseling “prudence” in using those standards “as benchmarks of educational adequacy.” CFE I, 86 N.Y.2d at 317. “Proof of noncompliance with one or more of the Regents’ or Commissioner’s standards may not, standing alone, establish a violation of the Education Article.” Id. Importantly, this caution of “prudence” was directed at the use of the RCTs as a constitutional benchmark -- not the vastly more rigorous RLS, which had not been adopted when CFE I was decided.

_____As discussed in Point II, infra, the trial court deemed irrelevant the Legislature’s determinations about the minimum requirements to be demanded of the State’s schools and students -- for example, by insisting that students satisfy performance standards (RLS) that will not be fully implemented for years, while dismissing out of hand the local (RCT) diplomas, which the State has long considered representative of successful completion of a basic skills education. And the court cast aside government decisions about what resources are necessary for students to succeed in the classroom, inserting itself into debates about everything from class size to the processing power

performance conclusively demonstrates that students have ample opportunity to learn how to read, write, and calculate at a level enabling meaningful civic participation. Likewise, the City’s schools more than meet the adequacy standards for each category of educational resources deemed necessary by the Court of Appeals for a sound basic education. The City system makes available: (1) “minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn”; (2) “minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks”; and (3) “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.” CFE I, 86 N.Y.2d at 317. These public school resources provide all students with a reasonable opportunity for a sound basic education.

A. The Educational Resources Provided by the City Schools Are Clearly Sufficient To Enable City Students to Obtain Basic Literacy, Verbal, and Math Skills.

The systemic evidence presented below shows that the services, facilities, and instrumentalities of learning available to the City’s public school students are adequate to provide students with a sound basic education. This should come as no surprise, given that the City’s average per pupil expenditure of approximately \$9,500 (FY2000) far exceeds those in some of the most effective City public and Catholic schools educating similar populations of at-risk, poor students. See DTEV Tab 10, ¶¶ 304-18, 331, 334-36, 338-39.

For instance, the evidence showed that Community School District (“CSD”) 2 in Manhattan, a national model for successful public school education, is one of the highest performing school districts in the City despite being one of the lowest spending districts in the City in terms of per pupil expenditures. In 1998, CSD 2 was the second-highest scoring district on citywide tests. In reading, 72 percent of students were at or above grade level, compared to the national average of 50 percent, and in math, 82 percent attained this level. DTEV Tab 10, ¶ 305; T.7888-90 Fink; DX10103; DX10109.

The City’s Catholic schools also perform successfully, even though those schools spend only half of what the City’s public schools spend per pupil and have a larger pupil-teacher ratio, larger class sizes, lower paid teachers,

older facilities, and fewer science labs and other educational amenities than public schools. DTEV Tab 10, ¶ 331, DX19564; T.19340-44, 19353-55 Puglisi; T.16404, T.16416 Murphy. As the following analysis demonstrates, under every category of basic resources specified by the Court of Appeals in CFE I, the City’s public schools meet or exceed constitutional minimums.

1. “Minimally Adequate Teaching Of Reasonably Up-To-Date Curricula by Sufficient Personnel Adequately Trained to Teach Those Subject Areas”

a) “Minimally adequate teaching” by adequately trained teachers Although the trial court found that teaching in New York City was inadequate under its improperly heightened standard, it failed to address the actual quality of teaching in New York City classrooms, focusing instead exclusively on teacher credentials. CFE Trial, 187 Misc. 2d at 24-30. The evidence on both points, however, indicated that the quality of teaching in the City’s schools satisfies the constitutional requirement. The trial court also relied heavily on evidence of disparities between the City and the rest of the State, see e.g., id. at 26, 28-30, disparities that the Court of Appeals has explicitly declared outside the reach of the Education Article.

i) Direct teacher observations demonstrated adequacy

The only direct evidence of the actual quality of teaching in New York City public schools is the systemic teacher observations regularly conducted by BOE personnel in the ordinary course of business for its own internal operational and management purposes. See CFE Trial, 187 Misc. 2d at 31-33. These observations, which include annual teacher performance reviews and “Performance Assessment in Schools Systemwide” (“PASS”) reviews, both demonstrate adequacy.

The teacher performance reviews evaluate such teaching skills as whether a teacher is “adapting instruction to individual [student] needs and capacities,” making “effective use of appropriate methods and techniques,” or demonstrating “evidence of pupil growth in knowledge.” DTEV Tab 4, ¶ 49; DX10398; T.3086-93 Tames. From at least 1995 to 1997, about 99 percent of the teaching force has been rated “satisfactory” on these measures by educators who actually observed classroom teaching. Although several of plaintiffs’ witnesses testified at trial that a rating of “unsatisfactory” is reserved only for the “worst of the worst” teachers, T.3220-22 Ward, this testimony was offered by superintendents, who generally do not perform these assessments, rather than principals. T.8846 Fink; T.9839 Ward. Nor did plaintiffs present any testimony by principals indicating that under-performing teachers are

not appropriately evaluated in the annual performance review process.

The adequate teaching reported in the teacher performance reviews was confirmed by the PASS review process -- BOE's only comprehensive system of assessing school quality. DTEV Tab 3, ¶ 39; T.15742 Rossell. See supra at 13. As part of that process, trained educators are required to neutrally evaluate the quality of a school's teaching. Those observations showed that, on average, schools were performing between an "exemplary" and "approaching exemplary" standard in the area of instruction. DTEV Tab 4, ¶¶ 53-55; DX15140, pp.6-9; DX19267; T.16738-42 Rossell.

The court erred in rejecting this systemic evidence of satisfactory performance documented in BOE's own records, which were prepared for operational and management purposes, not litigation. The court instead accepted the testimony of certain school superintendents reflecting their belief that certain school principals had not accurately rated performance in these reports. CFE Trial, 187 Misc. 2d at 32. This contention, however, was based on a mistaken premise: that evaluators were reluctant to rate teachers as unsatisfactory because those teachers would be fired and the schools would have difficulty replacing them. Id. In fact, such teachers would not be fired, and would merely lose their seniority transfer rights or salary increases. DTEV Tab 4, ¶ 52; T.8848 Fink; T.7188-89 Zardoya. More important, government officials should be presumed to carry out their responsibilities in good faith. If, as the trial court believed, the reverse were true, the waste of millions of dollars on a falsified evaluation process would be just as troubling as the doubt cast on the accuracy of the evaluation's results. But plaintiffs presented no persuasive evidence of such rampant bad faith in execution of the teacher performance and PASS reviews.

ii) Teacher credentials reflected adequacy

Rather than focus on actual teaching in New York City schools, the court used teacher credentials as a proxy for teaching quality. It found that, as compared to teachers statewide, the City system's teacher population had a lower percentage of certified teachers, lower "pass" rates on State teacher exams, and attended less competitive colleges. CFE Trial, 187 Misc. 2d at 25-30. However, as Levittown and CFE I unmistakably teach, such claims of disparities among school districts cannot support an Education Article claim. Levittown, 57 N.Y.2d at 47; CFE I, 86 N.Y.2d at 314. (In any event, the evidence at trial demonstrated that teacher credentials are a poor indicator for effective teaching: there is little or no correlation between the indicators cited by the court and student learning. See infra, Point III.C.)

Even if these comparisons were relevant, teacher credentials in New York City establish that the City's teachers are more than "adequately trained." Perhaps the best indication that there are sufficient numbers of adequately trained teachers is the number of certified teachers in the New York City public school system. BOE employs more than 68,000 certified teachers -- more than 87 percent of its teaching force. PX1222.

These teachers have demonstrated the competence required by the State's certification process, PX1234, pp. 320-22; DX12545, and, even according to plaintiffs' witnesses, these teachers are at least adequately trained to teach a basic curriculum, T.11304-05 Levy; T.3464-68 Garner; T.6352-53, T.6648-49, T.6651 Darling-Hammond. With this teaching force, BOE could staff its schools exclusively with certified teachers, and still have a pupil-teacher ratio better than the national average. DTEV Tab 4, ¶ 104; T.16242-49 Murphy; DX19190.

In addition, New York City has in place a system designed to ensure that its uncertified teachers (who are deemed "qualified" to teach by BOE) are also adequate. These teachers are required to have a bachelors degree and, typically, have the same amount of subject area course work that the Regents require for certification. (In certain subject areas where there is a shortage of teachers, this requirement is relaxed.) PX1192; T.3652-53, T.3656-58 Cohen; T.3098-101 Tames.

The trial court also examined teachers' pass rates and test scores on teacher certification exams. CFE Trial, 187 Misc. 2d at 27-29. In evaluating these scores, however, the court relied exclusively on comparisons with other districts across the State, id. at 28-29 -- evidence that the Court of Appeals has held cannot establish an Education Article violation. In any event, this evidence showed that for the year studied, only 1,615 City teachers had not passed the primary certification exam, and only 6 percent of the City teachers failed the exam one or more times. DTEV Tab 4, ¶ 106; PX1535; T.4568-70, T.4559-60 Lankford.

The trial court also used teacher experience as a measure of teacher quality. CFE Trial, 187 Misc. 2d at 29. New York City teachers have adequate teaching experience: the median experience level for school teachers is 13 years, a level consistent with the national average. DTEV Tab 4, ¶¶ 112-14; PX2; T.20375-76 Smith.

The court's final measure of teacher quality was the quality of teachers' own educational background. CFE Trial, 187 Misc. 2d at 30. New York City teachers are highly educated. Approximately 75 percent of the City's teachers have at least a Masters degree, as compared with 47 percent of teachers nationwide who have such a degree. DX19167; T.17558-59, T.17868 Podgursky. Almost half of City teachers have taken 30 hours of class

credit beyond their Master's degree or possess a doctoral degree. DTEV Tab 4, ¶¶ 82-83; DX19166; DX19167; T.17556-58 Podgursky. Rather than look at this evidence on the merits, the trial court instead compared those credentials to other districts statewide. (For example, the court accepted as an indicator of inadequacy the fact that 16 percent of New York City's teachers have "only" a bachelors degree, compared to 11.9 percent in the rest of the State.) CFE Trial, 187 Misc. 2d at 30. As with the other evidence of disparities among school districts referenced by the trial court, this evidence is not relevant to determining if the City's schools comply with the Education Article.

iii) Professional development opportunities were adequate

New York City also spends almost \$3,000 per teacher per year on professional development, more than other large urban school districts. DTEV Tab 4, ¶ 85; T.16324-25 Murphy; DX19053. BOE's extensive professional development program includes employment of substantial numbers of full-time staff developers whose sole role is to train other teachers, with some districts having one full-time staff developer for every 17 teachers -- a better ratio than the national average of teachers for every pupil. DTEV Tab 4, ¶¶ 84-94; DX19048; T.7224 Zardoya. The trial court attempted to marginalize this systemic evidence -- dismissing it as "defendants[]" recit[ation of] the litany of professional development resources that BOE makes available to its teachers" -- but failed to address why these facts do not establish professional development opportunities that are at least adequate. Instead, the court relied again on the anecdotal testimony of SED personnel and several school superintendents. The trial court's terse assertion that it had "weigh[ed] the evidence offered by both sides on this issue" and found "that the professional developments currently provided . . . is inadequate," CFE Trial, 187 Misc. 2d at 31, is unsupported and unpersuasive.

b) Reasonably up-to-date curricula

The trial court properly ruled that, even under its heightened standard, the BOE curriculum satisfied the constitutional standard. CFE Trial, 187 Misc.2d at 37.

c) Sufficient personnel

Although the Court of Appeals' template required an evaluation of whether the City's schools have "sufficient personnel," the trial court rejected this measure, substituting instead the measure of "class size." Id. at 49-56. While, as demonstrated below, this was error, under either measure plaintiffs failed to demonstrate that New

York City's schools fall below the constitutional standard.

New York City has one teacher for every 14.1 students, placing it in the top 10 percent of large districts across the nation. DX19048; T.16242 Murphy. By comparison, the second largest school system in the nation (Los Angeles) has one teacher for every 20.8 students. DTEV Tab 4, ¶ 58; T.20393-96 Smith. New York City also compares favorably in other categories of school-based personnel, such as teacher aides and principals. DTEV Tab 4, ¶¶ 62-63; PX1167; DX19059. For example, New York City has a paraprofessional and teacher aide for every 32 students; nationally, the average ratio is 90.5 to 1, almost three times higher. DTEV Tab 4, ¶ 62; DX19059; T.16251 Murphy.

Rather than evaluate whether the school system had "sufficient personnel" -- which it does -- the court undertook to evaluate whether school class sizes are appropriate. CFE Trial, 187 Misc. 2d at 51-56. Class size, however, is a function of how BOE deploys its teachers, not a measure of whether the City employs enough teachers. DTEV Tab 4, ¶ 75; T.1269-73 Mills; T.3565 Garner. The collective bargaining agreement negotiated by New York City provides its teachers with a shorter contractual teaching day than other school districts elsewhere in the State and in large urban districts across the nation. DTEV Tab 4, ¶¶ 78-79; DX19154A; DX19156; T.16535-48 Podgursky. BOE also has thousands of teachers who are not assigned classroom teaching duties. CFE Trial, 187 Misc. 2d at 55; see also DTEV Tab 4, ¶ 77; PX3159; PX3160B; T.15409-11 Donohue. Thus, despite the City employing roughly the same number of teachers per student as the rest of the State, its class sizes are larger. DTEV Tab 4, ¶ 75; DX19189; PX1167.

Even if class size were the relevant inquiry, the evidence showed that the City's class sizes -- ranging on average from 23.8 students per class for kindergarten students to 28.72 per class for eighth graders -- were small enough to enable basic student learning. Indeed, the evidence at trial showed that average class sizes within that range are not inconsistent with the provision of a sound basic education or with the class sizes prevailing nationally. DTEV Tab 4, ¶¶ 68-69; PX1167; T.20421 Smith; T.16160 Murphy.

The trial court disregarded this evidence, and instead found that class sizes in New York City were too large because: (1) they are larger than classes elsewhere in the State; and (2) an academic study, the Tennessee STAR study, showed that reducing class sizes improves student performance. CFE Trial, 187 Misc. 2d at 51-54. Neither of these findings supports the conclusion that class sizes in New York City are too large to comport with the

minimum standards embodied in the Education Article.

First, as described above, comparisons between New York City and other school districts cannot demonstrate a violation of the Education Article. Second, studies on the effect of reducing class size have been mixed at best. Most studies have shown no effects; a few have shown modest effects. The STAR study, heralded by the trial court, purportedly showed that reducing class sizes from 22 to 27 students per class to 12 to 17 students per class resulted in a one-time improvement of approximately two-tenths of one standard deviation -- a gain that even plaintiffs' experts considered "small or modest." DTEV Tab 4, ¶ 71; T.8012-14 Finn. The court appeared to adopt a standard of 18 to 20 students instead, on the ground that the benefits allegedly demonstrated by the STAR study would still be realized with this number. CFE Trial, 187 Misc. 2d at 54. Even under this relaxed standard, most classrooms in the New York State would be deemed constitutionally inadequate, according to the trial court.

The question, however, of whether the limited gains described by the scientific research justify the enormous expenditures that would be required -- or whether limited taxpayer dollars might be better spent on child health care initiatives or other important policy goals -- is a question of policy for the Legislature. The fact that such reductions might improve performance slightly does not enshrine such class-size reductions in the Constitution. Accordingly, as described above, the trial court erred in finding that plaintiffs had established that the New York City school system lacks "sufficient personnel" under the Constitution.

2. Minimally Adequate Instrumentalities Of Learning

The Court of Appeals' template requires students to have access to "minimally adequate instrumentalities of learning such as desks, chairs, pencils and reasonably current textbooks." CFE I, 86 N.Y.2d at 317. The trial court erred in ruling that this element of the template is not met in New York City's schools.

First, on a systemic level, the evidence shows that adequate books and supplies are being provided. The PASS review process shows City schools meeting or approaching the "exemplary" level in the area of supplies and materials. DTEV Tab 5, ¶¶ 122-23, 131; DX19267. In addition, teachers have filed almost no grievances under Article 7R of their contract alleging a lack of books and instructional supplies. DTEV Tab 5, ¶¶ 124, 132; T.2795 Weingarten. This system-wide evidence of adequate supplies is buttressed by additional evidence, such as the Comptroller's audit of textbook and workbook supplies in CSD 8, which concludes that there is no shortage of those items in that district. DTEV Tab 5, ¶¶ 125-26, 133-34; DX11122, pp.11-13. The more-than-adequate number of

books in school libraries is also demonstrated by the PASS reports and by testimony from plaintiffs' witness, Beth Lief, whose study on minimum library requirements called for an average of 6.6 books per pupil -- a number well below the 9 library books available per student reported in the most recent Report to the Governor and the Legislature on the Educational Status of the State's Schools: 1999 ("655 Report"). DTEV Tab 8, ¶¶ 213-14; PX1, p. 81.

Second, this conclusion is confirmed by the sheer amount of money that has been spent in this area. Sufficient funding for textbooks has been provided over the last four years, for example, to provide every student with current textbooks in the four basic subject areas of reading, math, science, and social studies, with enough money left over to buy an additional set of four textbooks. DTEV Tab 5, ¶¶ 116-19; PX3114, p.9; PX1169, pp.51-52, 75; PX3204. In fact, so much money for textbooks, software, and library materials has been made available that schools typically have had significant unspent balances into the second half of the school year. DTEV Tab 5, ¶ 121; Tab 10, ¶¶ 395-98; DX19054; DX10859; DX16014.

Third, BOE documents prepared in the normal course of business, rather than in preparation for this litigation, make clear that New York City's schools provide more than "minimally adequate" specialized equipment. DTEV Tab 5, ¶ 155; PX1592; DX10556; DX10922; DX11047, p.788678; DX10922, p.9. In the area of computers, for example, BOE has purchased sufficient equipment to bring the ratio of students to computers to a level that equals or exceeds the ratio prevailing nationally. DTEV Tab 5, ¶¶ 143-45; PX1592, p.8a; PX1856. And, contrary to anecdotal testimony from the district superintendents called by plaintiffs, BOE's system-wide documents show that the vast majority of these computers are current models. DTEV Tab 5, ¶¶ 151-55; PX1592, p.8a; DX10556. In fact, BOE has recently completed its Project Smart Schools initiative in the middle schools -- a program that former Chancellor Crew said had the potential to make the school system "one of the most technologically advanced in the nation." DTEV Tab 5, ¶ 149; PX1856.

3. Minimally Adequate Physical Facilities And Classrooms

The Court of Appeals' template instructs that "[c]hildren are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn." CFE I, 86 N.Y.2d at 317. Here, plaintiffs faced a dual burden. They must not only demonstrate deficiencies in light, space, heat, or air; they must also show that any such deficiency prevents children from learning the "basic literacy,

calculating, and verbal skills” that constitute a sound basic education. The trial court erred in finding that plaintiffs sustained their burden on either prong. This court should reverse the trial court’s determination on this point, and instead find that “the physical facilities . . . made available under the present system are adequate to provide children with the opportunity to obtain these essential skills.” *Id.* at 316.

a) Condition Of School Facilities

Although plaintiffs presented primarily anecdotal evidence of poor physical conditions in City schools, two of plaintiffs’ witnesses did testify about systemic conditions. Harry Spence, then-Deputy Chancellor for Operations, stated that all existing school buildings were water-tight and safe; and both Spence and Patricia Zedalis, Chief Executive of the Division of School Facilities, testified that dangerous conditions that might previously have existed had been eliminated. DTEV Tab 7, ¶ 166; T.4201-22 Spence; T.4864-65 Zedalis. Both identified the Building Condition Assessment Survey (“BCAS”), completed by independent consulting engineers in 1998, as providing the best information currently available about systemwide conditions in the City’s school facilities. DTEV Tab 7, ¶ 168; T.4251-52, T.4248 Spence; T.4866-67 Zedalis.

The BCAS data indicated that the City’s school facilities are largely in reasonable condition, with only a small percentage of building components displaying serious problems. DTEV Tab 7, ¶¶ 173-74; T.18809-12 O’Toole; DX19706. The consulting engineers on average rated approximately 84 percent of the 251 building components to be in “fair” condition or better. DTEV Tab 7, ¶ 172; DX19706; T.18809-12 O’Toole. Facilities expert Robert O’Toole, in analyzing the BCAS data on the basis of repair costs per square foot, found that the cost data confirmed the “by and large better than fair” picture presented by the BCAS component ratings. DTEV Tab 7, ¶ 174; T.18814, T.18817-20 O’Toole; DX19498.

b) Facility capacity

Plaintiffs also contended that school facilities are overcrowded. DTEV Tab 7, ¶¶ 177-79; T.7714-15 Fink; T.12707 Lee. The only objective, system-wide evidence relating to the issue of overcapacity was information from BOE's capacity utilization reports, which annually compare each school building's rated capacity with the school's reported enrollment. DTEV Tab 7, ¶ 180; T.4467-68 Zedalis; PX76, p.8. This evidence did indicate that some CSDs, which operate the elementary and middle schools in the City, are operating at utilization rates above 100 percent of rated capacity; however, only three CSDs exceed full utilization by more than 10 percent. DTEV Tab 7, ¶ 184; PX76; T.19573-77 O'Toole; DX19495. There are also some City high schools with utilization rates that exceed their rated capacity.

Schools that are over capacity can increase their available space in various ways, such as by a local decision to lengthen the school day. Under the assumption that high schools are available for instruction only 6 hours and 20 minutes a day (the contractual maximum for teachers to teach), those schools are reported as operating at 14 percent above capacity. However, increasing the instructional period to 7.5 hours per day (an instructional period widely used elsewhere) would drop utilization below 100 percent in all boroughs. DTEV Tab 7, ¶¶ 185-86; PX108A, figure IIC-3; T.6776-80 Zedalis; T.3072 Tames; T.19614-17 O'Toole; PX108A, p.II-52; DX10034-06, p.6. Moreover, average daily attendance in the City's high schools in 1997 was 81.29 percent of enrollment. DTEV Tab 7, ¶ 188; PX1166, NYS012522. Therefore, from the standpoint of the actual number of children in classrooms on a typical day, City high schools were operating at about 93 percent of full capacity. DTEV Tab 7, ¶ 188; DX17122A; DX10088; T.6781-83, T.6900 Zedalis; PX1166, p.4.¹

Other cost-effective administrative solutions are available to resolve localized overcapacity conditions without the need for new construction, which, at more than \$48,000 per seat, is the most expensive way to meet capacity needs. DTEV Tab 10, ¶¶ 472-74; T.6819-20 Zedalis. For example, schools can increase capacity through

¹The City's public school enrollments are projected to decline substantially in coming years. BOE's demographers project a drop in elementary school enrollment of 103,438 students by 2008. DTEV Tab 10, ¶ 471; T.6806 Zedalis; DX17124, p.19. While middle and high school enrollment is projected to increase over the same period, the net result will be a decrease of approximately 66,000 students, or about 5 percent of the City's current public school student population. DTEV Tab 10, ¶ 471; T.6806-16 Zedalis; DX17124, pp.19, 37; DX17123A; DX19503. As a result, without assuming any increase over 1998-99 school capacity, all but five of the City's community school districts would be operating below capacity by 2008, most below 80 percent, and there would be a citywide excess of high school seats. DTEV Tab 10, ¶¶ 472-73; T.19621-26 O'Toole; DX19521; DX19494.

overlapping or double sessions. DTEV Tab 10, ¶¶ 465-66; DX19507; DX19508; T.19581-83 O’Toole. Year-round schooling, transfers of students within and between districts, and shifting grades between elementary and middle schools or middle and high schools are also more cost-effective. DTEV Tab 10, ¶ 467-69; T.19604-05 O’Toole; T.6823-25 Zedalis. In short, plaintiffs’ claims of current or prospective systemic overcrowding are not supported by the objective evidence, and cost-effective administrative methods are available to deal with localized overcapacity conditions.

c) No causal connection exists between building repair needs or overcapacity conditions and denial of an opportunity to learn basic skills.

Finally, plaintiffs were also required to do more than merely show that facility conditions are less than optimal. The Court of Appeals’ template also requires them to demonstrate that such conditions prevent learning. CFE I, 86 N.Y.2d at 317. Anecdotal testimony from superintendents about a relatively small sample of poor conditions among the City’s more than 1,100 schools -- or conclusory statements by SED witnesses concerning the City’s facilities as a whole -- failed to forge the requisite link between repair needs or overcapacity conditions and deprivation of an opportunity for City school children to learn basic skills.

If poor physical conditions or overcrowding in City schools were depriving children of an opportunity to learn basic literacy, calculating, and verbal skills, one would expect scores on the standardized tests that measure those skills would be lower for schools with high repair needs or overcapacity conditions. The record reflects just the opposite. DTEV Tab 7, ¶¶ 191-96. Trial evidence showed that a school facility’s relatively high repair needs or utilization rate is not associated with lower student performance. Id.; T.15828, T.15861, T.15872-92 Hanushek; DX19082-85; DX19088-90. In particular, the systemic data relating standardized reading and math test scores in high-poverty schools to building repair needs showed that high-performing students tended to be in with the highest costs of repair,² i.e., the ones in the worst condition. DTEV Tab 7, ¶¶ 192-93; T.15872-74 Hanushek; DX19083; DX19088. Similarly, the data on building capacity in high-poverty schools showed that high-performing elementary schools were the most overcapacity at 105 to 108 percent utilization, while low-performing schools had, on average, excess capacity, or 92 to 94 percent utilization. DTEV Tab 7, ¶¶ 194-96; T.15827-28 Hanushek; DX19083.

²The trial court determined that the analyses Dr. Hanushek conducted based on “facility scores” derived from the BCAS survey were of no probative value because no witness had laid a proper foundation for them

Moreover, multi-variate regression analyses, which took into account non-school factors that affect achievement, such as poverty, demonstrated the absence of any statistically significant relationship between student performance and either building repair needs or utilization percentages. DTEV Tab 7, ¶¶ 193, 195; T.15872-74 Hanushek; DX19084; DX 19085.

In sum, the teaching, instrumentalities of learning, and physical facilities provided by the City's public school system more than meet the constitutional standard of minimal adequacy.

B. The Systemic Evidence Presented At Trial Regarding Student Performance Conclusively Establishes That New York City's Public Schools Meet Minimum Constitutional Standards.

The trial court's conclusion that New York City public schools fall below the constitutional standard is conclusively refuted by the systemic evidence of student performance presented at trial.

The evidence established that New York City public school children perform at a level above minimum adequacy on state and citywide tests. In 1998, 65 percent of the City's third graders scored above the Statewide Reference Point (the "SRP," or score that demonstrates age-appropriate achievement) on the PEP reading test and 89 percent scored above the SRP on the PET math test, while 63 percent of the City's sixth graders scored above the SRP on the reading test and 91 percent scored above the SRP on the math test. See PX1. pp. 34-35. While these scores arguably indicate that student performance could be improved, Dr. William Mehrens, Professor of Educational Measurement at Michigan State University, testified that despite lower socioeconomic status on average, New York City students did as well as students in the State's other four largest cities on State tests. T.18528 Mehrens.

Dr. Armor presented a study of statewide third and sixth grade math and reading scores on the State's PEP tests. DTEV Tab 9, ¶ 277. He showed that the disproportionately disadvantaged backgrounds of New York City students -- a fact agreed upon by all parties -- are reflected in the unadjusted test scores, which show that New York City students generally scored lower than students in the rest of the State on these tests. T.20465-67 Armor; DX19601; DX19538. However, after a regression analysis was performed on the statistics, to control for students' socioeconomic background characteristics, Dr. Armor's study showed that the performance of New York City students on the state math and reading tests was virtually identical to the performance of students in the rest of the

State. T.20470-74 Armor; see also CFE Trial, 187 Misc. 2d at 70-71.

New York City's students performed better on citywide tests, and in fact did well in comparison to children in other parts of the country. The evidence showed that students score near or above the national average on citywide nationally-normed tests, even though New York City has two to three times the percentage of disadvantaged children than does the national sample. Tab 9, ¶ 258; T.10475, T.10540-43 Tobias; T.2373-81 Spence. In a comparison of New York City test scores with those of other large urban school districts, New York City children outperformed children from those districts even though such other districts had a less disadvantaged student population. DTEV Tab 9, ¶ 263; T.10523-33 Tobias; DX10176; DX10190 (Council of Great City Schools study). The evidence presented by defendants' witnesses Dr. John Murphy, the former Superintendent of both the Prince George's County and Charlotte-Mecklenburg school districts (two of the largest school districts in the United States), corroborated this finding. He testified that New York City students performed much better on standardized tests than students in other large urban school districts. T.16096, T.16195-98 Murphy.

New York City student performance on the Regents Competency Tests ("RCTs") further undermines plaintiffs' claim. At the time of the first appeal to the Court of Appeals in this case, the State required that students pass the RCTs to graduate. SED reports indicate that in 1997-98, 90 percent of New York City's eleventh grade students achieved graduation competency status by passing the RCTs (or an alternative examination administered to students with disabilities), or the more rigorous Regents' exams. PX2, p. 11.

The RCTs are sufficiently demanding that the Court of Appeals labeled them "aspirational," and found that they may exceed the Constitution's minimum adequacy requirement. CFE I, 86 N.Y.2d at 317. These tests also serve as a reliable measure of the skills necessary for civic participation as a voter and juror, which is what the Education Article requires. Defendants' expert, Dr. Walberg, analyzed local newspaper and television coverage -- the source of information most used by voters prior to election day -- and jury materials used in New York civil trials. He found that these materials are written at a grade level that is lower than that tested by the RCT. DTEV Tab 2, ¶¶ 28-29; 31-34; DX19298; DX19317; DX19316; DX 19318; DX19319; T. 17200-03, 17220-21, 17355-56 Walberg.

In the face of this evidence, the trial court simply rejected the standards themselves. CFE Trial, 187 Misc. 2d at 61. It asserted that a sound basic education requires more than the basic proficiency level required by the

RCTs, and decided that it would instead measure student performance according to the RLS. Id. at 61-62. Even if it were appropriate for the trial court to select its own yardstick of student performance (which it clearly is not), the choice of this particular standard is unreasonable. The RLS are far more demanding than the RCTs, and given that the Court of Appeals found that the RCTs themselves may be too rigorous to serve as a reliable indicator of constitutional adequacy, there is no justification for relying on the RLS.

The court's justification for explicitly disregarding this statewide requirement appeared to be that the court believed judicial review function authorized an independent assessment of these issues. See id. But as the United States Supreme Court has held, "the legislature's efforts to tackle the problems [of financing and managing a public school system] should be entitled to respect." Rodriguez, 411 U.S. at 42; see also Idaho Schools for Equal Opportunity v. Evans, 850 P.2d 724, 734 (Idaho 1993). The trial court's dismissal of New York City students' strong performance on the RCTs was just one example of its refusal to accord any respect to these determinations.

In conclusion, the levels of available resources and student performance in New York City's public schools -- which clearly exceed the standard of minimal adequacy -- demonstrate that the trial court erred in holding that the City's students are deprived of the opportunity to acquire a sound basic education.

POINT III THE TRIAL COURT ERRED IN FINDING THAT THE STATE'S EDUCATION FINANCE SYSTEM IS THE LEGAL CAUSE OF ANY PROVEN FAILURE TO PROVIDE A SOUND BASIC EDUCATION

Even if this Court were to agree that New York City public school students do not receive the opportunity to acquire a sound basic education, plaintiffs are not entitled to relief unless they established that New York State's education funding system caused this failure. As the Court of Appeals specifically instructed the trial court:

In order to succeed in the specific context of this case, plaintiffs will have to establish a causal link between the present funding system and any proven failure to provide a sound basic education.

CFE I, 86 N.Y.2d at 318.

The trial court never carried out this directive. Instead, it adopted a simple syllogism that fundamentally distorted the meaning of causation in this context:

If it can be shown that increased funding can provide New York City with better teachers, better school buildings, and better instrumentalities of learning, then it would appear that a causal link has been established between the current funding system and the poor performance of the City's public schools.

CFE Trial, 187 Misc. 2d at 68. This standard -- "if money can help, the State is liable" -- is most revealing for what it leaves out. Under this formulation, the court would find the State's funding system to be the cause of any proven failure to provide a sound basic education so long as additional funding -- no matter how much -- could improve certain educational inputs -- no matter how little. Causation would be established whether or not the current level of total funding for the City's public education system is adequate to buy a sound basic education. And it would be established without consideration of any possible causal factor other than the State funding system. See CFE Trial, 187 Misc. 2d at 82 (failures of the City and BOE are "the ultimate responsibility of the State").

The question of causation in this case presents three main issues. If defendants prevail on any one of them, this Court must find that the trial court erroneously held that the State's education funding system is the cause of any proven failure to provide a sound basic education. In fact, as demonstrated below, defendants are entitled to prevail on all three issues.

This Court must first determine whether the funds currently available to BOE are sufficient to provide a sound basic education -- a question the trial court gave no serious consideration. (In fact, the trial court directed the State to conduct a study to address this question -- a burden that should have been plaintiffs' to carry at trial -- as part of its overly broad remedy.) To the trial court's way of measuring, New York State would be causally

responsible for any constitutional deficiency in New York City's public schools whether per-pupil funding in New York City was half the national average, equal to the national average, or ten times the national average. This premise is wrong, both intuitively and legally. To ignore the resources currently available to the system and what those resources should buy in terms of education is to ignore something integral to determining whether the finance system bears responsibility, either as a matter of common sense or law, for any established constitutional deficiency in education. In fact, as set forth in section A, infra, current funding levels are sufficient to pay for a sound basic education in New York City, as defendants established.

Consistent with its position that the State fails to meet its constitutional obligation even where BOE receives enough funding to provide a sound basic education, the trial court also erroneously determined that no entity other than the State's funding system can bear legal responsibility for the constitutional inadequacy of a local public school system. CFE Trial, 187 Misc. 2d at 79-82, 91-92. Obviously, this logic eliminates the City's stewardship of its own system as a possible cause, thereby ignoring the clear import of the Court of Appeals' direction and turning on its head the principle of local control of education -- a principle intrinsic to the meaning of the Education Article and firmly rooted in New York State's history of education since long before the Article was enacted. The trial court thus ignored evidence of waste, ineffectiveness, and fraud in the City's oversight of its public schools, all of which indicate that inadequate funding is not the cause of any educational deficiency.

Second, as established in section B, infra, even if the total amount of funding for the City's public schools is insufficient to pay for a sound basic education, this Court should find that the City, not the State, is responsible for any underfunding. Again, this is a possible conclusion that the trial court did not examine in any depth once it determined, incorrectly, that the City was constitutionally exempt from responsibility. See CFE Trial, 187 Misc. 2d at 97-99. In reality, the Education Article was enacted against the backdrop of a longstanding practice of relying on localities to pay their appropriate share of public education costs, a practice that reflects the principle of local control over education inherent in the Article. Defendants demonstrated at trial that while the State funds New York City public schools at appropriate levels, the City has substantially underfunded them during the period at issue in this case, in light of its relative wealth and in relation to the local contributions made by other districts across the State.

Nor does the trial court's attack on the education funding formulas themselves in any way undermine this conclusion. CFE Trial, 187 Misc. 2d at 84-90. The relevant question with regard to State funding is whether the

amount of funding provided by the system was sufficient to meet the State's obligation under the Education Article, not whether the methods by which that amount was derived are desirable. The charges leveled against the inner workings of the funding system are irrelevant, inaccurate, or both. Not only does this political budgetary system operate essentially like any other, but impugning it is no substitute for establishing legal causation.

Finally, and only if the Court rules for plaintiffs on the first two issues, the Court must determine whether plaintiffs have established that additional funding would yield the performance gains plaintiffs claim are necessary to bring about a sound basic education. The existence of a significant correlation between increased education spending and enhanced student performance is a necessary condition for establishing causation in this case, since funding cannot be the cause of any deficiency unless the infusion of additional funds into the City's system will significantly improve the quality of education. As addressed in Section C, infra, the court's finding that the necessary correlation exists is without adequate foundation. CFE Trial, 187 Misc. 2d at 75-79. Proceeding effectively as though defendants, rather than plaintiffs, bore the burden of proof, the court unjustifiably discredited the testimony of defense experts, which established the absence of a correlation between funding and achievement in New York City schools, and relied on plaintiffs' mostly anecdotal evidence. Plaintiffs' evidence included no analysis of New York City data, and failed to either quantify the improvements that would supposedly be realized if additional funds were available or determine if these improvements would enable the system to offer a sound basic education.

B. Current Funding Levels Are More Than Adequate to Support a Sound Basic Education In New York City, and Any Constitutional Deficiency Is Attributable to Local Mismanagement, Waste, or Fraud.

The State's funding system cannot be deemed responsible for any constitutional inadequacies if, in fact, the funds available to BOE are sufficient to provide a sound basic education. The evidence at trial demonstrated overwhelmingly that total spending on public education in New York City is indeed enough to offer its students such an education. Any failure to satisfy the constitutional minimum can only be attributed to the failure of the City and BOE – through a combination of poor management decisions, waste, and fraud -- to effectively deploy these resources. Proceeding on the erroneous assumption that the Education Article forbids holding a locality accountable

for its own delinquency, and instead mandates that the State must bear liability for such local failures, the trial court wholly ignored this essential step in identifying the cause of any constitutional deficiencies in the City's schools.

CFE Trial, 187 Misc. 2d at 91-99.

1. Current Funding Is Adequate to Pay for a Sound Basic Education in New York City Public Schools.

Current levels of funding are more than sufficient to pay for a “minimally adequate” education in New York City’s public schools. Dr. James Smith¹ testified to his opinion that New York City has adequate resources to provide a sound basic education.² T.20366 Smith. Dr. Smith stressed that New York City has more money per pupil than similar districts nationwide and spends “significantly more than the national average.” T.20367-68 Smith. Additionally, he noted that New York City’s 1998-99 spending of \$8,596 (at the elementary level) is a vast sum of money in absolute terms; with these funds, a typical elementary school of 800 students would have over \$5 million left over after paying for all teacher salaries and benefits for the school year. T.20368-70 Smith.

Defendants also sought to introduce evidence of a “professional judgment study” conducted by Dr. Smith in which impartial educators assessed whether they could provide educational programs meeting the sound basic education standard set forth in CFE I, given the level of resources actually available to BOE. Although his methodology is generally accepted as a valid means of measuring the adequacy of school resources, the trial court erroneously excluded the study -- which showed that sufficient resources were present to provide a sound basic education, T.20415-16 Testani Proffer -- on the ground that it was based on hearsay.³

¹Dr Smith is an education administrator at Stanford University and president of an educational consulting firm, who served as a deputy superintendent for the California Department of Education for eight years and as vice president of the National Board for Professional Teaching Standards. DTEV Tab 10, ¶ 297 n.62.

²Several of plaintiffs’ witnesses testified that, in their opinion, the funding available to the New York City public schools was insufficient to provide an education which would enable all or most New York City public school students to meet the extremely rigorous Regents Learning Standards. T.2005 Spence; T.5250-51 DeStefano; PX2026A, ¶ 28 Zardoya Witness Statement; PX2332A, ¶ 149 Rosa Witness Statement. These opinions, however, are irrelevant to the issue in this case, namely, whether available funding is sufficient to provide an education that satisfies the Court of Appeals’ standard of minimal adequacy.

³New York courts have repeatedly recognized that experts may testify about the contents of documents that are not in evidence so long as the material is of a type generally relied upon by experts in the field. See e.g., Freitag v. New York Times, 260 A.D.2d 748, 748-49 (3d Dep’t 1999); Greene v. Xerox Corp., 244 A.D.2d 877 (4th Dep’t 1997). Here, the study was of a type accepted by the social scientific community. Even plaintiffs’ expert, Dr. Berne, acknowledged the reliability of this type of “professional judgment” study. T. 12558 Berne (noting that there are three main methods of estimating the cost of providing an adequate education, including the “professional judgment” method, which assembles educators to measure what educational programs and resources are required to

Finally, the court's decision to exclude Dr. Smith's testimony contradicted its rulings on several other occasions, including its decision to allow the testimony of Dr. Richard Jaeger, who over defendants' objections, related the opinions and conclusions of unnamed educators who provided a content analysis of the CAT-5 and NAEP tests. T.13303-13304. Other evidence presented at trial confirms Dr. Smith's testimony. For example, it was shown that the New York City school system spends more per pupil than virtually all of the largest school districts in the nation, and spends significantly more than the national average for all school districts. DTEV Tab 2, ¶ 13. During the 1999-2000 school year, federal, state, local, and other revenues provided \$10.4 billion for BOE to operate the New York City public schools. This amounted to approximately \$9,500 per enrolled public school student, placing New York City in the top 10 percent of spending among the nation's largest school districts. DTEV Tab 10, ¶¶ 292-93; DX19118; T.16234-35 Murphy.

In the 1998-99 school year, New York City was the second highest spending district of districts of over 50,000 students subscribing to the Education Research Service ("ERS"), spending \$8,578, or 46 percent more per student than the average amount spent in the other districts. DX19039; DX19063; T.16229-30 Murphy. Data from the U.S. Department of Education's National Center for Education Statistics ("NCES") showed that for the 1995-96 school year, New York City's average per pupil expenditure was 25th out of the 463 largest school districts. DX19114; T.15639-40 Hanushek. If New York City were counted as a state, it would rank fifth highest in per pupil expenditures. DTEV Tab 10, ¶¶ 293-95; T.15651-52 Hanushek. Even when adjusted for cost-of-living, New York City's spending would rank ninth if it were treated as a state. DTEV Tab 10, ¶ 293; T.15652-53 Hanushek; T.20168-69 Guthrie. For the 1995-96 school year, even using a "large" cost-of-living adjustment of 20 percent, the City still ranked in the top 10 percent of spending among the nation's 263 largest school districts. DTEV Tab 10, ¶¶ 293, 298B; T.15640-42 Hanushek; DX19115.

The trial court rejected the use of such comparative funding figures, on the grounds that "[a] sound basic

achieve state standards).

Moreover, the Smith findings were admissible as the results of a survey. Dr. Smith polled the experts, and the experts responded to the questionnaire he designed. In New York, experts are permitted to present the result of surveys or polls. See e.g., Greene (upholding trial court's decision to allow defendant's vocational expert to give opinion testimony based on a labor market survey he conducted by phone with prospective employers) Dr. Smith designed the specifications for the study (the instructions, the budgets) which could all be cross-examined, and he also coordinated the study's implementation, oversaw the deliberations and analyzed the results of the study. T.18385-92. Therefore, plaintiffs would have had ample opportunity to question the study's findings through cross-examination of Smith.

education is gauged by the resources afforded students and by their performance, not by the amount of funds provided to schools.” CFE Trial, 187 Misc. 2d at 90. While it is true that neither funding comparisons nor absolute funding levels, by themselves, can demonstrate the presence of a sound basic education, actual funding levels are plainly relevant to ascertaining the cause of any constitutional deficiencies in the quality of education. Put simply, the fact that New York City is among the highest-spending large school districts in the nation belies the contention that it possesses insufficient funds to provide a sound basic education.

2. **Given the Longstanding Tradition of Local Control of Education, Local Actors Can Be Held Responsible for Any Failure to Provide a Sound Basic Education.**

Although the evidence demonstrated that any constitutional inadequacy in the New York City’s school system is caused by local actors who actually deliver educational services, the trial court foreclosed this conclusion by holding that local entities are exempt from blame in the context of an Education Article claim. CFE Trial, 187 Misc. 2d at 79-82, 91-92. This was clear error.

The Education Article does not make the State the exclusive guarantor of a sound basic education. The primary obligation it imposes on the Legislature is to “provide for the maintenance and support of a system” that affords students throughout the State the opportunity for a sound basic education, not to micro-manage the administration of education in hundreds of localities across the State. To the contrary, local control over public schools was a fundamental element of education in New York long before adoption of the Education Article in 1894. The laws in place at that time authorized localities, for example, to divide themselves into school districts, raise additional monies for the establishment and operation of common schools, determine their own course of study in those schools (in addition to the subjects that the State required to be taught), and elect school commissioners who were charged with supervising and managing schools in each district and school inspectors who were charged with examining and certifying district teachers. See supra, at 28-29. More than two centuries later, local school districts still retain significant authority and responsibility for the actual delivery of educational services. See CFE I, 86 N.Y.2d at 333 (Simons, J., dissenting in part) (“individual districts . . . remain charged with administering the schools in their districts and possess broad powers for that purpose”).

The historical foundations and soundness of local control have been emphasized by both the New York

Court of Appeals and the United States Supreme Court. As the Court of Appeals observed in Levittown, “the preservation and promotion of local control of education . . . is both a legitimate State interest and one to which the present financing system is reasonably related.” 57 N.Y.2d at 36; see also Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy had long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process.”) The trial court’s refusal to consider how local management of educational resources affects the quality of education available to New York City students flies directly in the face of this well-established principle, and the Court of Appeals’ direction to determine whether the school finance system is the cause of any proven deficiencies.

3. Any Lack of a Sound Basic Education Is Attributable to Local Management of Educational Resources.

If current funding levels could support a sound basic education, as defendants demonstrated at trial, responsibility for any constitutional deficiency must fall to the City’s and BOE’s management of their own system. This deduction is amply supported by evidence of waste, ineffectiveness, and, to some degree, fraud, in the oversight of public education -- all of which the trial court ignored in its analysis of causation. CFE Trial, 187 Misc. 2d at 91-99.

To begin, BOE overspends on its very costly special education programs, thereby diverting significant funds that could be used for general education programs. DTEV Tab 10, ¶¶ 412-416; T.18872, T.18892-96 Reschly; DX11170. BOE also overspends on its Limited English Programs (LEP) because it over-refers children to such programs and uses programs that are less effective and more expensive. DTEV Tab 10, ¶¶ 440-42; DX12215, p. ii; T.9260-62 Hernandez; T.16847-48 Rossell.

Particularly inefficient and wasteful are BOE’s policies related to facilities. DTEV Tab 10, ¶¶ 443-76. Existing conditions of disrepair in the New York City public school system have been caused by the failure of New York City and BOE to allocate adequate amounts from available funds for preventive and corrective maintenance, and to spend the funds that are allocated in an efficient manner. DTEV Tab 10, ¶ 444; T.4220-22 Spence. The high cost of needed school repairs is the result of past choices made by BOE and the City to defer spending on necessary maintenance, in order to use these funds for other purposes. DTEV Tab 10, ¶445; T.4220-22 Spence. Over the

years, the Inspector General of the School Construction Authority (“SCA”) has uncovered extensive fraud and corruption in connection with the construction and rehabilitation of school facilities. DTEV Tab 10, ¶ 523; DX15062, p.1,5; DX17065, p.13; DX19007, p.4,11,19,27,29; DX19005, pp.4-5, 12-31,33.

In addition to these management failures, fraud and corruption have long been rampant in BOE, as demonstrated at trial. These problems, uncovered by numerous public commissions, include inappropriate patronage hiring, the availability of wasteful perks, bribery, and blatant theft. See supra, at 17. Unfortunately, the consequences of such fraud and corruption are often manifested in the reduction in quantity or quality of resources for the education of children, particularly in districts with low performing schools. T.14736 Fruchter; DX10025-34 p.NYS00628; T.21442-43 Stancik.

B. Even If Insufficient Funding Were the Reason for Any Failure to Provide a Sound Basic Education, the City’s Severe Underfunding of its Schools Has Caused That Shortcoming.

History and widespread practice make clear that New York City, like any locality, bears substantial responsibility for funding its public schools. Even if the approximately \$10,000 New York City spends yearly on each student were not sufficient to give public school children a sound basic education, examination of State and local funding levels in New York City unequivocally demonstrates that the City, not the State, bears responsibility for any shortfall. The trial court’s focus on the mechanics of the budget process itself distracts from this conclusion, but cannot hide it. CFE Trial, 187 Misc. 2d at 82-90. Indeed, the only “gross and glaring inadequacy” in this case is the City’s deviation from the statewide norm in financially supporting its own schools.

2. **The City Substantially Underfunds its Schools in Relation to its Relative Wealth and the Extent of Local Education Funding Across the State.**

For the same reasons that the trial court cannot ignore the role of local management of public schools, see supra, Point III.A.2, the Constitution does not authorize it to ignore the responsibility of localities in funding their schools. For a full century prior to the Education Article’s enactment in 1894, the Legislature had been providing funds to localities to assist in the support of public schools. Importantly, the localities were eligible for these State funds only if they contributed matching funds.¹ As members of the 1894 Constitutional Convention made clear, the

¹ See Ch. 75, “An Act for the Encouragement of Schools,” enacted 1795 (requiring each county in State to raise tax totaling half of county’s education funding, with the balance to be provided by State); Commission of 1812 report

Education Article was not intended to dramatically alter this system or impose a new set of obligations upon the Legislature, but rather to bolster and bring permanence to the existing system. See 3 Revised Record at Constitutional Convention of 1894, at 695; Report Submitted by Committee on Education and Funds Pertaining Thereto, (Aug. 23, 1894) (Doc. No. 62, at 4) (amendment requires that free public schools “shall be sufficient in number, so that all the children of the State may, unless otherwise provided for, receive in them their education”); see also 3 C. Lincoln, The Constitutional History of New York 554 (1906); Report of the Temporary State Commission of the Constitutional Convention of 1967, Vol. 6, p. 7694. Thus, the Court of Appeals has held that, “[w]hile the provisions of [the Education Article] formally establish the public policy of the State, . . . they merely crystalize into fundamental law in mandatory form earlier decisions made by the people and recognized by the Legislature since the organization of the State and the adoption of the first Constitution.” Judd v. Board of Educ., 278 N.Y. 200, 210 (1938).

CFE I’s directive to the trial court further underscores the importance of local contribution to education funding. Judge Simons, in recounting New York City’s declining and substantially lower-than-average contribution to local education, warned 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.” CFE I, 86 N.Y.2d at 341 (Simons, J., dissenting in part). While the majority opinion described Judge Simons’s discussion of causation as “premature” at that point in the case, it took no issue with his conclusion that localities have a duty to meaningfully contribute to education funding -- an obligation that is a critical part of the causation calculus mandated by the Court of Appeals in CFE I. Id. at 318.

An examination of New York City’s contribution to education funding reveals its inadequacy. In 1996-97, the latest year for which comparative data were presented at trial, New York City raised about \$4,000 per student from local resources for K-12 education -- \$2,200 less than the state average of \$6,200 per student. DTEV Tab 12,

(“[it was] hardly to be imagined, the legislature intended that the state should support the whole expence [sic] of so great an establishment”[cite]; Ch. 242, “An Act for the Establishment of Common Schools (towns eligible to receive state funds only if equivalent amount raised by local tax); Ch. 1912 (1814) (localities authorized to raise up to three times amount provided by State funding); see also Matter of Wilwyck Sch. for Boys v. Hill, 11 N.Y.2d 182, 191 (1962) (noting that the Legislature had previously imposed upon localities a duty to “maintain[] and support . . . a system of free common schools, wherein all the children of this state may be educated”). Today, individual school districts still “supply a major part of the funding necessary to support and maintain their schools.” CFE I, 86 N.Y.2d at 333 (Simons, J., dissenting in part).

¶ 560; DX1939; T.18108 Wolkoff. If the City had funded the education of its 1.1 million students at the State average, it would have contributed an additional \$2.4 billion, raising the total expenditure from all sources including the City more than 25 percent. If the City had contributed to local education commensurately with its relatively high wealth (it is wealthier than approximately two thirds of districts statewide, see supra at 26), the additional spending capacity would be even greater. DTEV Tab 10, ¶¶ 342-43; T.1258-59 Mills. In another relevant measure, the City's lost levy of \$841 million in 1999, see supra at 27, represented 95% of lost levy statewide among districts that spent less than the state average per pupil and had comparatively low test scores.

When New York City's local effort for education is compared to that of a school districts of similar wealth, its local effort pales in comparison. Looking at local effort as a percentage of adjusted gross income, while New York school districts whose wealth is approximately equal to New York City's expend about 6.2 percent of their income for education, New York City spends only about 3.5 percent, i.e., these districts spend a percentage of their income on education that is greater than the percentage spent by New York City by a factor of 1.77. T.18137 Wolkoff; DX19410. A comparison based on percentage of property value shows that the two percent effort of districts of similar wealth is one-third greater than New York City's effort of 1.5 percent. Id. New York City would increase its local spending by more than \$2,000 per pupil if it matched the local effort of similar wealth districts. T.18137-39 Wolkoff; DX19445.

Not only is the City funding education at anomalously low rates, but the BOE has refused to spend funds available to it, accumulating substantial budget surpluses in recent years. The BOE had surpluses of \$226 million, \$259 million, and \$212 million, respectively, in fiscal years 1997, 1998, and 1999. T.15482-83 Donohue. The trial court concluded that these surpluses are the product of "sound budgeting practices." CFE Trial, 187 Misc. 2d at 91. But it is hard to see why a City that views its education as constitutionally inadequate would save rather than spend hundreds of millions of dollars on needed improvements. Just as with its refusal to assign proper responsibility for BOE's mismanagement of its resources, the trial court's refusal to confront the City's woefully inadequate funding of its schools in examining causation is plainly incorrect.

2. **The Trial Court's Attack on the Workings of the State's Aid Formulas and Budgetary Process Are Irrelevant to Determining Whether the State in Fact Provides Sufficient Funds to New York City's Schools.**

Rather than recognize that the State appropriately funds City schools and that the City does not, the trial

court expended great effort in building a case against the inner workings of the State education funding system. As plaintiffs attempted to do at trial, the court painted the picture of a system that is intentionally mysterious, inequitable, and, ultimately, disadvantageous to New York City. CFE Trial, 187 Misc. 2d 82-90. Aside from being largely false, this portrait is entirely irrelevant to the question of whether the State's education funding system is the cause of any deficiency in the City's schools. Cf. Campaign for Fiscal Equity, Inc. v. State of New York, 271 A.D.2d 379 (1st Dep't 2000) (legislative motive irrelevant to claim based on Title VI implementing regulations). The constitutional adequacy of education funding is independent of the particulars of the democratic mechanisms that give rise to it. If the State provides an amount of money that, taken together with a reasonable contribution from the locality, is sufficient to support a sound basic education, the State has discharged its constitutional responsibility. As demonstrated above, it has done so here.

The trial court's criticism of the funding process is blind to the political process itself. The overworn characterization that the education budget is decided by "three men in a room" who "manipul[ate the aid formulas] to conform to budget agreements" puts a cloak-and-dagger spin on the common reality of the democratic process. Id. at 83, 88. The coming together of elected political leaders to negotiate and reach final agreement on appropriations that will meet the approval of a majority of duly elected legislators is not deviant, but the norm. It is, as the trial court reluctantly admitted, "not inherently unconstitutional." Id. at 83. More to the point, it is not remotely unconstitutional. As for the court's complaint that the process is somehow shrouded in mystery, "complex[ity] and opa[city]," id., are not constitutional defects. It can hardly be expected that a process that determines the distribution of more State funds than any other, and attempts to accommodate an extraordinary array of educational needs and competing policy considerations, would be simple. See Levittown, 57 N.Y.2d at 38 ("The determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous practical and political complexity") This process, even if inelegant and imperfect, is most surely the province of the people's elected representatives and not an occasion for judicial intervention.

Nor are the choices embedded in the formula the trial court's to make. For example, the trial court's preference for funding based on enrollment rather than attendance, CFE Trial, 187 Misc. 2d at 84, has no constitutional force against the Legislature's legitimate preference for distributing aid based on how many children

are actually going to school and for encouraging school districts to ensure that students actually go to class. Nor does its desire to modify transition adjustments or make the budget more sensitive to the purported effects of the State's School Tax Relief ("STAR") Program, *id.* at 86, trump valid legislative decision-making. The same logic applies to the court's broadest dissatisfaction with the funding system -- that it purportedly is not sufficiently wealth-equalizing and does not "align funding with need." *Id.* at 83. These allegations are not borne out by the evidence. Indeed, the school aid formulas provide for four times more aid to low-wealth districts than to high-wealth districts. DTEV Tab 10, ¶287; PX2027, p.9. But, more to the point in the context of causation, the Constitution does not require school funding to be perfectly wealth-equalizing or perfectly aligned with need. It requires that the State provide a level of funding that -- building on appropriate funding from the localities, on which the State may reasonably rely -- is sufficient to allow public school children throughout the State to enjoy a sound basic education. This the State has surely done.

C. Contrary to the Trial Court's Ruling, the Evidence Failed to Demonstrate That Increased Spending Would Improve the Quality of Education in New York City.

To show that the state education funding system is the cause of any proven failure to provide New York City public school students with a sound basic education, plaintiffs had to show -- as a necessary but not sufficient step in their proof -- that a significant correlation exists between increasing education funding in New York City and improving academic performance. Plaintiffs failed to meet this burden. To the contrary, the evidence at trial showed that there is little or no connection between spending more money on education -- or providing more of the educational resources that plaintiffs and the trial court believe are tied to educational quality -- and better student performance in the New York City school system. *See CFE Trial*, 187 Misc. 2d at 69 (issue of correlation between resources and achievement is relevant "as it pertains to New York City public schools"). The trial court's conclusion that such a correlation had been established rests on two errors. First, the court unjustifiably rejected the testimony of two defense experts who showed that there was no established link between increased funding and better performance. *Id.* at 69-75. Second, plaintiffs did not present a persuasive affirmative case that such a connection exists. Their evidence fell far short of meeting their burden of demonstrating that added funding would bridge any supposed gap between the education currently provided in the New York City schools and that required by the Education Article.

1. Defendants' Experts Demonstrated the Absence of Any Significant Correlation Between Additional Resources and Higher Achievement.

Most of defendants' evidence regarding the relationship between increased education spending and student performance was presented through the testimony of two experts, Dr. David Armor, a professor of sociology at the George Mason University Institute of Public Policy, and Dr. Eric A. Hanushek, an economist specializing in education issues. These witnesses conducted a variety of statistical analyses that demonstrated the lack of any real world correlation between higher spending and achievement in New York City schools (as well as in school districts across the State). DTEV Tab 10, ¶ 346; DX19073-75; DX19113; T.15786-807 Hanushek; T.20559-64 Armor; DX19579; DX19541-45A; DX19556-60; DX19546-55.

Most of the experts' analyses sought to isolate a measure of spending (e.g., per pupil spending) or resources (e.g., teacher certification) and ascertain whether variations in the level of that particular "input" had an impact on student performance, as measured through student test scores. To obtain accurate results, the experts had to control for variables unrelated to the spending or resource measure they were studying. In particular, it was necessary to control for differences in the socioeconomic backgrounds of students. The process of controlling for these differences, which are universally recognized to have a substantial impact on student performance, was referred to at trial as "leveling the playing field."

Controlling for the differences in the socioeconomic backgrounds of students, T.20488 Armor, Dr. Armor concluded from his study, examining four different single-year "cohorts" (e.g., fifth graders in the 1996-97 school year) of New York City students, that five separate resource measures -- teacher experience, teacher education, teacher certification, pupil-teacher ratio, and per pupil spending for general education students -- had virtually no statistically significant effect on student performance on state and citywide tests. Tab 10, ¶ 351; T.20559-64 Armor; DX19579; DX19541-45A; DX19556-60; DX19546-55.

Dr. Hanushek's testimony regarding the effect of increased inputs on students' test scores in New York City was consistent with Dr. Armor's. Dr. Hanushek analyzed the effects of certain school resource measures on student performance on citywide math and reading tests in all New York City elementary and middle schools, taking into account differences in students' socioeconomic backgrounds. Overall, he found no systematic relationship

between resources and performance. DTEV Tab 10, ¶ 348; T.15810 Hanushek. In his first analysis, Dr. Hanushek divided these schools into two groups -- moderate poverty schools and high poverty schools -- and, across both groups, found that to the extent there were differences in the levels of school resources among high versus low achieving schools, in virtually all instances the resource differences favored the low performing schools.¹ In his second analysis, Dr. Hanushek considered all City elementary and middle schools and, controlling for socioeconomic differences, found no statistically significant effect of four resource items -- per pupil spending, computer-to-pupil ratios, capacity utilization, and facility conditions -- on student performance on the citywide math and reading tests. He therefore concluded that resource levels in New York City schools are not related to high performance, but instead, educational quality and performance are a function of something other than simple resource differences. T.15892 Hanushek.

Dr. Hanushek also examined student performance on SAT tests and National Association for Educational Progress (“NAEP”) exams over several decades, and again concluded that resources are not closely related to performance. T.15705 Hanushek. From 1970 to 1996, pupil-teacher ratio steadily declined, the percentage of teachers with Master’s degrees doubled, the median teacher experience rose from eight to fifteen years, and per student expenditures, in inflation-adjusted dollars, nearly doubled. T.15706 Hanushek. Yet student performance trends did not correspond to this massive increase in resources. T.15705-07 Hanushek. Hanushek also testified that other claimed indices of educational quality -- teacher salary, teacher test scores, condition of facilities, and administrative resources -- have “no real systematic effect on student achievement.” T.15732-35 Hanushek. Another of Dr. Hanushek’s studies, which examined whether variations in spending among states correlate with performance on the NAEP math test, confirmed this conclusion. T.15760 Hanushek. Dr. Hanushek further found, using 1990 census data, that school funding does not generally have an effect on a student’s subsequent earnings. T. 15777 Hanushek.

¹The lone exception was in high poverty middle schools, where Hanushek found a very slight advantage in pupil-teacher ratios that favored the high performing schools. DTEV Tab 10, ¶ 349 DX 1977, DX 19078; 19079; 19080; 19081; 19082; 19083; 1908A; 10907A; 19132; 19133; 19143; 19144; 19088.

In sum, these expert witnesses performed a range of analyses, relying on an array of available data, and viewing the education system from a variety of angles. Their unvarying and well-supported conclusion was that more money is not what drives improvement in educational quality. Although the trial court took exception to the methodology of these experts on numerous grounds, see CFE Trial, 187 Misc. 2d at 69-75, none of the court's critiques undermines their conclusions.

* Use of single-year data points. The trial court attacked defendants' experts for "reliance on analyses of single years of data," on the grounds that "education is a cumulative enterprise, and student outcomes are dependent not just on the resources that they receive in a single school year, but on the resources that they receive over years of schooling." CFE Trial, 187 Misc. 2d at 71; see also id. at 74. This criticism posits that conclusions drawn about the relationship between resources and performance, based on single-year input measures, will be unreliable if that year's inputs are not representative of inputs in preceding years. However, while this type of skewing is theoretically possible, the suggestion that it occurred here is unfounded.

First, there is no reason to think that there are wide year-to-year variations in the resources afforded students, most of whom attend the same school for years in a row, such that their inputs in the year studied would not be representative of the inputs in previous years. Plaintiffs presented no evidence of such a systematic bias and, indeed, Dr. Armor selected cohorts at the end points of students' time in grade school or middle school. T.20489, 20564 Armor. Second, if the skewing that concerned the court actually took place, it would be expected to overstate the correlation between resources and performance just as often as it understated it. Yet, all the studies at issue show little or no correlation between additional resources and performance. There is no contradiction between acknowledging that education is a "cumulative process" and recognizing that a cross-sectional analysis of data from a single year can yield accurate information about the relationship between education spending and academic performance.

* Leveling the playing field. The trial court accepted plaintiffs' contention that the studies of the defense experts were flawed because they "leveled the playing field." CFE Trial, 187 Misc. 2d at 71-72. This finding entirely misses the point of those studies -- to isolate, and find the effect of, certain resource measures on student performance. If these experts had not controlled for students' socioeconomic backgrounds, their analyses would only have confirmed a point on which the parties agree: that socioeconomic deprivation is highly correlated

with low academic performance. Under the trial court’s approach, the Legislature would have a constitutional obligation to erase the differences in performance between the disadvantaged and the non-disadvantaged, no matter the cost, and no matter whether the factors that hampered student performance emanated from outside the school setting. See id. at 68, 79-82. That view, which has no grounding in any Court of Appeals decision construing the Education Article, cannot withstand scrutiny. The “myriad of factors,” CFE I, 86 N.Y.2d at 317, that contribute to socioeconomic disadvantage are largely outside the education system’s responsibility or capacity to remedy. See Levittown, 57 N.Y.2d at 41 (“[I]nequalities existing in cities are the product of demographic, economic, and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction.”). See also Point I.B, supra.

Indeed, the evidence at trial showed broad consensus supporting the undeniable fact that the impact of educational resources on student performance cannot be meaningfully assessed without taking account of the powerful influence of socioeconomic factors. BOE has repeatedly recognized this fact. For example, in one of its test score reports, BOE stated: “A fair and accurate analysis of the relative performance of our schools must ‘level the playing field,’ and take into account demographic factors that significantly affect student achievement.” DTEV Tab 9, ¶ 272; PX2373, pp. BOE769546, BOE769548. Similarly, the SED’s “Guide to the Comprehensive Assessment Report” states:

It may not be appropriate, for example, to make inferences about the quality of an instructional program solely on the basis of test scores. There are many other factors that influence test results, such as the general intellectual level of the students, the extent to which they are motivated to learn and to obtain high test scores, the availability of community resources such as museums and libraries, etc. Motivation is particularly important. School achievement suffers in communities and neighborhoods where unemployment, hunger, violence, drugs, and broken homes prevail.

Tab 9, ¶ 273; PX781, p.2. Finally, plaintiffs’ own witness on student achievement, Dr. Grissmer, controlled for socioeconomic factors in his achievement analyses, T.9487, 9515-16 Grissmer, and admitted that family factors so strongly affected achievement that “investing it in the family might pay off more” than directing additional resources to schools, T.9621 Grissmer.

Nor should plaintiffs be permitted to prevail by mischaracterizing the State’s position on this issue. The State has not suggested that “at risk students’ educational potential is immutably shaped by their backgrounds,”

CFE Trial, 187 Misc. 2d at 72, and this distortion does not justify placing on the State’s education system the obligation to eradicate all such socioeconomic disadvantages. Indeed, there is no district in the nation with a large number of disadvantaged children that has achieved the goal of eliminating the gap between disadvantaged children and non-disadvantaged children. T.1216 Mills. The defense experts’ analyses demonstrated that spending has no significant effect on student performance after controlling for these external factors. Notably, plaintiffs did not even present evidence that there is a simple (non-leveled) correlation between funding and achievement.

* Reliance on overall spending. The trial court also criticized the defense experts’ testimony on the ground that their resource analyses “failed to track the effect of resources provided to individual students.” CFE Trial, 187 Misc. 2d at 72 (emphasis added); see also id. at 74-75. For example, the court observed, “dollars spent on a Reading Recovery program in a given school would be attributed to a school’s budget, but very few students would actually receive that benefit.” Id. This reasoning -- that “[s]tudies that examine overall spending on student achievement are of limited probative value,” id. -- ignores the essential question: whether the money is sufficient, and inadequacies are the product of ineffectual programming, waste, and any other problems in how schools actually allocate resources. The question before this Court is not whether higher funding for Reading Recovery, or any other particular program, will improve the performance of the individual children who happen to be in that program; it is whether increasing overall education spending will significantly enhance overall performance.

* Not accounting for variance in school costs and resources. The trial court also concluded that the experts’ “spending data were incomplete. The data failed to account for variance in school costs and resources depending on such factors as the size of the school, whether its space was owned or leased, transportation costs and whether it received private funding.” CFE Trial, 187 Misc. 2d at 72; see also id. at 75. This critique of expert testimony based on BOE’s own budget reports lacks foundation. Plaintiffs, who had the burden to show causation at trial, failed to demonstrate that the resource and cost differences not captured in the experts’ data actually distorted their results, or how extensive this distortion might have been. Pointing to theoretical methodological errors without demonstrating that they in fact exist or compromise the validity of a study cannot serve to undermine the credibility of expert testimony.

* Poor choice of variables. Finally, the trial court identified as a flaw in Dr. Armor’s evidence his purportedly poor choice of resource variables. CFE Trial, 187 Misc. 2d at 72. First, the court criticized Dr. Armor

for focusing on teachers with five years' or less experience in assessing whether teacher experience adversely affects student performance. Id. The court insisted that "the evidence at trial indicated that teachers with two years' or less experience were particularly correlated with lower student outcomes." Id. (emphasis added). Plaintiffs' own expert, however, claimed that it was "teachers with less than three years experience [that] tend to be less effective." PFF at 181 (emphasis added). In any event, because the five-year period Dr. Armor used encompasses the two- and three-year periods claimed as relevant by the trial court and plaintiffs' expert, respectively, one would expect his study to reflect at least some significant correspondence between teacher experience and student outcomes; but it reflected none. Notably, plaintiffs, who bear the burden to show causation, did not present a study based on the two-year data that was available in the very same school report cards on which Armor relied.

Both plaintiffs and the court took issue with Dr. Armor's reliance on the relationship between student performance and the percentage of teachers with Master's degrees. CFE Trial, 187 Misc. 2d at 72. Plaintiffs, however, argued elsewhere that "percent of teachers with at least a master's degree" was an "objective criteri[on], directly affect[ing] the quality of educational opportunity," PFF at 162, and used that criterion in claiming that New York City teachers are not as qualified as teachers in the surrounding suburbs or the rest of the state, PFF at 211.¹ Putting aside the inconsistencies in plaintiffs' argument, the court's criticism of using Master's degrees as a measure merely amounts to an agreement with Dr. Armor's conclusions -- that this particular mark of higher educational attainment by teachers has no material impact in terms of student accomplishment -- and thus further supports the State's demonstration that infusion of new funds is not significantly correlated with better educational results. 2. Plaintiffs Failed to Meet Their Burden to Establish a Substantial Correlation Between Education Funding and Higher Student Outputs.

Of course, even if the trial court's attacks on the defense experts' methodology were entirely well-founded, its rejection of their findings would not alter the plaintiffs' burden to affirmatively demonstrate that increased funding would cure any constitutional deficiencies in the City's public school system. Plaintiffs failed to meet this burden, and for this reason alone, the trial court's ruling on causation must be reversed.

¹ Moreover, a Master's degree is a prerequisite for permanent certification, which plaintiffs advance as an important indicator of teacher quality. PFF at 189.

Plaintiffs presented no analyses of data pertaining to New York City to suggest that the level of spending in the City's public schools has an effect on the achievement of the children who attend them. Instead, they relied largely on anecdotal evidence from superintendents and other witnesses to the effect that performance levels could not be improved without more money. See e.g., DTEV Tab 10, ¶¶ 300, 360; PX2332A ¶ 149 Rosa Witness Statement; PX2026A ¶ 28 Zardoya Witness Statement; T.5250-51 DeStefano; T.2005 Spence. The opinions of these witnesses as to how much is "enough" or "adequate" simply do not bear any necessary relationship to the constitutional standard. Plaintiffs also relied heavily on the STAR Study, which was conducted in Tennessee and concluded that class size affects performance. But defense expert Dr. Hanushek raised numerous doubts about the reliability of the STAR study and its applicability to New York City, see T.15892-15919 Hanushek, and plaintiffs made no effort to show directly that class size reduction would improve performance in New York City, see T.2241 Grissmer (acknowledging that he had done no New York City analysis). And that study's conclusion -- which pertains to just one resource measure -- is directly contradicted by the findings of defendants' experts.

Indeed, several of plaintiffs' witnesses corroborated the defense experts' conclusion that additional resources are not substantially correlated with student performance. For example, plaintiffs' expert Dr. David Grissmer agreed that, based on studies across states, teacher salary levels and the education level of teachers have no significant effect on student achievement. T.9487 Grissmer.¹ Similarly, Dr. Robert Berne, another of plaintiffs' experts, conceded that he had not attempted to perform an analysis that would correct for the flaws he contended existed in the testimony of Dr. Armor and Dr. Hanushek, and that he could not say whether such an analysis would change their results at all. T.22700 Berne. In fact, in forming his opinion on the efficiency of New York City's educational spending, Dr. Berne did not undertake any examination of teacher productivity or the efficiency of New York City's spending in any specific category. T.13119-21 Berne.

¹In his initial testimony, Dr. Grissmer disagreed with the methodology of an analysis conducted by Dr. Hanushek, which indicated that no positive correlation existed between resource measures and the rate at which students earned Regents diplomas. On rebuttal, Dr. Grissmer acknowledged that he had performed his own Regents diploma analysis, correcting for the mistakes he perceived in Dr. Hanushek's, and that this analysis revealed no significant positive correlation for an array of resource measures, including per pupil spending, pupil-teacher ratio, teacher salary, teacher experience, teacher education, and provisional teacher certification. T.22435-40 Grissmer. Indeed, two of Dr. Grissmer's regressions yielded statistically significant, positive relationships for pupil-teacher ratio, i.e., "as pupil-teacher ratio increased, that is as class size got larger, performance got larger." T.22438 Grissmer.

In sum, the trial court erred in concluding that plaintiffs had met their burden to show that the State's education funding system caused any proven failure to provide a sound basic education.

**POINT IV
PLAINTIFFS' CLAIM BROUGHT PURSUANT TO TITLE VI'S
REGULATIONS MUST BE DISMISSED IN LIGHT OF THE UNITED
STATES SUPREME COURT'S RULING IN ALEXANDER V.
SANDOVAL THAT THESE REGULATIONS DO NOT CREATE A
PRIVATE RIGHT OF ACTION**

The trial court held that the State's education financing system has a disparate impact on minority students in New York City's public schools, in violation of Title VI's implementing regulations. CFE Trial, 187 Misc. 2d at 113. The evidence presented by plaintiffs at trial did not support this claim. See DTEV Tab ¶¶ 570-673. But even if plaintiffs had established a violation of Title VI's regulations, this claim must now be dismissed.² After the trial court issued its decision, the United States Supreme Court ruled that the implementing regulations of Title VI do not create a private right of action. Sandoval, 121 S.Ct. at 1523 (2001).

Title VI prohibits discrimination in programs or activities receiving federal financial assistance. See Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. While a plaintiff must make a showing of intentional discrimination to succeed on a claim brought under the statute itself, see Guardians Ass'n. v. Civil Serv. Comm'n of City of New York, 463 U.S. 582, 610-11, 639-42 (1983), Title VI's implementing regulations also prohibit practices that are facially neutral but have a disparate impact, see 34 C.F.R. § 100.3[b] [1], [2]. Until the Supreme Court decided Sandoval in April 2001, there was some debate as to whether private plaintiffs could bring a cause of action under the Title VI regulations, or whether that right was reserved to the federal government alone. See New York City Env'tl. Justice Alliance v. Guiliani, 214 F.3d 65, 73 (2d Cir. 2000).³ The trial court adjudicated plaintiffs' private cause of action, found that the State's funding mechanism had a disparate impact on minority students in violation of Title VI's regulations, and ordered the State to put in place reforms of school financing and governance designed to redress these violations. CFE Trial, 187 Misc. 2d at 113, 115-16.

In Sandoval, decided April 24, 2001, the United States Supreme Court held that Title VI's implementing

²In the unlikely event that this Court concludes that Sandoval does not foreclose plaintiffs' claim under Title VI's implementing regulations, this Court should dismiss plaintiffs' claim for the reasons set forth in defendants' post-trial brief.

³Section 601 of Title VI prohibits intentional discrimination by federal funding recipients in "programs or activities," and Section 602 authorizes federal agencies that disburse those federal funds to promulgate regulations to enforce Title VI. Sandoval, 121 S.Ct. at 1516-17. Pursuant to that authority, federal agencies, including the Department of Education, have adopted regulations prohibiting practices with a disparate impact on minorities. 34 C.F.R. § 100.3(b)(2).

regulations do not create a private right of action. Reiterating that congressional intent is the touchstone in determining whether a federal statute creates a private right of action, the Court reviewed both Sections 601 and 602 of Title VI for evidence on this point. The Court noted the complete absence of “rights-creating” language from § 602. Rather than providing private individuals with a right to sue to enforce the regulations, that provision merely authorizes the federal agencies to effectuate rights granted under § 601:

Nor do the methods that § 602 goes on to provide for enforcing its authorized regulations manifest an intent to create a private remedy: if anything, they suggest the opposite. Section 602 empowers agencies to enforce their regulations either by terminating funding to the “particular program, or part thereof,” that has violated the regulation or “by any other means authorized by law.”

Id. at 1521 (quoting 42 U.S.C. § 200d-1).

The Court further noted that the only means of enforcement articulated by Congress in § 602 is the agency’s detailed enforcement process, culminating in the agency’s termination of federal funding to the offending recipient in egregious cases. Id. at 1521-22. Nowhere in these detailed enforcement procedures did Congress state that private individuals could sue to enforce the regulations, and absent express authorization by Congress, the Court held, an agency may not create such a right. Id. The Court dismissed plaintiffs’ disparate impact challenge to Alabama’s administration of driver’s license tests in English only, concluding that “neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce [the disparate impact] regulations We therefore hold that no such right of action exists.” Id. at 1523.

Just as plaintiffs lacked a private right of action to sue for the disparate impact of Alabama’s English-only rules, following Sandoval, plaintiffs here have no private right of action to assert that New York’s education aid scheme has a disparate impact on minorities. Accordingly, the trial court’s ruling on this claim must be reversed and the claim dismissed.

A. The Trial Court’s Overbroad Remedy Impermissibly Intrudes on the Legislature’s Powers.

The New York State Constitution provides for a balanced distribution of powers among the three branches of government. See N.Y. Const., art. III, § 1; art. IV, § 1; art. VI; Cohen v. State, 94 N.Y.2d 1, 17 (1999). “[I]t is a fundamental principle of the organic law that each department of government should be free from interference, in the lawful discharge of duties expressly conferred, by either of the other branches.” New York State Inspection, Security & Law Enforcement Employees, Dist. Council 82 v. Cuomo, 64 N.Y.2d 233, 239 (1984). While courts are permitted in some circumstances to resolve claims against the legislative or executive branches, they must exercise this authority with great sensitivity to this principle.

Accordingly, the Court of Appeals has repeatedly instructed that the judiciary should be hesitant to intervene in the affairs of the Legislature. Indeed, an analysis of a claim against the Legislature must “begin with an awareness of the respect due the legislative branch [and the principle of] distribution of powers in our State government.” Steingut, 40 N.Y.2d at 257 (determining whether Legislature’s practice of fixing monetary allowances for legislators violated constitutional prohibition against increasing or diminishing a legislator’s salary during her term of office). Moreover, “it is not the province of the courts to direct the legislature how to do its work.” Id. (quoting People ex rel. Hatch v. Reardon, 184 N.Y. 431, 442 (1906)); see also Heimbach v. State of New York, 59 N.Y.2d 891, 893 (1983); Bright Homes, Inc. v. Wright, 8 N.Y.2d 157, 162 (1960). This presumption is a powerful one; so strong, in fact, that courts have refused to even exercise jurisdiction over a claim if the remedy sought would necessitate significant judicial interference in the Legislature’s affairs. See, e.g., Jones v. Beame, 45 N.Y.2d 402, 409 (1978); Matter of Abrams v New York City Transit Auth., 39 N.Y.2d 990, 993 (1976).

Judicial intrusion into legislative affairs raises even more acute separation of powers concerns where the issue at hand involves “questions of judgment, discretion, allocation of resources and priorities inappropriate for resolution in the judicial arena.” Beame, 45 N.Y.2d at 407 (quoting Abrams, 39 N.Y.2d at 992) (emphasis added). Resource allocation decisions require a legislative body to make difficult choices among a “whole range of municipal services” -- a task reserved to the Legislature, in part because the courts are “ill-equipped to undertake the responsibility.” Id. at 409. “Obviously, it is untenable that the judicial process . . . should intervene and reorder priorities, allocate the limited resources available, and in effect direct how the vast [governmental] enterprise should conduct its affairs.” Id. at 407. This principle has particular vitality in the area of education policy, given the

“enormous practical and political complexity” of allowing courts to “determine the amounts, sources, and objectives of expenditure of public moneys for educational purposes.” Levittown, 57 N.Y.2d at 39.

The trial court’s remedy will likely have the effect of reordering legislative priorities to a degree that implicates these concerns. Although the court stated that the Legislature retained some measure of discretion in deciding how to address alleged educational deficiencies, see CFE Trial, 187 Misc. 2d at 77, it also acknowledged that the directives in its order will impose tremendous financial obligations on the Legislature. For example, as the court noted, decreasing class size as required by the court’s order “may require billions of additional dollars,” id. at 78; “more resources will have to be made available to increase salaries and improve working conditions of teachers,” id.,¹ Id. at 78. “additional funding [will be required] for library books, school supplies, and instructional technology,” id. at 79; and “[s]ubstantial funds are necessary to provide the expanded platform of educational resources necessary to boost the achievement of all at risk children,” id. at 79.

Of course, the mere fact that a judicial order may impose a financial cost does not insulate the State’s actions from review. But compliance with the court’s expansive remedy is likely to be so costly that it will necessarily be achieved at the expense of other programs in the State -- whether those initiatives aid at-risk children, the elderly, people in need of affordable healthcare, economically-depressed communities, or other groups in need of additional resources. These broad policy decisions, which require the setting of priorities and the allocation of finite resources, are matters for the executive and legislative branches of government. The place to question their wisdom lies not in the courts, but “at the voting machine.” See Abrams, 39 N.Y.2d at 992.

Moreover, the trial court’s remedy may have the effect of shifting funds away from other school districts in the State. Faced with an analogous Education Article claim, the Fourth Department recently held that plaintiffs in that case were required to join the neighboring school districts as necessary parties on the grounds because the action “threatened the very existence of the neighboring school districts as they are presently constituted,

¹Regarding teachers salaries, the trial court observed:

Given that New York City has approximately 78,000 teachers, even a modest increase in teachers' salaries will be costly. If the average raise were \$ 5,000 -- which would be a good deal less than the current average wage differential between the City and its suburbs -- the annual increase in teacher pay (not including benefits) would amount to \$390 million.

administered and funded, the school districts are parties ‘who might be inequitably affected by a judgment’ and ‘who ought to be parties if complete relief is to be accorded.’” Paynter v. State, 270 A.D.2d 819, 820 (4th Dep’t 2000) (citing CPLR § 1001 [a]). While the State does not seek the formal joinder of all school districts, this point highlights the broad implications of the trial court’s remedy, and its potential impact on all other districts in this State. Such broad decisions ought to be the province of the Legislature, and not of a particular judge in any single county.

Additionally, the detailed nature of the trial court’s remedy is inappropriate because it denies the Legislature the opportunity to debate and select among various approaches for addressing any educational deficiencies in the City’s public schools. Particularly where there has been no showing of legislative inaction or neglect -- and here, the Court of Appeals has never concluded that the State has violated the Education Article,² see REFIT, 86 N.Y.2d 307; Levittown, 57 N.Y.2d 27 -- courts must rely on the good faith of the Legislature to fashion an appropriate remedy for a constitutional violation. Choosing among policy options should be a matter of legislative discretion, not judicial instruction -- as numerous other state courts to have considered similar challenges have concluded.

B. The Trial Court’s Remedy Is A Striking Departure from Orders Issued by Other State Courts, Which Have Held that Separation of Powers Principles Mandate Substantial Deference to the Legislature in Crafting a Remedy

The trial court’s decision is a striking departure from the approach taken by other state courts that have considered constitutional challenges to the adequacy of school funding. Although a number of other state courts have identified flaws in their state’s educational funding mechanism, the courts have almost uniformly deferred to their legislatures at the remedial stage.³

These courts have cited two reasons for leaving to the Legislature, not the courts, the question of how the State should address any violation of its education clause. First, separation of powers principles require courts to afford the Legislature the first opportunity to remedy any constitutionally-cognizable deficiency, and to presume that

²Indeed, until the decision on appeal in this case (which is stayed pending resolution of these proceedings), no court had ever found the State liable for an Education Article violation.

³Several courts have held that defining educational adequacy violates separation of powers principles. See e.g., Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1199 (Ill. 1996) (holding that the question of whether the educational institutions and services in Illinois are “high quality” is outside the sphere of the judicial function); Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So.2d 400, 408 (Fla 1996) (holding that appellants failed to demonstrate in their allegations, or in their arguments on appeal, an appropriate standard for determining “adequacy” that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature, both generally (in determining appropriations) and specifically (in providing by law for an adequate and uniform system of education)); City of Pawtucket v. Sundlun, 662 A.2d 40, 56 (R.I. 1995) (Basing its rejection of a challenge to Rhode Island’s method for funding public schools on a refusal to “[scale] the walls that separate law making from judging,” and supporting its decision with extensive citations from the United States Supreme Court’s political-question and separation-of-powers jurisprudence).

the Legislature will act in good faith to do so. The Alabama Supreme Court, for example, vacated a trial court's decision holding the State's education financing scheme unconstitutional, to the extent the decision directed the Legislature to implement the court's "Remedy Plan." Ex Parte James, 713 So. 2d 869, 882 (Ala. 1997). Concluding that the trial court had abused its discretion in ordering a specific remedy before providing the other branches of government an opportunity to act unilaterally, the Alabama court noted that "the legislature . . . bears the 'primary responsibility' for devising a constitutionally valid public school system." Id. (citing McDuffy v. Secretary of the Exec. Office of Educ., 615 N.E.2d 516, 554 n.92 (Mass. 1993)).

The court explained:

Although the judiciary is not without the power to enforce judgments designed to remedy constitutional defects in the educational system, the judiciary should exercise this power only in the event the legislature fails or refuses to take appropriate action.

Moreover, the judiciary should not presume at the outset of litigation of this nature that legislative and executive officials will be derelict in their duties. Indeed, it must assume the contrary. The best approach for the judiciary, having invalidated the present public education system, would be to stay further action in the case -- but retaining jurisdiction -- for a reasonable time, thus affording the legislative and executive officials the first opportunity to devise a constitutional public education system. In other words, the judiciary should -- upon its first encounter with this species of litigation -- forgo specific remedial action until the coordinate branches of government have had a reasonable opportunity to discharge their constitutional responsibilities consistent with its holding of liability.

James, 713 So. 2d at 882.

Similarly, the highest courts of other states have held that "the details" of remedying an education clause violation "are best left, at least initially, to the executive and to the legislative branches of government [Courts] shall presume at this time that the Commonwealth will fulfill its responsibility with respect to defining the specifics and the appropriate means to provide the constitutionally-required education." McDuffy, 615 N.E.2d at 619 n.92. See also Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397, 399 (Tex. 1989) (court would not "instruct the legislature as to the specifics of the legislation it should enact The legislature has primary responsibility to decide how best to achieve an efficient system. We decide only the nature of the constitutional mandate and whether that mandate has been met."); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 726 (1995) ("[The court's] role under our Constitution's separation of powers provision should be one of restraint. We do not dictate to the Legislature how to discharge its duty."); Sheff v. O'Neill, 678 A.2d 1267, 1270-71 (Conn. 1996) ("[T]he constitutional imperative of separation of powers persuades us to afford the legislature, with the assistance of the executive branch, the opportunity, in the first instance, to fashion a remedy that will most appropriately respond to the constitutional violations [the court] identified.")⁴

⁴See also Leandro v. State, 488 S.E.2d 249, 261 (N.C. 1997) ("The courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education.

Second, in addition to insisting on restraint based on separation of powers concerns, state courts have expressed doubt that expansive and specific remedial orders will result in substantial or effective educational reform. One point of reference is New Jersey’s education financing litigation. See, e.g., Robinson v. Cahill, 303 A.D.2d 273 (N.J.1973). That court has provided broad, detailed instructions that the State’s Commissioner of Education must satisfy the State Constitution’s guarantee of a “thorough and efficient” education. Abbott v. Burke, 710 A.2d 450 (N.J. 1998). In refusing to hold its education funding system unconstitutional, the Rhode Island Supreme Court addressed the apparent ineffectiveness of this approach:

We decline to follow the example of New Jersey Supreme Court which has struggled in its self-appointed role as overseer of education for more than twenty-one years, consuming significant funds, fees, time, effort and court attention The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature.

Sundlun, 662 A.2d at 59 (R.I. 1995); see also Ex Parte James, 713 So. 2d at 905 (“The New Jersey Supreme Court has been the self-appointed overseer of education in New Jersey for 23 years The reason the litigation has not yet ended is because the New Jersey Court entered into the realm of policy-making. Policy-making has no end; there are always new matters to be addressed.”) (Hooper, C.J., dissenting).

This Court should heed those cautionary words. The remedy ordered by the trial court is legally flawed because it impermissibly intrudes on the Legislature’s prerogatives to allocate resources and to choose among policy options for addressing any constitutional violations that may exist. Furthermore, installing courts as the monitor of day-to-day decisions about teaching, school administration, and curriculum leaves these critical determinations to institutions that may lack the expertise to make them in the way that best aids the City’s children.

Accordingly, even if this Court upholds the trial court’s finding of an Education Article violation, it should vacate the remedy with instructions to permit the Legislature to define the appropriate means of providing New York City’s public school students with a constitutionally sufficient education.

A clear showing to the contrary must be made before the courts may conclude that they have not. Only such a clear showing will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education.”); Seattle School Dist. No. 1 v. State, 585 P.2d 71, 106 (Wash. 1978) (reversing trial court’s decision to the extent it retains jurisdiction over the parties and the action, on the grounds that court has “every confidence the Legislature will comply fully with the duty mandated by [the Constitution] within the time specified in the judgment as here modified.”); Serrano v. Priest, 557 P.2d 929, 957 (Cal. 1976) (“We are confident that the Legislature, aided by what we have said today . . . , will be able to devise a public school financing system which achieves constitutional conformity. . . .”).

CONCLUSION

For the foregoing reasons, the trial court’s decision should be reversed and judgment entered for defendants.

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