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

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

BRIEF FOR PLAINTIFFS-RESPONDENTS

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PRELIMINARY STATEMENT

The last class to graduate from the New York City public schools before this trial started was the Class of 1999. The Class of 1999 entered kindergarten in September 1986. Over the next 13 years, these students were denied the opportunity to obtain a sound basic education. As a result, only 60 percent of the Class of 1999 who entered the ninth grade will obtain a high school diploma. Many of those who receive a diploma will take as many as seven years to do so. And most of those who do receive a diploma will find that they are nonetheless unprepared for the demands of citizenship or a productive workplace; they will need substantial remediation before they can even begin basic college-level work.

What happened to the Class of 1999? It was devastated by the collective and cumulative effect of gross resource inadequacies.

When the Class entered the New York City public school system in the fall of 1986, it was already behind. Most of the children were poor, many came from homes where English is

not the first language and a disproportionate number suffered from a variety of ailments common to the inner city such as asthma and other disabilities. In short, an overwhelming majority of the children were "at risk" of educational failure. Although the State knew that adequate pre-kindergarten would substantially increase the odds for academic success, only 25 percent of the Class attended pre-kindergarten classes.

The Class of 1999 entered schools that were overcrowded, dilapidated and lacked facilities essential to learning such as laboratories and libraries. In 1988, when the Class of 1999 was in second grade, the system was short 100,000 seats and the State Legislature declared that the City's schools were in such "deplorable physical condition" that they were "a serious impediment to learning." For the next 13 years, there was little improvement. In 1995, when the Class of 1999 was in ninth grade, a blue-ribbon commission found a state of "imminent calamity" and described overcrowded schools that lacked adequate heat, light and air. And as the Class approached graduation, thousands of students attended high schools that were severely overcrowded, required shortened academic programs and continued to lack laboratories, adequate computers and gymnasiums. Across the City, students attended classes in converted busses, hallways, cafeterias, gymnasiums and offices.

The Class of 1999 was taught by teachers who were unprepared and inexperienced. When the Class was in elementary school, at least one in ten teachers lacked the minimum credentials required for certification by the State; one of four elementary teachers had failed the basic teacher competency exam at least once. As the Class moved through junior and senior high school, it was taught by at least 1500 uncertified math and science teachers (there were only

a handful of uncertified teachers in the entire rest of the state). Px 1205.[1] More than 40 percent of the math teachers, 37 percent of the biology teachers, and 24 percent of the chemistry teachers failed the certification tests in their subject matter at least once. Px 1482 at 18-19, 87. Throughout their 13 years in the public school system, the Class of 1999 was taught, on average, by teachers who lacked significant teaching experience and who had too little professional support and training. Schools with the largest percentages of at-risk students frequently had the least qualified and most inexperienced teachers.

Because the system lacked sufficient space and a sufficient number of qualified teachers, class sizes for the Class of 1999 were always too high. The average kindergarten class size was 25 students, but there was a one in four chance that class size exceeded 28. Outside of New York City, the percentage of at-risk children was significantly lower, the teachers were substantially more qualified and the facilities were in much better shape. There, class sizes were 25 percent smaller. By junior high school in New York City, there were 30 students in English class, and in high school biology there were 32 students. Inadequate teachers were asked to teach too many children, who had substantial educational disadvantages, in inadequate buildings.

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[1] For the Court's convenience, and in order to facilitate easy reference to the voluminous record in this case, Plaintiffs have annotated this brief with references to Plaintiffs' Proposed Findings of Fact and Conclusions of Law ("PFOF") which contains a more detailed discussion of many of the issues included in this brief. PFOF cites are to the paragraph numbers contained in that document, and the entire text of the PFOF is included in the parties' Joint Appendix on Appeal at pages 495 to 1690. Citations to exhibits submitted at trial are indicated by the prefix "Px" (for Plaintiffs' exhibits) and "Dx" (for Defendants' exhibits), *e.g.*, Px 3114, Dx 10014-40. In addition, citations to trial testimony are preceded by the name of the testifying witness, followed by the relevant pages of the transcript, *e.g.*, Sobol 1065:4-14. Plaintiffs' CD-ROM, included in the Joint Appendix contains fully searchable electronic versions of the PFOF, all exhibits referenced in the PFOF, and the settled trial transcript. A small number of cited exhibits that were omitted from the CD-ROM are included in Plaintiffs-Respondents' Supplemental Appendix. Should the Court so desire, Plaintiffs would be happy to demonstrate the use of the CD-ROM at the Court's convenience.

Although the State Education Department and the Board of Education knew that at-risk students require substantial additional resources just to have the opportunity to achieve academic success, there was never enough money to provide these resources to the Class of 1999. The limited programs available when the Class first entered the system – such as small group literacy enrichment, extended day programs and summer programs – were virtually eliminated in the early 1990s. As the Class neared graduation, some programs were restored, but never enough to serve the extraordinary need.

The Class of 1999 also had very little instruction in music, art and physical education. Even though it was widely understood that instruction in these subjects was an important means to support the core curriculum, particularly for at-risk students, the arts and physical education had been substantially eliminated from the schools by the time the Class of 1999 began. and were only partially restored by the end of their time in high school.

There were other substantial inadequacies: insufficient numbers of up-to-date textbooks for many years; hundreds of schools had no libraries; the number of library books per student was less than half of the state average and actually declined as the Class of 1999 moved from elementary to high school; insufficient numbers of computers and too few teachers who understood how to use them; and a chronic shortage of basic classroom supplies, from papers and pencils to math and reading workbooks.

The Class of 1999 suffered a collective and cumulative denial of adequate resources, collective because the multiple inadequacies reinforced each other and cumulative because the inadequacies continued year after year, the effects snowballing. The consequences were devastating. When the Class of 1999 took its first standardized literacy test in the third grade, one-third of the class – 20,000 children – was judged to be functionally illiterate. By the time the

Class reached junior high school, it ranked last in the state in social studies and science competence.

In 1999, just one-half of the members of the Class of 1999 that entered the ninth grade graduated on time; in the rest of the state, more than 80 percent graduated on time. By the year 2002, when the Class of 1999 is no longer eligible for free education, only another 10 percent will have graduated. A large portion of the students who do receive a high school diploma will still not have the skills and knowledge needed for success in life. More than 70 percent of the students from the Class who attend the City University will require remediation in English or math.

The history of the Class of 1999 provides overwhelming support for the trial court's finding that the "education provided to New York City students is so deficient that it falls below the constitutional floor." 187 Misc. 2d at 4. It is a history for which the State must take responsibility. The gross resource inadequacies and abysmal outcomes arose substantially from the failure of the state education finance system to ensure that the New York City Board of Education had sufficient funds over the last decade to provide adequate educational resources to New York City students. And apart from finance, the State must take responsibility because of the extensive control it has long wielded over the operation and governance of the New York City public school system. Having done so much to influence the current structure and condition of the system, the State must take responsibility for the consequences.

On this appeal, the State seeks to avoid responsibility for what happened to the Class of 1999 by asserting three principal claims. All three claims are so incredible that they appear to rest on the willful suspension of reason; they certainly require a blind eye for the record.

First, the State claims that the Court of Appeals has already endorsed a constitutional standard so low that the gross inadequacies visited upon the Class of 1999 and the abysmal outcomes it suffered actually pass constitutional muster. The State claims that, under this purported standard, even the skills and knowledge expected of junior high school students are "aspirational."

Of course, the Court of Appeals never endorsed such a hollow standard. To the contrary, it expressly reserved judgment concerning the appropriate standard, pending the development of a full factual record at trial. That record provides overwhelming support for the rational and meaningful standard ultimately adopted by the trial court, which rejected the State's claim that the Education Article has no substantive meaning. The trial court's standard embraces the template suggested by the Court of Appeals. It properly requires schools to provide students with the opportunity to acquire the skills and knowledge necessary to become productive citizens capable of civic engagement and sustaining competitive employment.

Second, the State claims that the education available in the New York City public school system is "exemplary" and "far exceeds" the constitutional threshold. Def. Br. at 1, 65. The State asserts that ***all*** of the resources available are adequate, and pronounces student achievement to be "exceptionally good." Def. Br. at 4. Not surprisingly, the State ignores virtually the entire record to advance this claim and willfully distorts or simply fails to understand the limited evidence it does cite. And the State makes no attempt to assess what happened to the Class of 1999 or any other group of students over time, advancing a snapshot view of a system frozen in time and claiming that it can find no connection between current resources and current outcomes.

The trial court properly rejected this ahistorical view and examined inputs and outputs "over multiple years" because "education is cumulative." 187 Misc. 2d at 24. Relying on a mountain of systemic evidence, the trial court found a history of gross inadequacies and abysmal outcomes that have persisted over time. Indeed, the trial court's findings and conclusions are not new or original; they mirror and affirm the findings and conclusions of all of the myriad agencies, boards, commissions and independent experts who have have examined and reported on the state of the city's schools for the last decade.

Third, the State simply denies responsibility for whatever failures might afflict the New York City public school system, asserting that there is no connection between the state education finance system and any failure to provide a sound basic education. And the State says that, whatever the cause, all blame must rest with the city or Board of Education, purporting to ground this claim in a 19th century vision of "local control" that is completely at odds with the modern realities of the City-State relationship.

The record is clear, however, that the system of finance does not provide the Board of Education with enough money and that this failure is the direct cause of inadequate resources. The State's principal factual assertion with respect to money is simply that the Board of Education spends a lot and, therefore, it must be enough. In fact, the Board spends less than the state average, even though the city has a significantly higher proportion of at-risk students who require additional educational resources, and the city faces the highest regional costs for resources. Given these facts, it is not surprising that the State completely failed to prove any substantial fraud or waste. Indeed, in its effort at blame shifting, the State admits that money is the problem, claiming that most New York City schools "have been adversely affected by the

City's underfunding." Def. Br. at 2 (emphasis added). Whatever the City's fault, the State Constitution squarely places ultimate responsibility directly on the State.

Running through all of the State's arguments is a wrong-headed notion about socioeconomic status. This was a term that the State and its witnesses employed frequently at trial. It embraces a concept that permits the State to argue that at-risk children are doing well, even though they cannot achieve minimal competence in literacy. In the State's view, the needs of at-risk students do not require that schools provide any additional resources to meet those needs; instead, those needs excuse the State's responsibility for abysmal outcomes. It is this view that leads the State to urge on this Court the testimony of its experts who offer purported statistical proof that New York City students are doing just as poorly as at-risk students elsewhere. It is this view that informs the State's urging of a standard so low that it will not require that at-risk students be provided with resources necessary for academic success, so that they can read and have hope for a productive future. And it is this view that says that there is no connection between the state education finance system and the failure to provide a sound basic education, because when you control for "external factors" (*i.e.*, socioeconomic status) money has no effect on performance. Def. Br. at 107.

The trial court properly rejected this view and found, as the evidence proved, that resources do make a difference for at-risk children; qualified teachers, decent facilities and the right instructional program can do much to address the educational needs of at-risk children. The trial court did not require that the State "erase differences in performance between the disadvantaged and the non-disadvantaged." Def. Br. at 106. But it did require that the State

ensure that schools provide those resources that are necessary for at-risk children to have an ***opportunity*** to achieve academic success. This is exactly what the Constitution requires. Thus, even though an overwhelming majority of the Class of 1999 was at risk, the State cannot escape its responsibility for the abysmal outcomes.

Finally, we anticipate the State's claim that the Class of 1999 is old news, that the courts must assess educational adequacy based on present conditions and future prospects. First, the only fair way to judge an education system is to look at its effect on the children whom it was charged to educate. Since education is cumulative, the most appropriate way to assess that effect is to look at the ultimate outcome; the Class of 1999 provided the most recent and complete group of students for which it was possible to judge the full effect of the New York City public school system. Second, there is substantial evidence that the conditions faced by the Class of 1999 have not changed significantly. The "current" story is not much different than the old news; the children of the Class of 2012, which entered the system as the trial began, face gross inadequacies and the prospect of dismal outcomes. Third, although it is true that there have been increases in state and city funding in recent years, the increases (which barely kept pace with inflation) have not satisfied the need. More important, there has been no fundamental change in the flawed structure of the state education finance system, and there has been no significant reform of governance and accountability that might also be needed to provide New York City children with a sound basic education. The State bears ultimate responsibility for both.

The framers of the Education Article understood even in 1894 that:

> ***The public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before . . .. The highest leadership is impossible without intelligent following.***

5 *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 3)

While we now confront public problems of a magnitude that may have been unimaginable to the framers, they understood that our ability to solve those problems rested largely on the strength of the public schools: "***their importance for the future cannot be overestimated."*** The trial court's carefully considered opinion sets a standard that will require the public schools to provide an opportunity for the state's students to acquire the "accurate knowledge" and "reasoning power" necessary to confront and overcome even the grimmest and most difficult public problems of our times. For that reason, it should be affirmed.

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Where the Court of Appeals explicitly instructed the trial court to determine the meaning of a sound basic education after the "the development of a factual record," did the trial court err in filling out the template sketched by the Court of Appeals and holding that a sound basic education (a) consists of the foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment, and (b) requires the educational resources needed to allow New York City students the opportunity to obtain these skills?

The trial court did not err.

2. Is a public school system providing a sound basic education if its teachers are unprepared and inexperienced, classes are exceptionally large, school buildings are in deplorable condition, basic textbooks and classroom supplies are missing, an up-to-date curriculum has not been implemented, and the majority of its students leave high school unprepared for more than low-paying work, unprepared for college, and unprepared for the civic responsibilities placed upon them by a democratic society?

The trial court held that it is not.

3. Is the State responsible for the constitutional failure of the New York City public school system where the evidence established that additional resources, properly directed, can provide the opportunity for a sound basic education to New York City children and where both the State Constitution and state law place the power and duty to control the New York City school finance system in the hands of the State?

The trial court held that it is.

4. Can Plaintiffs seek relief in this court for a state financing system that has a negative disparate impact on New York City's minorities where Plaintiffs have sued under

42 U.S.C. § 1983 and the implementing regulations of Title VI and where Section 1983 provides a private right of action for violations of Title VI's implementing regulations?

The trial court held that Plaintiffs have the right to bring this claim.

5. Did the trial court err in constructing a narrowly-tailored remedy that (a) deems unconstitutional the finance system that is responsible for the New York City public schools' failure to provide a sound basic education, (b) outlines general parameters for reforming the system, but (c) leaves the specific policy options, implementation mechanisms and allocation decisions to the Legislature and the Governor?

The trial court did not err.

HISTORY OF THE LITIGATION

Plaintiffs filed their original Complaint in this action on May 3, 1993. Since that time approximately 600,000 children have graduated from, dropped out of or aged out of a school system that the trial court held is inadequate under the New York State Constitution. Approximately 240,000 of those 600,000 students left school without a New York City high school diploma.

This case was first considered by this Court in November 1994 on an appeal from the trial court's denial of a motion to dismiss Plaintiffs' Amended Complaint. *Campaign for Fiscal Equity, Inc. v. State of New York*, 205 A.D.2d 272 (1st Dep't 1994). In June 1995, the Court of Appeals also considered this case and found that Plaintiffs had stated a legitimate claim under both the New York State Constitution and the anti-discrimination provisions of federal Title VI's implementing regulations. As discussed in more detail below, the Court of Appeals remanded the case to the Supreme Court, New York County, for "discovery and the development of a factual record." *Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 317 (1995) ("*CFE I*").

For more than four years following the Court of Appeals' decision, the parties engaged in extensive discovery that ultimately resulted in the exchange of at least 500,000 pages of documents and in more than 170 individual depositions (including, by agreement of the parties, all 30 expert witnesses identified by the parties). *See* Joint App. at 1740-41, 1808-27 (Affirmation of Joseph F. Wayland dated July 24, 2000 ("Wayland Aff.") at ¶¶ 11-14, Ex. G). Through this discovery process and through a pre-trial agreement between the parties to disclose in advance of testimony the identities of witnesses and the exhibits to be used with these witnesses, any risk of unfair surprise or trial by ambush was avoided. *See* Joint App. at 1828-34 (Wayland Aff., Ex. H).

The case proceeded to trial before Justice Leland DeGrasse, sitting without a jury, against Defendants the State of New York, Governor Pataki and Tax Commissioner Urbach.[2] Opening statements took place on October 12, 1999, and the first witness was called the following day. The last witness left the stand on May 15, 2000. Closing arguments were held on July 27, 2000. In total, testimony in the trial was taken during 111 court days over a seven-month period. The settled transcript exceeds 23,000 pages; more than 5,000 exhibits (constituting more than 140 boxes of paper) were admitted into evidence.

Plaintiffs' Direct Case

Plaintiffs' direct case spanned 75 court days, including 56 witnesses:

Ten School District Superintendents: Ten New York City school district superintendents testified, covering three of the City's five high school superintendencies, six of the City's 32 community school districts, and the Chancellor's District (a district created to cover the worst schools in the system). They gave concrete descriptions and explanations of what was happening in the New York City school system. Collectively, they were responsible for approximately 323,000 students in 336 City schools, nearly one-third of the New York City public school system. Px 1410; Px 1604; Px 1849; Px 2026A-Zardoya Stmt. ¶ 19; Px 2332A-Rosa Stmt. ¶ 27; Px 2855-Lee Stmt. ¶¶ 2, 16; Px 2900-Young Stmt. ¶ 33; Cashin 266:2-4; Coppin 554:2-9; Santandreu 13512:14-22. Their districts ranged from the poverty-stricken Community School District 23, located in Ocean Hill-Brownsville, Brooklyn, to the affluent Manhattan Community School District 2. PFOF ¶¶ 81-90.

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[2] Through various stipulations, a number of the original additional parties to the case, including the legislative leaders and the state comptroller, were dismissed under the express condition that they not use their dismissal as a ground in opposing any relief or remedy ultimately granted by the courts of this state. Joint App. at 1783-94 (Wayland Aff., Exs. C, D).

Thirteen Senior BOE Administrators: Thirteen of the most senior central BOE administrators testified, including the Deputy Chancellor for Operations and the executives in charge of finance, facilities, personnel and assessment. These witnesses had system-wide responsibilities, and testified about system-wide conditions, system-wide resources, and system-wide performance measures.

Seven Senior SED Officials: Seven current or past senior officials of the State Education Department and the Board of Regents testified at trial, including the current Commissioner of Education, Richard Mills, the former Commissioner of Education, Thomas Sobol, and the Chancellor of the Board of Regents, Carl Hayden. They testified about the state's public education system, the Learning Standards created by the Regents, and the relative resources allocated to the New York City public schools. Current New York City public schools chancellor Harold Levy, a Regent at the time he was first called to the stand to testify, testified about the state education finance system.

Eleven Nationally Recognized Experts: Eleven experts in education, teaching, testing and educational research testified. Many of them had conducted studies of the New York City and New York State school system as part of their regular academic studies, unrelated to any litigation.

Other Fact Witnesses: Other witnesses included Randi Weingarten, president of the New York City teachers union (the United Federation of Teachers or "UFT"); Benno Schmidt, former president of Yale University and current president of Edison Schools, and Frederick Salerno, Chief Financial Officer of Bell Atlantic, who testified about the high level of skills required for employment at one of the state's largest employers.

Defendants' Case

Defendants called a total of 15 witnesses over 36 court days. All but three were highly paid expert consultants. Many of them had previously been retained by the out-of-state law firm that was hired by the Attorney General and the State to conduct the trial. The Defendants paid these 12 experts approximately $1,000,000 for their services. None of their experts had *any* substantive prior experience with or knowledge of the New York City public schools.[3]

Post-Trial Submissions and the Decision

On July 24, 2001, the parties submitted post-trial submissions totaling more than 1,800 pages. The trial court issued its 182-page decision on January 10, 2001.

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[3] Hanushek 15632:10-18, 16074:16-20; Murphy 16616:21-16618:21; Rossell 16954:21-16955:9; Walberg 17275:9-24; Podgursky 17684:21-17685:25; Wolkoff 18223:11-18224:10; Mehrens 18552:18-21, 18553:4-18; Reschly 19042:20-24, 19046:9-11; O'Toole 19727:24-19728:19; Guthrie 20348:5-23; Smith 20418:17-19, 20419:18-25; Armor 20609:13-22; 20610:2-24.

STATEMENT OF FACTS

Summary of Statement of Facts

The State's brief is remarkable for what it says that is not accurate, and for what it ignores. The substantial Statement of Facts that follows is necessary in order to correct the inaccuracies, and present the record to this Court. It is particularly important to present a full record when the State claims that there is "no factual basis" for the trial court's findings.

A full Statement of Facts is also necessary in fairness to this Court, since the State asks this Court to conduct a *de novo* review of the entire 23,000 page, 5,000 exhibit record and reach a *de novo* determination of the accuracy of the trial court's 189-page opinion. At this Statement of Facts makes clear, the trial court's opinion was carefully written and abundantly supported by the evidence.

This Statement of Facts begins with a description of the *facts* about the control of education in New York State. Contrary to the State's portrayal, the Constitutional Convention of 1894 did not enshrine local control, but instead placed the responsibility for providing *all children* with an education squarely on the shoulders of the state government. And the history of the last century shows that the legislative and executive branches seized that role. As set out in the Statement of Facts, virtually every aspect of the New York City public schools is controlled by, limited by, funded by, and ultimately judged against, state statutes, rules and regulations. From deciding who can go to school, who is too old to go to school, and what is taught in school, to deciding the terms and conditions of the employment of school custodians, nothing is beyond the State's reach.

The State is therefore directly, and ultimately, responsible for the conditions of the New York City schools, and for what has happened to the children in those schools. It is undisputed that the more than 1.1 million children in New York City, despite extensive poverty and lack of

educational preparation, are able to learn. No one has suggested that this group of 1.1 million children is in any way less talented, less intelligent, or less able to succeed in life than the students in the rest of the state. The witnesses agreed that many of these children, called at risk for failure, need additional resources to learn what they need. But no one said, openly, that added resources could not bridge that gap.

The Statement of Facts will then show the factual support for what the trial court found: a school system that does not give sufficient resources to these children. Instead, the New York City public schools force students to endure conditions that would be impossible to overcome for virtually any student in this state.

First, the Statement of Facts describes the City's school buildings: crumbling, overcrowded, inadequate relics of decades past that do not offer art or music, and lack adequate libraries and science labs. Then, we will show the excessively large class sizes inflicted on these students, making education a difficult proposition at best. But the next section, describing the teachers who will be in front of that oversized class, describes conditions that make education a virtual impossibility. Those classes will be taught by too many inexperienced, untrained and unqualified teachers.

We will then describe the factual record supporting the trial court's findings that when these inexperienced and unqualified teachers are thrown into classrooms, too many of them never receive the professional training they need. Indeed, they will not even have the basic educational tools they would have in any other system.

It was undisputed at trial that all children can learn. But when children are forced into these conditions, and they do not have adults at home with the education and time to make up for

them, those children will fail to learn. And the Statement of Facts will list the evidence showing that, in New York City's public schools, they fail in appalling numbers.

Contrary to the State's bizarre characterizations, the trial record showed massive failures beginning in the earliest grades and continuing through to the 21st birthday of some students. As the trial court held, a system where 40 percent of the students leave the system as adults unable to read at an eighth grade level or do sixth grade math is a failure. There is no question about the truth of the trial court's determination that New York City's children were not being given the opportunity for a sound basic education.

The final section of the Statement of Facts will examine the evidence that answers the question, how is it possible for these conditions to continue year after year? The answer is simple: money. For the last two decades the City schools have been denied enough money to provide adequate resources. And that denial was a direct result of the funding system that was entirely created and controlled by the State.

The trial court held that the State's control over the finance and the actual operations of the schools demanded that the State be held responsible for the school system's failures. The record fully supported that holding.

I. THE CONSTITUTION PLACED THE RESPONSIBILITY FOR PROVIDING AN EDUCATION FOR ALL THE STATE'S CHILDREN SQUARELY ON THE SHOULDERS OF THE STATE GOVERNMENT; A CENTURY LATER EVERY SIGNIFICANT AREA OF THE NEW YORK CITY SCHOOLS IS CONTROLLED BY STATE STATUTES, RULES AND REGULATIONS

The State seeks to avoid responsibility for the gross inadequacies of New York City's public schools by suggesting that it has little to do with what happens in those schools. Def. Br. at 10. While there may have been a time in our history when Albany left New York City to its own devices concerning education, that time passed many decades ago. In modern times, the State has exercised extensive control over virtually every aspect of New York City school

governance and finance. The McKinney's Consolidated Laws of New York compilation of the education laws runs to *nine* volumes.

The State tells the City how to organize its school system, setting the powers of the Board of Education, the Chancellor and community school boards. The State tells the City how it can pay for its schools, prescribing what taxes it may collect and how much of the City's budget must be allocated for education. The State determines the geography of the districts, when children must go to school, when they are too old to go to school, how long the school year must be, the maximum length of the school year, and even who gets free transportation and who does not.

The State's control over what happens in the classroom is pervasive and includes education and graduation standards. The State determines what subjects must be taught, and it gives tests to determine if those subjects are being taught. The State can impose penalties for failure to meet State requirements, based on State-required testing. The State imposes a variety of other rules and regulations that control virtually every area of curriculum and operations.

This section describes the State's control over the operations of the New York State, and New York City, schools. At the end of the Statement of Facts, we will describe the State-created and State-controlled system of funding that has led to the educational disaster documented in the following pages, and in the trial courts 182-page opinion.

A. The State Controls Every Major Area Of Education In The Public Schools

State responsibility over education begins with Article XI, Section 1 of the State Constitution, which requires the state Legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated." *Id*. Contrary to the State's claim, this did not preserve "local control" over the schools. Indeed, following this grant of authority the Legislature has enacted statutes that: (1) establish school

districts and local educational authorities, N.Y. Educ. L. §§ 1501-2590; (2) set specific curricula standards, *id.* §§ 801-810, 3201; and (3) provide general state aid for education as well as grants for special programs. *Id*. §§ 450-495, 559-563, 701-752, 1101-1116, 3601-3642, 4001- 4904.

The Legislature futher provided that if there is not a specific statute controlling some aspect of education, then the official state policy is articulated by the sixteen-member Board of Regents.[4] N.Y. Educ. L. § 207; Sobol 890:11-891:11; Kadamus 1558:19-1559:4.

The Regents are empowered to charter, register, and inspect any school or institution under the supervision of the State, and to certify teachers and librarians. *Id.* §§ 207, 215-16. The Regents determine the standards by which elementary and secondary schools shall operate, Sobol 851:4-22; Kadamus 1555:9-18, and frequently appoint formal committees and task forces to conduct research and to investigate particular educational issues in order to develop educational policy for New York State. Sobol 887:12-889:14.

The Regents oversee the State Education Department (the "SED"), N.Y. Educ. L. § 207, and appoint the State Commissioner of Education. N.Y. Const. art. 5, § 4; N.Y. Educ. L. § 101. The Commissioner and the SED are charged by statute with the general management and supervision of all public schools in the state. N.Y. Educ. L. § 101. Subject to specific statutory mandates and the general direction and control of the Regents, the Commissioner has supervisory authority over all aspects of schools and other state, local, and private educational institutions. The Commissioner has the power to promulgate regulations, examine and inspect school facilities and curricula, and oversee the school officers and other public officials in all

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[4] Under state law, the sixteen-member Board of Regents is composed of one individual from each of the state's twelve judicial districts and four at-large members. All sixteen members are appointed to five-year terms by concurrent resolutions of both houses of the Legislature. N.Y. Const. art. XI, § 2; N.Y. Educ. L. § 202.

districts and cities in the state. *Id.* §§ 215, 305(2). The Regents issue regulations pertaining to the safety and rights of students. Sobol 851:4-22.

The SED has the power to take over school districts or to close schools through its Schools Under Registration Review ("SURR") program. Px 2976 at 1; Fruchter 14535:4-17; PFOF ¶ 1624. SED regulations require SURR schools to submit a Corrective Action Plan, setting forth a detailed explanation of how each school intends to address its problems. 8 N.Y.C.R.R. § 100.2(p)

The following examples illustrate the reach of the State's authority:

Teachers and other Personnel. The State has developed a system of state certification that is formalized in the Commissioner's Regulations. Px 1234. Under these rules, no teacher can teach in New York City without the State's permission. In addition, state law specifies procedures for the discipline and dismissal of teachers, including requirements regarding written notice and minimum grounds for dismissal. N.Y. Educ. L. §§ 2590-j, 3020, 3020-a. State law also specifies tenure and dismissal rules for principals and assistant principals. Pension plans for both teachers and principals are created and managed by the State.

Classroom Instruction: Curriculum and Assessment. The Commissioner's Regulations specify which academic subjects and units of study must be provided to all students. The Regents Learning Standards set statewide standards in seven specific subject matter areas. Px 316; Px 317; Px 318; Px 319; Px 320; Px 321; Px 322; Px 2032; Px 2033; Px 2034; Px 2035; Mills 1228:2-24; PFOF ¶¶ 168-77.

The State requires physical education, and mandates the scope of kindergarten and pre-kindergarten programs. The State has mandated statewide assessment tests that must be administered to students at different grade levels, and its sets the standards for evaluating the

results of those tests. Px 2033; Px 2034; Px 2035; Mills 1228:16-19. The State sets high school graduation requirements. Px 2035; Mills 1228:10-15.

Special Education. The education of students with special needs is subject to pervasive State control. State laws and regulations, in conjunction with federal laws, extensively regulate the referral, evaluation, placement and provision of special education and related services to students with disabilities. N.Y. Educ. L. § 4401 *et seq.*; PFOF ¶ 1230 n.3154.

ELL Education. The Commissioner's Regulations prescribe the general structure for the education of English Language Learners ("ELL"). The SED and the Commissioner determine which children may be classified as ELL students, and what services must be provided to ELL students. Px 299; PFOF ¶ 1313.

Data Collection and Reporting. In order to facilitate its management of education, the State requires all agencies and local authorities to submit comprehensive annual reports on virtually every aspect of education in New York State. 8 N.Y.C.R.R. § 100.2. Section 215-a(1) of the Education Law requires the Regents to submit to the Governor an annual report detailing a wide range of information, comprising an overall assessment of the general state of education in New York. Enacted under Chapter 655 of the Laws of 1987, these "655 Reports" are required to survey the following areas:

> [E]nrollment trends; indicators of student achievement in reading, writing, mathematics, science and vocational courses; graduation, college attendance and employment rates; such other indicators of student performance as the regents shall determine; information concerning teacher and administrator preparation, turnover, in-service education and performance; expenditure per pupil on regular education and expenditure per pupil on special education and such other information as requested by the governor, the temporary president of the senate, or the speaker of the assembly.

N.Y. Educ. Law § 215-1(1).

B. The State's Pervasive Control Over The New York City Public School System

There is an additional set of statutes, regulations and rules that directly control the New York City schools. State law created the system of governance for the City's schools, providing for a central Board of Education ("BOE") and Chancellor, and for 32 geographically based community school districts ("CSDs") for elementary and middle school education.[5] N.Y. Educ. L. §§ 2590-b(1)(a), 2590-b(2)(b), 2590-h.

State law provides for the election of community school boards and determines the nature of the relationships among the community superintendents, the community boards, the BOE and the Chancellor. *Id.* §§ 2590-e, 2590-h. In December 1996, the Legislature shifted the balance of power, giving the Chancellor back some of the authority over the management of the schools that had been taken away by the Legislature in the creation of the community school districts. Spence 2048:9-15; *see also* N.Y. Educ. L. § 2590-h(30).

The Legislature gave the Chancellor the authority to terminate superintendents, and substantially enhanced the Chancellor's authority over those superintendents. Spence 2048:16-2049:7; *see also* N.Y. Educ. L. § 2590-h(30)(a).

The Legislature also took basic operating authority away from the community school boards, who had been given that power by the Legislature when they were created, and gave it to the superintendents. *Id.* § 2590-f. The Chancellor now has the overall authority to ensure that

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[5] In addition to the 32 CSDs, the City schools are also divided into six high school districts for secondary school education, and four community school districts for special services. The four special service districts are District 75 for self-contained special education schools, District 85 (the "Chancellor's District") composed of 47 extremely low-performing schools, District 89 composed of several schools that report centrally for special circumstances, and the Alternative High School Superintendency for high school students with consistent academic problems and serious personal issues. PFOF ¶¶ 110-12.

resources are being properly used to achieve educational outcomes, and can hold superintendents accountable. *Id.* § 2590-h(10), (11).

The 1996 School Governance Law also required the BOE to create annual School Based Budget Reports. Px 586; Spence 2097:20-2098:20, These are designed to "explain in plain English where and how [the BOE] budgeted every dollar" in its budget. Supp. App. at RA67 (Px at 586 STBE 0031915). The BOE also created School Based Expenditure Reports to report actual costs rather than budgeted costs. Px 3160B-Donohue Stmt. ¶ 36; PFOF ¶¶ 1751-53.

The State's control further extends into the City's schools, by allowing the BOE to avoid complying with state regulations. For example, with respect to teacher certification, the State has waived its minimum standards for New York City because the BOE cannot find enough qualified candidates. PFOF ¶ 322. The SED has granted waivers to New York City schools, allowing them to offer fewer hours of schooling per day in order to deal with overcrowding. And the State keeps the City from introducing year-round schooling to extend school time and reduce class sizes by refusing state aid for summer sessions. PFOF ¶ 828.

Although they are discussed in detail in other sections of the Statement of Facts, a brief summary of the State's control over facilities and finance illustrates the virtually complete control exercised by the State over the New York City public school system.

Facilities. In 1988, in response to the "deplorable" condition of the City's school facilities, the Legislature created the School Construction Authority ("SCA") as a ***State*** authority with the mandate to perform and oversee all aspects of capital construction for the New York City public school system. N.Y. Pub. Auth. L. § 1727; PFOF ¶ 686. The BOE must submit to the SED for approval five- and ten-year plans describing the nature of all capital projects to be undertaken, including costs and anticipated funding sources. N.Y. Educ. L. § 2590-p.

Finance. Every element of spending is controlled by the State, even budgeting and planning. By law the Chancellor must submit an annual budget request to the Mayor with funding requests and fiscal estimates. *Id.* § 2590-q.

The State's power over school finance, and its refusal to use that power to provide an education for New York City's students, is crystallized in the Stavisky-Goodman Law, which purports to impose a "maintenance of effort" obligation on the City, requiring a minimum level of City funding for the City's schools. *Id.* § 2576(5); PFOF ¶ 2005. But that legislation was ineffective as passed, PFOF ¶ 2006, and the Legislature has refused to exercise its power to require an increase in City funding for the schools.

II. THERE ARE 1.1 MILLION CHILDREN IN THE NEW YORK CITY SCHOOLS WHO ARE JUST AS TALENTED AND INTELLIGENT AS CHILDREN IN THE REST OF THE STATE, AND WHO CAN SUCCEED IF THEY ARE GIVEN THE EDUCATIONAL RESOURCES THEY NEED

Every witness in this case agreed that "all children can learn, but children who have been placed at risk by poverty, homelessness, poor nutrition, or inadequate care, often require special educational and support services to master basic competencies." Px 1 at 68. It was also undisputed that a large number of New York City's 1.1 million students are placed at serious risk of academic failure by poverty and other socioeconomic and demographic factors. Seventy-three percent of New York City students are eligible for the federal free lunch program offered to low-income students. Px 1 at vi; Px 466 at 5; Spence 2035:21-2036:5; *see also* Dx 19601. Eighty-four percent of the students are from a racial minority group. Over 80 percent of the state's limited English proficient students are in New York City, as are over 90 percent of the state's recent immigrants. Px 1 at 16, 71; Px 307 at 12; Px 1969; Px 1972; Kadamus 1609:23-1610:13. Collectively, over 93 percent of the students in New York City's schools are classified by the State as "extraordinary needs" students. Px 469A at 28, 29; Px 2768; Px 2769.

These statistics are the beginning of our discussion, though, not the end. While the schools are not required to eliminate poverty or disability, "[t]he evidence introduced at trial demonstrate[d] that these negative life experiences can be overcome by public schools with sufficient resources well deployed." 187 Misc. 2d at 23; Fruchter 14546:20-14547:16. To use a phrase repeated again and again at trial: "all children in New York City can learn."

The State's position on this issue is purposefully oblique and disingenuous. On the one hand, the State is anxious to deny that it believes that "at-risk students' educational potential is immutably shaped by their backgrounds." Def. Br. at 107. But throughout its brief, the State insists that there is nothing schools should or can do to help these students achieve academic competence. It claims that: "deficiencies in student performance that are attributable to socioeconomic conditions extrinsic to the education system are not relevant...to assessing whether schools are meeting constitutional standards." *Id*. at 62. The State further claims that spending has no significant impact on student achievement "after controlling for [socioeconomic] factors." *Id*. at 107.

The State actually goes so far as to offer testimony from experts who claim to have discovered – through the use of their mathematical formulas – that you can't expect any better from poor children. *Id*. at 82, 106-07.

In fact, the educational experts (even the ones called by the State) agreed that smaller classes, better teachers, and extended time in school would improve the performance of at-risk students. The evidence showed that when these students are given the additional educational resources they need, they will succeed.

A. The Educational Experts All Agreed That Smaller Classes, Better Teachers And Extended Time In School Are Necessary For At-Risk Students

All the experts, even the ones called by the State, agreed that at-risk children must be provided with certain resources and programs to have the opportunity for academic success. Sobol 992:9-999:8; Mills 1153:5-23; Hayden 1302:18-1303:9; Kadamus 1565:16-1567:5; DeStefano 5386:10-22; Darling-Hammond 6453:14-24; Fink 7835:13-15; Santandreu 14317:2-13; Murphy 16340:15-20. As Professor Norman Fruchter explained, the correlation between certain demographic factors and academic failure can be broken with "the sufficient application of significant resources." Fruchter 14556:17-14557:11.

There is also a wide consensus, shared by the State's experts, about what resources and programs will allow at-risk children to overcome educational deficiencies arising from their socioeconomic circumstances: better teachers, smaller class size, adequate facilities, and appropriate instructional materials all have particular benefits for at-risk students. Px 1027; Ferguson 5982:5-14; Hanushek 15928:14-16; PFOF ¶¶ 281-82.

In addition, resources and programs that provide more "time on task," *i.e.*, increase the amount and intensity of academic instruction, are extraordinarily helpful. These include programs such as pre-kindergarten, summer school, after school and Saturday morning programs, small group or individualized reading instruction, and the use of specialized literacy programs in regular classrooms. Px 1027; PFOF ¶¶ 241, 1073-76.

B. Even The State's Experts Agree That With Added Resources, At-Risk Children Can Learn And Can Succeed

Dr. John Murphy was the only defense expert with substantial experience running a school systems. Dr. Murphy implemented extended day and extended year programs as well as other instructional support services for at-risk students, with dramatic results: he substantially

closed the performance gap between at-risk children and more advantaged children. Dr. Murphy admitted the existence of the causal connection: these programs allowed the schools to compensate for the lack of educational opportunities at home. Px 3376; Murphy 16450:20-16451:16, 16461:23-16463:21.

The State's other experts also agreed on the value of additional instructional support for at-risk students. Rossell 16905:21-24; Murphy 16650:12-16651:9; Walberg 17256:9-17259:22. The Court should compare this testimony to the State's suggestion that it is impossibile to close the gap between at-risk and other students. Def. Br. at 107.

C. Programs In The New York City Public Schools Have Shown That At-Risk Students Can Succeed, If Given Added Resources

The State repeatedly claims that there is no evidence about the value of these programs in New York City. That is simply not true. It may be that the State is stating the obvious: there has not been enough money to allow all the at-risk students in the New York City schools access to these programs. But that is proof of the funding system's failure. One of the tragedies of the New York City public schools is the existence of programs that clearly would succeed if only there were enough money to make them available to enough students.

1. There Is No Dispute: Reading Recovery Can Teach Any Child To Read And Read Well

Reading Recovery is a nationally recognized literacy program for children in the early elementary grades. Reading Recovery students are given one-on-one and small group reading instruction from experienced, highly trained reading teachers. Research conducted by New York University experts shows that Reading Recovery has improved performance both in the City and throughout New York State. Px 3162 at 2; Px 3163 at 2; Ashdown 21296:25-21298:15, 21305:9-24; PFOF ¶¶ 1154-56.

In New York City, 99 percent of students who complete the Reading Recovery program were able to read at grade level by the end of the school year, even though they began the year significantly below grade level. Px 3161 at 3; Ashdown 21308:19-21309:21. Among a comparison group of at-risk students who did not receive Reading Recovery support, only 38 percent were able to achieve this level. Px 3161 at 3; PFOF ¶ 1157.

Despite this overwhelming success rate, Reading Recovery is not offered to even a small percentage of the students who need it. It costs too much. And so over one-third of New York City's third graders will continue to be unable to read. PFOF ¶¶ 1171-74.

2. Project Read Was Only Able To Help A Small Percentage Of Students Who Needed It, But It Showed Results

Project Read was established in 1997 to help at-risk students achieve basic literacy skills. PFOF ¶¶ 1113, 1121. Schools used the funds to conduct an intensive day program, an after-school program, or a family literacy program. PFOF ¶¶ 1121-22, 1124, 1128, 1131-32. Project Read was effective in improving literacy skills, but it did not reach many of the students who are at risk of not meeting the State's literacy standards. 187 Misc. 2d at 79; PFOF ¶¶ 1123-27, 1129-30, 1133-40. At least two-thirds of students in grades one through three are at risk of growing up illiterate, but only 40 percent were able to participate in any part of Project Read in 1998-99. Fifty thousand children did not receive any Project Read services. The students who did participate rarely received a full program because of a lack of funds. Px 1658 at 77; Px 2172 at 7; Px 2173 at 5-7; Px 2176 at BOE 775927; Px 2194-Casey Stmt. ¶¶ 57-60; PFOF ¶¶ 1127, 1129-30.

3. New York City Has Been Able To Offer Some Extended Time Programs, But Never To Everyone Who Needed Them

In the 1970s the BOE offered some extended time programs that were dropped under financial pressure in the 1980s. PFOF ¶ 1077. In recent years, the BOE has begun to restore

some of these programs. Spence 2003:25-2004:19; PFOF ¶¶ 1980-81. But "[s]ubstantial funds are necessary to provide the expanded platform of educational resources necessary to boost the achievement of all at-risk children." 187 Misc. 2d at 79.

For example, summer school is widely recognized to help in "stemming achievement loss during the summer months, [which is particularly acute] among disadvantaged, high-risk students." Px 465 at 13; PFOF ¶¶ 1200-03. Only in the last few years has the BOE been able to provide summer school to a significant number of students. Px 2192 at 2; Px 2194-Casey Stmt. ¶¶ 42, 45; Donohue 15205:24-15206:20. Even in 1999, summer school served barely one-quarter of the estimated students in kindergarten through eighth grade who were at risk of not meeting State and BOE literacy standards. Px 2170 at 1; Px 2192 at 2; Px 2194-Casey Stmt. ¶¶ 35-37, 42. As the trial court found, "summer school [is] available only to the neediest of the needy, leaving the majority of at-risk students unserved." 187 Misc. 2d at 79.

The value of pre-kindergarten is universally recognized, but only a fraction of the City's population of four-year-olds attend pre-kindergarten. Px 11 at xxix; Px 15 at xxiii; Px 314 at 7, Px 367 at 14-15; Dx 17256 at 27; Murphy 16651:7-19; PFOF ¶¶ 1083-86. In 1992, only 32.2 percent of the estimated four-year-old population attended pre-kindergarten. Px 1 at 21. Five years later, that figure had risen only slightly to 34.3 percent. *Id*. Because children from disadvantaged households have less access to preschool programs, they come to kindergarten without the experience needed to succeed. Px 2194-Casey Stmt. ¶ 10; Cashin 240:20-241:4, 414:20-415:9.

The State's "Universal Prekindergarten" program is inadequate and unreliable. PFOF ¶¶ 1101-03, 1109. Existing state funding covers only a portion of the total cost of the program, and

it is subject to reduction or elimination each year through the state budgeting process. Px 1169 at 270; Px 2194-Casey Stmt. ¶¶ 18-21; Px 3082B-Sweeting Stmt. ¶ 118.

4. The Chancellor's District Offers A Chance To See The Effect Of Additional Resources On The Education Of The Worst Performing Students

The Chancellor's District was created by taking schools that were identified by the SED as being in imminent danger of closure. Scraping together discretionary funds from every part of the Chancellor's budget, these schools were given extra supervision, extra resources, and better teachers in an effort to improve academic achievement. There were programs to extend time in school through after-school programs and Saturday learning academies.

The Chancellor's District implemented the nationally respected program "Success For All." This is a very structured specialized literacy program, designed to teach children to read even if the quality of the teaching is low. The Regents have stated that Success For All "significantly improves reading performance, especially for students in the lowest 25 percent of their class." Px 1027 at BOR 02330; PFOF ¶ 1146. Even defense expert Dr. Eric Hanushek agreed that Success for All produced positive results in some schools. Hanushek 15980:9-12; PFOF ¶ 1147.

The effect of these programs is now clear: in just three years of operation, the reading scores in the lower grades have climbed at a rate faster than most other New York City schools. PFOF ¶ 1636. Tellingly, the scores in the middle schools have remained low. As the superintendent of the Chancellor's District explained, it is very hard to repair the damage done by years of inadequate education with just one or two years of extra programs. Even more telling is the fact that this program cannot be expanded, because there is no more money.

5. Small Programs In Other New York City Districts Have Been Able To Help At-Risk Students

For example, in the Brooklyn High Schools, the passing rate for the statewide Regents English examination increased by nearly 60 percent in the four years after the introduction of an intensive English support program that included professional development, reduced class sizes, double periods of instruction, and tutoring. Px 964; Coppin 714:12-715:20, 720:24-723:11; PFOF ¶ 1173. In District 13, federal funding paid for a five day-a-week, extended day program focusing on science and technology at one middle school. Only two years into the implementation of the program, this school of only 200 students had an unprecedented 15 students accepted into the City's top three high schools. Young 12861:21-12864:2, 12865:5-11; PFOF ¶ 1191; *see also* Px 1762 at 4; Zardoya 6994:14-19; Fink 7767:22; PFOF ¶¶ 268, 616.

All of these programs show that students from even the worst of New York City's areas can learn, and can succeed. Yet the record of the City schools over the last two decades has been a record of complete failure to educate those students. The State attributes this to their socioeconomic background. But the evidence at trial demonstrated that those students were faced with an array of educational obstacles that would defeat anyone.

III. WHEN NEW YORK CITY'S 1.1 MILLION SCHOOL CHILDREN COME TO SCHOOL, THEY FACE DECAYING BUILDINGS, OVERCROWDED SCHOOLS, CLASSES WITH 30 OR MORE STUDENTS HELD IN CONVERTED HALLWAYS AND BATHROOMS

The first obstacle that confronts students is the condition of the buildings where they must try to learn. The trial court found that many public schools suffer from inadequate heating, ventilation, air conditioning and lighting. 187 Misc. 2d at 45-46; Px 1494 at STBE 0204743; Px 2855A-Lee Stmt. ¶ 100; Zedalis 4375:6-4377:4, 4378:3-4380:4, 4865:17-4866:6; DeStefano 5368:4-16, 5372:22-5373:16; Rosa 11043:3-16; PFOF ¶¶ 734-49. In 1997, the SED reported

that 79 percent of New York City public schools have problems with heating, ventilation, and air conditioning. Px 2029 at SEDA 029054; Levy 7106:9-13. In fact, some New York City classrooms do not even have windows.

Many older school buildings are still heated by coal-burning boilers. Px 2030 at 6; Px 2353; Evans-Tranumn 1389:9-15; DeStefano 5384:8-20; Rosa 11026:14-11028:22. In 1995, the Levy Commission termed it "scandalous" that 343 schools had coal-fired boilers. Px 2030 at 6. In October 1999, at least 125 schools still had them. Px 1480; Zedalis 4357:24-4358:13; PFOF ¶¶ 737-38.

These dilapidated, inadequate and overcrowded facilities make learning a physical challenge. Instructional space is lost due to leaky roofs or collapsed ceilings. The buildings are uncomfortably hot, or so cold that students wear coats to class. They pose health hazards, and in extreme cases, threaten serious physical injury or death. Px 2855A-Lee Stmt. ¶ 100; DeStefano 5368:4-16, 5372:22-5373:16, Rosa 11026:14-11028:22, 11043:3-16.

Beyond the physical impact, sending students to school in crumbling and decaying buildings sends a clear message to students that their education is not important. 187 Misc. 2d at 46-47 (citing Sobol 1780:6-20), Px 2030 at 5; Mills 1177:20-1178:7; Levy 7094:7-22. And they send that same message to prospective teachers, further damaging New York City's attempts to hire and keep competent teachers. Px 148 at 6; Santandreu 13729:25-13730:15.

When school buildings are in such poor condition that they challenge the most physically able students, it is no surprise that the vast majority of school buildings are not accessible to the physically handicapped. In fact, only about 20 to 25 percent of the school buildings in the City public school system are accessible to students, parents and teachers with limited mobility. Many of these buildings contain facilities that are overcrowded, and lack appropriate furniture,

bathrooms and facilities. Px 2082; Px 2084; Px 2085; Px 2088; Px 2089; Px 2090; Erber 7519:20-7524:13, 7548:7-21, 7549:4-7551:24, 7555:11-7559:5, 7569:21-25; Alter 9768:19-9769:5. Moreover, about half of the school buildings that contain programs for the severely and profoundly disabled are multi-story, and only the first floor is accessible. Px 2083 at 25-27; Erber 7541:4-14; Alter 9769:6-13. Any facilities on higher floors, such as libraries and computer labs, are unavailable. Erber 7541:25-7544:23; Alter 9769:18-25.

A. The Deplorable Condition Of The Decaying School Buildings Has Been Repeatedly Documented By Every Outside Expert Who Has Actually Looked At Those Buildings In The Last Decade

The State claims the trial court's findings on facilities were based on "anecdotal" evidence. Def. Br. at 77. In fact, they were based on: (1) testimony from BOE witnesses with system wide responsibility for school facilities; (2) a physical survey of ***every*** school building in the system by professional engineers; (3) the testimony of ten superintendents about the conditions suffered by approximately 323,000 students (representing nearly one-third of all New York City public school children); (4) photographs of dilapidated school facilities that superintendents testified were representative of conditions throughout their districts; (5) documents promulgated by the BOE and SED; and (6) findings of the Legislature itself. PFOF ¶¶ 715-53:

- In 1988, the Legislature declared that "the elementary and secondary schools of the city of New York are in deplorable physical condition. Many of the schools are overcrowded, unsafe, unhealthy and unusable. The physical deterioration of the schools is a serious impediment to learning and teaching." New York City School Construction Authority Act, L. 1988 c. 738 § 1.

- In June 1995, the Levy Commission, appointed by then-Chancellor Ramon Cortines and headed by Harold Levy, then an outsider to the school system, discovered "shocking conditions in our schools, such as collapsing building facades, thoroughly rusted structural beams, falling masonry, precariously hung windows, and roof gables held together with wire." Px 2030 at STBE 020775. The Commission ultimately found that "no amount of better management can make up for the neglect and under funding of" New York City public school

facilities, because "*[t]he money to maintain our schools is still wholly inadequate. Therein lies the problem.*" Px 2030 at 5, 6, STBE 0202776 (emphasis added); Levy 7092:24-7093:11; PFOF ¶¶ 706-10.

- In April 1997, the SED reported that 420 New York City schools required major modernization, 56 percent needed extensive roof work, 86 percent needed plumbing repairs, 79 percent had problems with their HVAC (heating/ventilating/air conditioning) systems, and more than half were inaccessible to the disabled. Px 2029 at 2-3; Levy 7105:8-7107:4; PFOF ¶ 713.

- In 1998, the late Justice Friedman found that many buildings specifically referred to in a 1994 lawsuit filed by the UFT "were still in decrepit condition notwithstanding the long years of this litigation; the timing of when, if ever, the final repairs to those schools would be done was still uncertain at the time of trial. The conditions of the schools referred to in the petition here were clearly shown to be serious and long standing." *Feldman v. City of New York*, No. 102170/94, slip op. at 3 (Sup. Ct. New York County Feb. 17, 1998).

Defendants did not dispute these findings, or offer evidence of a multitude of schools with science labs, libraries, gymnasiums, music and arts rooms and modern technology. Def. Br. at 77. They rely solely on the testimony of Robert O'Toole, a former employee of the Tucson Unified School District, who opined that New York City's schools were in fine shape. He was able to do this because he had never actually seen these buildings. He relied on a mathematical calculation, performed by someone else, that he claimed summarized a BOE document.

Mr. O'Toole was referring to the Building Condition Assessment Survey (the "BCAS"). The reality of the BCAS is that it offers conclusive proof of the deplorable condition of the City's schools. 187 Misc. 2d at 42-45. From late-1997 to mid-1998, outside engineers and architects conducted visual surveys of building components identified by the BOE. Zedalis 4393:3-4395:9. Among other problems, they found that 231 school buildings must have their exteriors completely overhauled; nearly 800 schools will require exterior masonry work within ten years of their evaluation; 758 schools will need roof repairs, 424 will need parapet repairs and 288 will need window repairs. Px 108A at II-6; Px 1532; Zedalis 4452:11-4454:7; PFOF ¶ 732.

Mr. O'Toole, however, did not focus on the various structural or safety problems identified in the BCAS, or on the need for massive overhauls and repairs. Instead, he took the average, scores for a few unidentified components in some unidentified schools. Looking at these number he proclaimed that the buildings — which he had never seen — were in good shape. Dx 19498; O'Toole 18802:25-18804:3. Mr. O'Toole averaged scores over two-thirds of the school system for individual components, such as flagpoles and roofs, without identifying which components he considered or which schools were involved. He did not take into account the size or importance of the components. In his analysis, awell-painted flagpole would equal and offset a roof about to collapse. *Id*.

The trial court properly rejected Mr. O'Toole's paper analysis of numbers he did not understand, and accepted the unanimous testimony of more than a decade of experts about the conditions of the New York City Schools.

B. In Addition To Being Dilapidated And Frequently Unsafe, New York City's Public School Buildings Are Overcrowded

Defendants admit that "some" school districts are overcrowded, but claim it is not a serious problem. Def. Br. at 78. The undisputed evidence supports the trial court's finding that there is serious and pervasive overcrowding throughout significant proportions of the system. 187 Misc. 2d at 49-51. In fact, the schools are so overcrowded that students must go to "classrooms" that are actually converted bathrooms, libraries and closets. Reducing class size is a physical impossibility. Some schools even have to cut short their class time to cram more students into the building.

The BOE calculates building utilization through a formula. Px 76; Zedalis 4468:6-16. Based on the testimony of Patricia Zedalis and ***all*** the Superintendents who testified at trial, that formula overstates capacity in many ways. For example, a school's capacity increases if it

converts a gymnasium or auditorium, or a bathroom or a hallway into a classroom. 187 Misc. 2d at 49-50; Px 2332A-Rosa Stmt. ¶ 118; Cashin 545:17-546:8; Coppin 639:15-640:9; Ward 3160:4-20; Zedalis 4472:25-4473:15, 4480:2-4481:7, 4496:8-4497:10; DeStefano 5364:3-15; Zardoya 6927:21-6928:23, 7329:14-7331:3; Fink 7714:7-7715:11; Rosa 11055:23-11059:15; Lee 12707:14-24; Santandreu 13688:20-13689:19; PFOF ¶¶ 758-66.

Even with these flaws, the utilization numbers show that almost 60 percent of all elementary schools and 67 percent of high schools are overcrowded. Px 25 at 1-2; Px 3082B-Sweeting Stmt. ¶ 106; O'Toole 19784:18-19785:21. Eleven community school districts were over capacity in 1997-98, and they were over capacity by more than 28,000 students. The overload at high schools was nearly 36,000. Px 108A at II-42, Figure IIC-3; Zedalis 6798:24-6779:18. Seventeen of the 32 community school districts have 100 percent or greater utilization in elementary schools, with eight operating at over 110 percent utilization. 187 Misc. 2d at 50; Px 1528; Zedalis 4492:19-4493:3. In addition, three of the five geographic high school superintendencies are at or above 119 percent of capacity. Px 1509; Px 1517.

Because of overcrowding, schools hold regular classes in auditoriums, gymnasiums, bathrooms, guidance offices, cluster rooms, science labs, computer rooms, cafeterias, libraries, and shop rooms. 187 Misc. 2d at 50; Px 489, Appendix II at 14, 38, 118, 151, 156, 176; Px 1649; Px 2349; Px 2352; Px 2855A-Lee Stmt. ¶ 70; Coppin 620:3-17, 654:20-23; Evans-Tranumn 1397:18-1398:7; Zedalis 4497:18-4498:18, 4732:20-4733:5; DeStefano 5329:19-5330:7, 5338:21-5339:2, 5370:18-5371:12; Rosa 11062:21-25, 11063:22-11064:8-14, 11066:22-11067:8. Special education classes and funded programs such as Project Read and Reading Recovery are held in hallways, converted closets and bathrooms, converted showers, cafeterias, auditoriums and stages, gymnasiums and locker rooms, lobbies, teachers' lounges, a kitchen,

office space, a basement, an alcove, a stairwell, a copier room, a supply room, a former phonebooth, and a former projection booth. Px 489, Appendix II at 4, 9, 14, 20, 26, 29, 38, 43, 49, 64, 69, 77, 92, 98, 118, 124, 133, 138, 142, 147, 151, 156, 162, 176, 180, 189; Px 1323; Px 1649; Px 1650; Px 1651; Px 2012; Px 2013; Px 2017; Px 2018; Px 2019; Px 2020; Px 2357; Px 2349; DeStefano 5326:14-18, 5330:14-5331:6; Zardoya 6960:8-16; 6963:5-19; Rosa 11063:22-11064:14; 11066:11-17. Desks in some classes are crammed up against one another. Px 489 at 22-23; *see also* Px 2012; Px 2013; Px 2014; Px 2015; Px 2016; Px 2018; Zardoya 6960:17-6961:8, 6963:20-6964:8; Sanford 11392:24-11395:18. The BOE had to set a higher student-to-computer ratio as its minimum goal because of the space that computers would take up. Taylor 6154:9-6155:24; PFOF ¶¶ 773-97.

Overcrowding in schools prevents class size reduction. Px 2332A-Rosa Stmt. ¶¶ 41, 121; Px 2855A-Lee Stmt. ¶ 85; Coppin 621:11-19; DeStefano 5290:24-5291:15, 5350:8-5351:5. The February 1999 early grade class size reduction plan states that "current facilities capacity constraints severely limit the New York City public school system's ability" to allocate resources based solely on need. Px 1487 at 2; *see also* Zedalis 4503:4-18. Many schools received no class size reduction funding because they lacked space. Some community school districts could not fully utilize their funding allocation because there were not enough additional classrooms in the entire district. Px 1487 at 2, 3-5; Zedalis 4503:4-4505:2.

The overcrowding crisis has forced many schools, including a majority of Queens high schools, to resort to extended-day and multishift programs. Seven schools, with a total enrollment of approximately 25,000 students, operate two shifts of six periods per day, rather than the state-mandated seven periods for each student, under special exemptions from the SED. PFOF ¶ 818. Schools on multiple shifts have physical education classes with as many as 150

students and lunch periods that may begin before 9:45 a.m. and end after 2 p.m. PFOF ¶ 820 These schools are also more difficult to staff with properly trained teachers and have greater difficulties in performing maintenance and necessary capital repairs. 187 Misc. 2d at 49, 51; PFOF ¶¶ 817-23.

The BOE uses "temporary" classroom spaces in schoolyards and playgrounds to alleviate the worst of overcrowding. These "transportables" and "minischools" are often unsuitable for computer use, create significant managerial and security-related issues, isolate teachers and students from the rest of the school, occupy much-needed playground space, and further tax the common spaces, such as lunchrooms, bathrooms, auditoriums and gymnasiums (if they still exist) in the main school facilities. 187 Misc. 2d at 50-51; Px 2332A-Rosa Stmt. ¶ 122; Px 2346; Px 2855A-Lee Stmt. ¶ 74; Px 2989; DeStefano 5316:4-21; Taylor 6204:9-6205:2; Zardoya 6969:9-25, 7332:18-24; Rosa 11071:20-11072:12, 11073:24-11074:9; Santandreu 13691:13-18; PFOF ¶¶ 805-07. Several districts also try to manage overcrowding through bussing (which Defendants euphemistically refer to as "transferring," Def. Br. at 79), but districts try to minimize its use because it moves students outside of their neighborhoods and school organizations and sometimes separates siblings. Moreover, further bussing is frequently unfeasible. Zedalis 4735:23-4736:13, 6828:13-20; DeStefano 5297:24-5300:20, 5307:25-5309:6, 5639:17-5640:22; Rosa 11075:10-18; Lee 12716:18-12717:12; PFOF ¶¶ 809-11.

Contrary to Defendants' assertions, the BOE *has* explored the possibility of providing new seats through multi-track year-round education. They are barred from doing so by state law. Donohue 15283:17-15284:9; PFOF ¶¶ 826-28.

C. New York City Public Schools Lack Necessary Educational Facilities

Beyond the overcrowding and the decay, many school buildings are missing necessary spaces such as science labs, libraries, art and music rooms, gymnasiums and athletic fields.

Zedalis 4756:4-15; 4758:13-4759:8. The Regents require all graduates to pass a lab science course with 30 hours of lab experience. Coppin 630:12-25; Zedalis 4746:17-4747:6. ***But at least 31 high schools, serving approximately 16,600 students, have no science labs whatsoever.*** Px 1533; Zedalis 4750:3-4751:20, 4752:13-4754:2.

Even the labs that do exist are usually obsolete. 187 Misc. 2d at 45; Px 1007; Px 1008; Px 2901; Px 2902; Px 2904; Px 2910; Px 2911; Coppin 628:20-22, 629:25-630:5; Zedalis 4745:20-4746:10, 4746:17-4747:6, 4751:21-4752:12, 4755:19-21; Lee 12724:6-12725:3, 12725:23-12726:5. And, although fourth-graders are expected to take a hands-on science exam, some districts have no working science lab in any of their elementary or middle school buildings. Px 2050; Px 2332A-Rosa Stmt. ¶ 112; Px 2900-Young Stmt. ¶ 54; Cashin 308:23-310:6; Doran 4688:22-4689:19; DeStefano 5338:8-5339:11; Zardoya 6976:7-15, 7337:12-15; Young 12826:7-16, 12864:3-12865:4; PFOF ¶¶ 846-48.

The library situation is no better. By the mid-Nineties, most of the libraries in New York City public schools had been neglected, and many had been closed. Px 27 at 16; Px 489 at 27; Px 1433; Px 3083-Lief Stmt. ¶ 25; Ward 3200:22-24; Doran 4689:23-4690:5; Zedalis 4748:13-23; DeStefano 5329:19-5330:5, 5331:11-5332:12, 5337:9-20; Lief 14969:13-15, 14969:22-24, 14972:13-15, 14998:14-15. Many libraries that do exist are too small to hold sufficient numbers of books or need physical rehabilitation. Px 27 at 44; Coppin 644:17-25; Zedalis 4748:13-23; Lief 14998:11-13; PFOF ¶¶ 857-61.

Defendants do not dispute that there is also a shortage of computer labs, electric power, and other support for current technology needs in New York City public schools. 187 Misc. 2d at 58-59. At many schools, the electrical system is unable to support modern computer and telephone equipment or even basic electricity services. PFOF ¶¶ 852-53. The electrical

problems so significant that one-third of the $150 million for Project Smart, designed to bring technology to sixth, seventh and eighth grades, was used simply to upgrade electrical systems so that computers and printers could work. Taylor 6142:8-6143:5, 6180:12-19; PFOF ¶ 852.

Many students attend schools that lack music and arts-related spaces because these rooms either do not exist or are used as regular classrooms due to space shortages. 187 Misc. 2d at 46. The Office of the Public Advocate's recent survey of 43 overcrowded elementary schools found that only four have music rooms and nine have art rooms. Px 489 at 1, 25-26, Table 24. Some students receive limited instruction because cluster teachers are forced to move from room to room, providing instruction from carts or shopping bags. Px 489 at 24-25. Music rooms in particular are critical because they provide an acoustically insulated space where students can sing or play musical instruments without disturbing instruction in regular classes. PFOF ¶ 868. Nevertheless, entire districts have few or no music or art rooms. Px 2855A-Lee Stmt. ¶ 91; Px 2900-Young Stmt. ¶ 57; Cashin 306:3-22; DeStefano 5329:19-5330:5, 5339:20-5340:2; PFOF ¶¶ 866-67.

Many students attend schools that lack functioning gymnasiums, or use rooms that are not suitable for physical education and may even be unsafe. 187 Misc. 2d at 38; Px 489 at 2, 27; Px 1321; Px 1764; Px 2047; Px 2855A-Lee Stmt. ¶ 94; Px 2900-Young Stmt. ¶ 56; Doran 4690:18-4691:8; Zedalis 4747:14-23; Virginia 5776:19-5778:9; Zardoya 6977:17-6978:14; Ward 9911:8-20. A school without a gymnasium cannot provide a proper physical education or after-school sports program. Px 1764; Px 2855A-Lee Stmt. ¶ 94; Cashin 312:7-18; Virginia 5772:23-5778:4. The shortage of athletic fields in the school system also makes it virtually impossible to deliver adequate sports programs. Px 1512; Virginia 5818:21-5819:10. The approximately 185 high school buildings in New York City, serving approximately 213 high school organizations,

share a total of fewer than 60 playing fields, many of which are unusable. Px 1512; Spence 2343:11-13; Zedalis 4755:3-4756:18. Moreover, few if any middle schools have athletic fields. Virginia 5819:11-14; PFOF ¶ 879.

D. The Deplorable Condition Of New York City's School Buildings Is Due To A Consistent Failure By The State To Fund Basic Capital Needs

These problems exist because the State has consistently failed to ensure that the capital needs of New York City's public schools are adequately funded. 187 Misc. 2d at 78. In 1989 the City prepared – as required by statute – a Year 2000 Master Plan and identified $17.4 billion in necessary capital projects by January 1, 2000. Px 190 at 44-45. The actual funds received over that decade: $7.8 billion in 1988 dollars, or just over $9 billion in actual dollars. Px 1524; Dx 19515A; Zedalis 4785:13-21; O'Toole 18738:16-24, 19842:25-19843:19. In 1993, the Year 2003 Master Plan identified a need for $25 billion in capital spending by 2003. Px 128 at 107. The funding received about $5.5 billion (in actual dollars). Px 1524; Dx 19515A; Zedalis 4786:16-4787:4; PFOF ¶¶ 886-87. The Defendants do not explain how New York City public school buildings improved from the "deplorable" condition the Legislature found in 1988 to the "reasonable" conditions proclaimed by Mr. O'Toole, when only a fraction of the necessary funding was made available. Def. Br. at 77.

The minimum cost of remedying just some of the problems with New York City's public school facilities has been calculated at over $11 billion. Px 1495 at STBE 0205321; Zedalis 4798:23-4799:9. Defendants claim that BOE's lack of spending on maintenance and purported corruption at the State-created SCA show that the BOE does not need to spend money to expand capacity or provide school buildings with science labs and libraries. Def. Br. at 94-95. They also claim that school enrollment is projected to decline substantially, so there is no need for more capacity. Def. Br. at 79 n.20.

The trial court concluded that the "credible evidence at trial indicates that the steady growth of the system will continue." 187 Misc. 2d at 49. Indeed, the BOE's outside consultants, the Grier Partnership, project that enrollment will be above current figures until 2005. Dx 17124 at 4. The trial also found that the maintenance problems have arisen because the BOE "lacks sufficient funds to conduct all necessary preventive maintenance, and must devote the lion's share of its limited resources to fixing major structural problems at the schools." 187 Misc. 2d at 94.

IV. NEW YORK CITY'S CLASS SIZES ARE TOO LARGE

Beyond the physical impact of overcrowding, students face another obstacle when they go to their classes to try to learn. There are far too many students in each class for an adequate education. There is little doubt that reducing class size would have a profound positive benefit for the City's school children. 187 Misc. 2d at 51-56. Class size matters at all grade levels. It is particularly important for students at risk of educational failure. PFOF ¶¶ 603-19.

The average New York City classroom has significantly more than an acceptable number of students and significantly more students than the average classroom in the rest of the state. PFOF ¶¶ 627-34. Hundreds of thousands of City public school students are in classes that far exceed federal and state standards, as well as the recommendations of both Plaintiffs' and Defendants' experts. *Id.* Indeed, the City's classes have been too large since at least the late 1980s. Significantly reducing class size in all grade levels to an acceptable level would substantially improve the opportunity for students in the City's schools to receive a sound basic education. PFOF ¶¶ 620-26. At present, however, the City lacks both adequate numbers of properly trained teachers and the classroom space necessary to reduce class sizes to effective levels. Contrary to the claims made by Defendants on appeal, the City uses its current teachers

and facilities effectively and efficiently, and any meaningful class size reduction effort would require significant additional financial resources. PFOF ¶¶ 635-75.

A. New York City Classes Are Extraordinarily Large

In every grade and every district, New York City regular education classes exceed the levels recommended by educators and experts. 187 Misc. 2d at 53; PFOF ¶ 628.

While the federal and state guidelines, the available experimental analysis, and the expert testimony at trial recommend class sizes of 20 or less as a general standard for all students, Evans-Tranumn 1394:8-1396:22; Spence 2277:16-2279:5, 2286:17-2287:2; Pub. L. No. 106-113, 113 Stat. 1501, 1501A-263 (1999); N.Y. Educ. L. § 3602, even smaller class sizes might be appropriate for New York City's at-risk students. Indeed, as discussed above, class size research unambiguously supports the proposition that class size matters most for at-risk children. Cashin 315:22-316:11; Sobol 1072:22-1073:22; Evans-Tranumn 1395:25-1396:17; Kadamus 1622:16-1623:8; Fink 7768:7-22; Finn 7965:23-7966:7; Casey 10066:21-10067:12; Sanford 11399:3-11; Santandreu 13716:5-13717:6; Hanushek 15971:20-23; PFOF ¶¶ 617-19. Moreover, given the poor quality of the New York City teaching force, smaller classes (and therefore smaller teaching loads) can only benefit the City's children.

A detailed description of the size of New York City classes was presented by Dr. Finn, based upon BOE data concerning the classroom registers for grades K-8 as of October 31, 1998. Px 1833A; Finn 8092:14-20, 8093:24-8094:5. Dr. Finn's analysis established that as of October 31, 1998, average general education class sizes in New York City were 23.8 for kindergarten, 25.12 for first grade, 24.97 for second grade, 25.46 for third grade, 27.34 for fourth grade, 28.05 for fifth grade, 27.62 for sixth grade, 28.13 for seventh grade, and 28.72 for eighth grade. Px 2104 at 3. These numbers translate into overall averages of 24.86 for grades K-3, 27.68 for grades 4-5, and 28.12 for grades 6-8. Px 2105 at 8; PFOF ¶ 629.

These unacceptably high averages tell only a portion of the class size story in New York City. Many children are in classes that are much larger than the average. 187 Misc. 2d at 54; PFOF ¶ 630. Thus, 27.1 percent of all the students in K-3 (89,139 children) were in classes of 28 or more, Px 2107A; Px 2108A; Px 2108B; Px 2108C; Px 2108D; 66.6 percent of the students in the fourth and fifth grades (102,347 children) were in classes of 28 or more, Px 2107B; Px 2108E; Px 2108F; and 72.3 percent of the students in sixth through eighth grades (148,869 children) were in classes of 28 or more. Px 2107C; Px 2108G; Px 2108H; Px 2108I. In grades K-6, 4,282 students were in classes of 35 or more, 20,895 were in classes of 33 or more and 68,325 were in classes of 31 or more. Px 2164.

New York City class sizes are consistently higher than state averages at every level, including high school, for every year that data is available for the last 20 years. 187 Misc. 2d at 53; PFOF ¶ 632. In nearly every 655 Report, the SED has singled out for criticism the City's comparatively large class sizes, which it has labeled as being "substantially larger than classes in other school categories." Px 1 at 26; Px 3 at 26; Px 5 at 50; Px 7 at 43; Px 9 at 66; Px 11 at 47; Px 13 at 45; Px 15 at 41.

B. These Large Classes Are Due To Lack Of Funds, Not Mismanagement Or Misuse Of Teaching Personnel

As the court found, and as is discussed in more detail, the New York City schools have no additional classroom space. According to a February 2000 New York City Independent Budget Office ("IBO") study, to achieve a 20 student per class average *just for grades K-3*, New York City would need to add roughly 2,600 additional classrooms at a cost of nearly $2.8 billion. Px 2985 at 1; Px 3082B-Sweeting Stmt. ¶ 109; PFOF ¶ 652. A 1998 IBO study found that reducing grades 4-6 to 24 students would require between 1,218 new classrooms and 2,030 new classrooms at costs of $586 million and $977 million respectively, depending on the method of

class size reduction used. Px 2869 at 2, 17-18, 21; PFOF ¶ 650. Annual costs for additional teachers when K-3 is capped at 20 students would range between $97 million and $199 million, while capping grades 4-6 at 24 students yielded an annual estimate of $112 million to $178 million. Px 2869 at 2, 21; PFOF ¶ 644-45, 651.

Defendants claim that New York City has plenty of teachers but simply chooses to use them inefficiently. Def. Br. at 72-73. Defendants cite to the overall student-teacher ratio, although there was substantial testimony that Defendants' numbers were inaccurate. PFOF ¶¶ 663-67. In any event, the overwhelming evidence presented at trial was that the City uses its limited teacher resources in an efficient manner. PFOF ¶¶ 655-70. Because of the high needs of New York City school children, many of the individuals included as "teachers" in Defendants' statistics actually must perform non-teacher functions related to student needs or serve as professional developers to support the ill-prepared and inexperienced New York City teaching force. PFOF ¶¶ 657-58. These legitimate competing needs were well illustrated by several superintendents who explained how actual staffing works in their districts.

The breakdown of the actual duties of the "teachers" in District 10 contained in Px 2051 shows that of the 2,913 "teachers" in the district, 21 are deans who are responsible for coordinating and supervising other teachers, 167 are staff developers who provide professional development for inexperienced, uncertified teachers, five are attendance teachers who work with the large number of chronically absent students in a district with high levels of poverty, four are administrative assistants, 301 are special education teachers (required by state law) who do not serve the general student population, 67 are resource room teachers (required by state law) who service children with special needs, 62 are teachers of speech, two are health coordinators, 16 are language coordinators, four fall into the "teachers assigned" category (administrative positions)

and one is a teacher trainer. Px 2051. Only 2,264 are regular classroom or cluster teachers. Px 2051.

Defendants also claim New York City should force its teachers to work more hours for no increase in pay. Def. Br. at 73. However, Defendants do not explain how the BOE and the City of New York could convince teachers who are already underpaid and teach larger classes with more at-risk students, to increase their hours without extra pay. As Justice DeGrasse found, any increase in the workday or workload imposed on New York City teachers will simply further hurt New York City's efforts to attract teachers. 187 Misc. 2d at 56.

C. A Small Class Size Is A Necessary Component Of A Sound Basic Education

After weighing the evidence on the importance of adequate class size, the trial court properly concluded that: "[C]lass size has an effect on student outcomes, and [] small class size can boost student achievement, particularly among at-risk children. The advantage of small classes are clear. A teacher in a small class has more time to spend with each student. Fewer students mean fewer administrative tasks for each teacher. Student discipline and student engagement in the learning process improve in smaller classes." 187 Misc. 2d at 51; PFOF ¶¶ 620-26.

The trial court's findings on this issue are unanimously supported by the federal government, the State of New York, the BOE, City school superintendents and national experts. 187 Misc. 2d at 51; Pub. L. No. 106-113, 113 Stat. 1501, 1501A-263 (1999); N.Y. Educ. L. § 3602; Px 1027 at BOR 02224; Px 2855A-Lee Stmt. ¶¶ 82-84; Px 2900-Young Stmt. ¶ 103; Sanford 11397:20-11398:16; Cashin 315:22-316:11; Spence 2276:16-22, 2277:7-9; Evans-Tranumn 1396:7-15; Ward 3297:17-3298:12; Zardoya 6991:9-6993:25; Fink 7769:5-22; Santandreu 13715:12-13717:6; PFOF ¶¶ 596-616. Indeed, as of the time of trial, the federal government and up to half the states, including New York, Nevada, Utah, Wyoming, California,

Wisconsin and parts of Virginia and North Carolina, had also implemented class size reduction programs.[6] Finn 8076:8-19, 8081:21-8082:13, 8084:23-8085:22, 8091:14-8092:10; PFOF ¶ 596. Class size was recognized as an important factor in student achievement by every one of the New York City superintendents – all experienced educators – called to the stand and asked about the subject. 187 Misc. 2d at 51-52; Px 2855A-Lee Stmt. ¶¶ 81-85; Px 2900-Young Stmt. ¶¶ 103-107; Cashin 315:22-316:11; Ward 3297:17-3298:22; Zardoya 6991:9-6993:5; Fink 7769:5-12; Santandreu 13715:12-13717:6. For example, District 10 Superintendent Irma Zardoya was one of the many superintendents who identified class size reduction as a priority for her district: "I think that the reality is that the less kids a teacher has to work with, the more focus and attention that teacher can give to the youngsters, and students are able to also work better in class." Zardoya 6991:14-18. Similarly, District 23 Superintendent Kathleen Cashin stated: "Our kids have tremendous needs. They have tremendous obstacles to overcome. The smaller the class size, the better for them in terms of individual attention that they need, supervision, correcting books, identification of their strengths and weaknesses pedagogically. To me, with all the obstacles the kids have, the smaller the class size, the better." Cashin 316:4-11.

The evidence presented at trial further establishes that while class size reductions benefit all students, children at risk of academic failure benefit the most from reduced class sizes. 187 Misc. 2d at 53-54. City superintendents, SED officials and experts for both sides all emphasized this fact. Cashin 315:22-316:11; Sobol 1072:22-1073:25; Evans-Tranumn 1395:25-1396:17; Kadamus 1622:16-1623:8; Fink 7768:7-22, 7827:3-14; Casey 10066:21-10067:12; Sanford 11399:3-11; Santandreu 13716:5-13717:6; Hanushek 15971: 20-23; PFOF ¶¶ 617-19.

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[6] The funding provided under the New York State and federal class size reduction programs is woefully insufficient to cover the class size reduction that is needed in New York City. PFOF ¶¶ 636-40.

The value of class size reduction was supported by the national experts who testified on behalf of both Plaintiffs and Defendants. Finn 7965:7-7968:24; Hanushek 15972:5-15933:4, 15971:12-23, 16039:11-18; Murphy 16160:13-16162:25; Walberg 17254:4-8; PFOF ¶¶ 603-17, 621. As recognized by the trial court, the Tennessee STAR project, which was presented to the trial court by Plaintiffs' expert Dr. Jeremy Finn, is the landmark study of the effect of class size on student achievement. 187 Misc. 2d at 52; PFOF ¶ 605. Indeed, although Defendants recognize that the STAR study was "heralded by the trial court," Def. Br. at 74, they fail to acknowledge that witnesses presented by both Plaintiffs and Defendants also championed it. Finn 7973:14-7974:7, 8024:8-8025:3, 8371:11-24; Grissmer 9456:2-9457:8; Levin 12217:23-12218:9; Hanushek 15976:14-15978:23; Guthrie 21208:18-23; PFOF ¶ 605. For example, Defendants' expert Dr. Eric Hanushek testified that Project STAR is the only existing large-scale controlled experiment on class size. Hanushek 15976:8-13; PFOF ¶ 605. Dr. Hanushek also admitted that, as a sample design, the experiment was merit worthy and supported the conclusion that reduced class size improves student performance at the kindergarten level. Hanushek 15976:14-21.

Defendants' description of the significance and magnitude of the STAR results in their brief is a blatant misrepresentation of the testimony on the study.[7] As the trial court found, Dr. Finn and other experts established that: (1) there is a significant educational relationship between reducing class size and improving student achievement; (2) small class size is particularly important in the younger grades but remains important through all grades; and (3) the more years a student is in a small class, the greater the likelihood that the benefits of being in

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[7] In the transcript cite referenced by Defendants, Def. Br. at 74, Dr. Finn said that while "in general" a two-tenths of a standard deviation gain could be considered a "modest effect

a small class will persist throughout the child's educational experiences. 187 Misc. 2d at 51-52; Sobol 1072:8-1074:13; Finn 7965:7-7968:24; Hanushek 15970:23-15973:4; Walberg 17251:23-17254:8; Guthrie 21206:12-23, 21209:11-21210:6; PFOF ¶¶ 595-616. More specifically, the STAR study established that:

- A child assigned to a small class could hope to gain the equivalent of as much as a half a year of additional schooling as a result of spending time in a small class as compared with a child in a larger class. Finn 8029:24-8033:12; PFOF ¶ 609;

- By the time the children reached third grade, those children who had been enrolled in the STAR experiment since kindergarten outperformed students in larger classes. 187 Misc. 2d at 52; Px 2110; Px 2115 at 2-5; Finn 8050:22-8057:22; PFOF ¶ 609;

- The benefits enjoyed by the children in the smaller classes in kindergarten through third grade continued even after the STAR program ended and all children were returned to regular-sized classes. 187 Misc. 2d at 52-53; Finn 8040:18-8041:25; PFOF ¶ 610;

- Students enrolled in the small classes in kindergarten through third grade were more likely to take either the SAT or ACT college admission tests when they reached high school, suggesting that students who benefit from being enrolled in small classes in the younger grades are more likely to aspire to go to college. Finn 8047:4-19; PFOF ¶ 611; and

- The effects of class size reduction on at-risk and minority students are substantially greater than those for other students. 187 Misc. 2d at 53; Finn 7965:23-7966:7.

V. AS A WHOLE, NEW YORK CITY'S TEACHING FORCE IS INEXPERIENCED, ILL-EDUCATED, UNTRAINED AND UNABLE TO TEACH, DEPRIVING ITS SCHOOL CHILDREN OF THE MOST IMPORTANT PART OF AN EDUCATION

Beyond the crumbling and decaying buildings, the overcrowding, and the large classes, the children face the ultimate inadequate resource: their teachers. Although, as the trial court

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size," the proper way to examine the STAR data was by looking at the consistency of across-the-board positive results. Finn 8014:6-24.

found, there are some superb teachers, the teaching force as a whole is not competent to do its job. Teachers are the front-line of education. An incompetent teacher can fail to provide an education to students even under good conditions. The conditions of most New York City schools, greatly exacerbate the risk of failure. "[T]here are too many ill-trained and inexperienced teachers to meet the difficult challenges presented in the New York City public schools." 187 Misc. 2d at 25.

A. Quality Teaching Is Crucial To Student Opportunity

Qualified teachers are necessary if students are to be provided with the opportunity for a sound basic education. 187 Misc. 2d at 24; Px 470 at 36; Px 3149 at 3; Sobol 1065:4-14, 1804:20-1805:3; Kadamus 1610:17-20; Ward 3297:17-3298:22; Ferguson 5905:15-5906:2; Darling-Hammond 6355:5-6356:5; Hanushek 15948:8-15949:8; Walberg 17239:4-11; Podgursky 17627:12-20; PFOF ¶¶ 315-19. As Dr. Thomas Sobol, a former Commissioner of Education for the State of New York, testified a "child's success or lack of it in learning is probably more dependent . . . than anything else on how well-trained and effective teachers are." Sobol 1804:20-1805:3.

The current New York City Schools Chancellor, Harold Levy, explained that "[w]e recognize – first and foremost – that student achievement is dependent on the quality of teaching and the ability of staff to create an environment that supports student success." Px 3149 at 5. Even Defendants' experts conceded the importance of quality teaching in effective education. Hanushek 15948:8-15949:8; Walberg 17237:25-17239:11; Podgursky 17627:12-20.

Business leaders, government officials and education leaders from all over the nation have also recognized this link between teacher quality and student achievement. Px 1189 at 1-3; PFOF ¶¶ 317-18. Indeed, even Defendant Governor Pataki's Executive Budget has credited the importance of quality teaching: "Teachers represent a key ingredient in effecting improved

educational performance. Without an adequate supply of qualified teachers, our schools will have difficulty meeting the new higher learning standards." Px 2554 at 60.

The SED several years ago conducted a statistical study designed to quantitatively answer the question: "Do Teacher Characteristics Make A Difference?" Px 11 at 54; PFOF ¶ 318. That study focused on teacher characteristics such as certification, experience, and education, and concluded that "teacher qualifications such as experience, certification, and education do significantly influence learning." *Id*. This study is consistent with the work of Ronald Ferguson of Harvard University's Kennedy School of Government, who presented a statistical study establishing a positive relationship between teacher quality and student outcomes. 187 Misc. 2d at 28; PFOF ¶¶ 332-35.

B. New York City's Teachers Are Inadequate By Any Measure

Repeated observations of New York City teachers by superintendents and other state and City officials reveals that too many City teachers are simply not qualified to teach any students, much less the many at-risk students in the City's schools. This is confirmed by statistical analyses and a wide range of comparative objective measures of teacher quality, including certification status, certification test scores, subject matter knowledge, experience, turnover, quality of educational institution attended, and percentage of teaching force with a master's degree or higher. PFOF ¶¶ 346-49. As the trial court found, with respect to every single one of these objective criteria, New York City's teaching force is inadequate. 187 Misc. 2d at 24-37.

The trial court's findings regarding the quality of teaching in New York City do not rest solely on teacher credentials (although these overwhelming statistics, alone, are enough). The record before the trial court was full of reliable and relevant observations of New York City classrooms by the individuals most qualified to make such observations. PFOF ¶¶ 346-49.

The superintendents in particular presented compelling evidence of this critical problem based on their day-to-day observations in their districts. Px 2900-Young Stmt. ¶ 74; Cashin 321:17-322:10; Coppin 664:15-19; DeStefano 5290:19-5291:2; Darling-Hammond 6410:12-6411:20; PFOF ¶¶ 346-49. These observations were based upon frequent visits to schools and classrooms, Px 2026A-Zardoya Stmt. ¶¶ 4-5; Px 2332A-Rosa Stmt. ¶¶ 3-4; Px 2855A-Lee Stmt. ¶ 3; Px 2900 Young Stmt. ¶ 3; Cashin 227:13-228:23; Coppin 556:10-559:4; DeStefano 5248:11-5249:21, 5383:8-19; Fink 7702:3-17, as well as extensive analysis in the form of the testing of teachers and comparisons of teacher efforts with student performance.

They testified elementary school teachers who do not know what "genre" means, and who cannot pass tests in the math courses they are teaching. Cashin 321:17-322:20; Young 12869:11-12871:22. In the Brooklyn high schools, many students failed Regents examinations after receiving passing grades from their the Regents-level courses instructors. Coppin 707:19-709:11.

Dr. Doris Garner of the SED presented evidence based on a comprehensive review of teaching in New York City and New York State that City teachers are among the least prepared in the state. Garner 3471:23-3472:18. Dr. John Murphy, a defense expert, visited 56 City public school classrooms as part of his preparation for this case. Murphy 16624: 2-15. Dr. Murphy, who usually rates teachers from below average to excellent, had to add (at least in a "draft" version of his report) a new category of teacher quality: "terrible." Murphy 17439:12-17441:12.

The trial court's findings were also based on its review of the voluminous statistical data presented by the parties. In each of the relevant categories the evidence supported the finding reached by the trial court that New York City teachers are not qualified or prepared to teach New York City students. 187 Misc. 2d at 24-31.

The State objects to data about the rest of the state. But if other districts can staff their classrooms with certified teachers, then having a certified teacher in a classroom is a meaningful (and realistic) requirement for New York City. In any event, the statistics for New York City are so objectively awful that comparisons are not even necessary to demonstrate inadequacy.[8] As discussed in more detail below, no teaching force can possible be considered adequate when tens of thousands of its members have been unable to acquire minimal state certification, fail the most basic teacher examinations, do not know their subject areas and quit before they gain the experience necessary for them to properly instruct their students.

State Certification. The evidence presented at trial demonstrated beyond question that teacher certification is directly related to teacher quality and student performance, and that absent proper certification, a teacher simply is not adequately prepared to teach. 187 Misc. 2d at 25; Cashin 324:21-325:10; Sobol 1062:7-1063:4; Evans-Tranumn 1371:3-1372:22, 1373:14-18; Kadamus 1632:9-15; Weingarten 2687:14-2688:25; Garner 3473:15-3474:10; DeStefano 5410:7-5411:16, 5644:6-15; Darling-Hammond 6352:15-6355:4, 6404:7-21, 6418:14-6419:12; Zardoya 7027:13-7030:20; Sanford 11382:16-11383:18. The Regents and the SED have expressly acknowledged the presence of a strong relationship between certification and teacher quality. Garner 3473:15-3474:10, 3495:17-3496:3. For example, Commissioner of Education Richard Mills testified that "[t]he lowest perform[ing] schools tend to have the highest proportion of uncertified teachers." Mills 1188:5-11. This observation was echoed by numerous other witnesses directly charged with educating New York City's children and by the various

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[8] For example, roughly one out of seven teachers lack state-mandated certification, Px 1186, Px 1222; roughly one out of three teachers initially fail the certification examinations, Px 1482 at 18, 19, 85, 88; nearly one out of two math teachers initially fail the state math test, Px 1482 at 22, 93; and 50 percent of New York City teachers quit within six years of being hired, Px 1196 at 1.

experts who took the stand. Hayden 1311:25-1312:12; Kadamus 1740:8-14. As the former superintendent of the Manhattan High Schools explained, "certification is a minimum standard, meaning that you've taken education courses, that you've taken courses in your content area. That, to me, is the base minimum that someone should have before they are in front of 100-plus kids every day." Ward 3219:19-23.

As further recognized by the trial court, an alarmingly high percentage of New York City teachers lack state-required certification. For example, evidence found credible by the trial court showed that the percentage of teachers lacking certification in New York City schools between the 1991-92 school year and the 1999-2000 school year fluctuated between 11.4 percent and 17.0 percent, compared with an average of 3.3 percent elsewhere in the state. 187 Misc. 2d at 26; PFOF ¶¶ 320-29, 353-57. By October 1999, the total number of uncertified teachers in the New York City school system had risen to over 10,000 individuals, almost 13 percent of the teaching force. Px 1222. The State asks this Court to hold that it is acceptable to deny a teacher who actually knows how to teach to anywhere from 110,000 and 170,000 children.

The percentage of uncertified teachers in New York City schools is not spread evenly across subject matters. Math and science are the most affected. For example, as of October 1, 1999, 59,500 students were taught high school biology by an uncertified teacher, 19,000 students were taught high school chemistry by an uncertified teacher, and 54,375 students were taught high school mathematics by an uncertified teacher.[9] 187 Misc. 2d at 26; Px 1205; PFOF ¶ 365.

Uncertified rates are particularly high for children with special needs. As of October 1, 1999, 25 percent of teachers of the severely and profoundly retarded in District 75 (the City's

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[9] These conservative estimates are premised on the assumption that each teacher teaches at least one class of 25 students. Accordingly, the number of certified teachers set forth in Px 1205 was multiplied by 25 to obtain these estimates.

Special Education District) were uncertified, Erber 7579:24-7580:8, as were 20 percent of the City's bilingual teachers. Px 2855A-Lee Stmt. ¶ 127; DeStefano 5476:19-5477:19. The worst performing schools in New York City suffer from a particularly acute lack of certified staff. 187 Misc. 2d at 27; Px 1223; Px 1233 at 7; Px 3776; Tames 3007:15-3010:7; Garner 3508:24-3511:24; PFOF ¶ 367.

Contrary to the State's contention, Def. Br. at 70, New York City does not have a system in place that transforms uncertified teachers into qualified teachers. Uncertified City teachers do *not*, as Defendants claim, "have the same amount of subject area course work that the Regents require for certification." Def. Br. at 70. Even the relaxed goals often cannot be met. Cohen 3637:19-3639:13; PFOF ¶ 359-60. The BOE hires uncertified teachers regardless of whether they have obtained the credit "goals" because to do otherwise would mean "[n]ot having a teacher in front of . . . five classes of students." Cohen 3639:11-13. Howard Tames, the Director of the Division of Human Resources for the BOE, testified that a school in need of a mathematics teacher may have to turn to an individual who had simply done well *in high school math* and on the Regents mathematics examination. Tames 3100:13-3101:11. The goal for credits for over 25 percent of all teachers is zero credits. Px 1192; Cohen 3634:6-3635:17. Other areas require only slightly more than zero. Px 1192; Cohen 3638:16-20.

Moreover, "certification standing alone is no guarantee of teacher quality." 187 Misc. at 25; Coppin 665:7-19; Ward 3220:8-19; DeStefano 5411:17-5412:12; Rosa 11107:8-12, 12229:6-25; PFOF ¶ 321.

Performance on Certification Examinations. A teacher must take and pass one or more examinations examinations to be certified. Lankford 4636:12-4638:15; PFOF ¶¶ 331, 375. Accepting an analysis by Plaintiffs' expert Dr. Ronald Ferguson, the trial court concluded that

"[t]he probative evidence at trial demonstrates that passage rates on certification examinations are predictive of teacher performance." 187 Misc. 2d at 27-28; PFOF ¶¶ 330-35.

Indeed, notwithstanding the testimony of Defendants' Professor Hanushek, witnesses called by both Plaintiffs and Defendants agreed that teacher performance on tests of general knowledge and literacy is a good indicator of the quality of the teaching force, teacher effectiveness and ultimately student performance. Px 2900-Young Stmt. ¶ 71; Sobol 1061:17-25; Weingarten 2744:9-2745:9; Garner 3464:8-3465:2, 3467:19-3468:4; Ferguson 5915:2-11, 5973:21-5974:21; Young 12869:22-12870:4, 12870:18-12872:2; Walberg 17239:4-18; Podgursky 17584:9-17585:23, 17632:5-18, 17641:18-17642:4. Widespread failure on these tests within a population of teachers indicates a lack of teacher quality. Mills 1191:22-1193:4; Darling-Hammond 6419:13-6420:22.

The certification scores of New York City teachers demonstrated that many City teachers repeatedly fail teacher certification examinations. 187 Misc. 2d at 28-29; PFOF ¶¶ 373-81. Fully 31.1 percent of City teachers who had taken the LAST test (the standard certification examination given today) failed it at least once. Only 4.7 percent of the teachers in the rest of the state failed it once. Px 1482 at 18, 85; Lankford 3924:11-3925:6. The average score on the test for first-time takers was 236.3 for New York City teachers (passing is 220), while the average score on the test for those teaching in the rest of the state was 261.6. Px 1482 at 18, 94. Similar failure rates were seen on other tests. Px 1482 at 18, 19, 85, 88; Lankford 3925:7-3928:24.

Test	Failure Rates for First-Time Takers		
	NYC Teachers	Teachers Outside NYC	NYC Suburbs
Elementary ATS	26.9 percent	3.0 percent	3.8 percent
Secondary ATS	25.7 percent	3.5 percent	4.6 percent
NTE - Communication Skills	23.7 percent	4.9 percent	5.3 percent
NTE - General Knowledge	29.0 percent	7.8 percent	9.9 percent
NTE - Professional Knowledge	20.0 percent	3.7 percent	4.8 percent

The scores are even worse on the subject-matter content examinations. For example, 42.4 percent of the math teachers *actually teaching math* in New York City failed the State's mathematics examination. Px 1482 at 22, 93; Lankford 3938:2-3939:14; PFOF ¶ 377. Other tests were just as bad. Unambiguously high failure rates were also observed for City teachers (biology: 37 percent failed; chemistry: 24.1 percent failed; earth science: 37 percent failed; and physics: 48.3 percent). Px 1482 at 18-19, 87; PFOF ¶ 377.

Defendants tried to challenge the integrity of the numbers, Def. Br. at 69-71, neglecting to mention that Defendants' own expert used Plaintiffs' numbers to check the accuracy of his own work. Podgursky 16559:10-16560:2; PFOF ¶ 380. Contrary to the misleading claim by the State,[10] Dr. Lankford examined the *entire teaching records* of more than 65,000 teachers who were teaching in the New York City schools as of the 1997-98 school year. The majority of those 65,000 teachers had taken one or more teacher certification examination over the course of their careers. PFOF ¶ 375. The statistics covered more than 90 percent of New York City public

[10] The citation to Px 1535 on page 70 of Defendants' brief is nothing short of misleading. Px 1535 is but one page of the hundreds presented by Dr. Lankford as part of his comprehensive study of State data. *See* Px 1482. The page itself represents just one of the hundreds of analyses performed by Dr. Lankford.

school teachers who began teaching in 1992 or later, and 95 percent of all certified teachers to join the system since 1992. Lankford 4636:12-4638:15; PFOF ¶ 375.

Experience. The trial court found that "[t]he unrebutted evidence validates the unremarkable proposition that teachers, like any professionals, frequently require several years' experience to achieve competency." 187 Misc. 2d at 29. An inexperienced teaching force has a negative impact on student achievement. Px 551 at 20; PFOF ¶¶ 338-41. As Plaintiffs' expert, Dr. Darling-Hammond, explained, "[f]or logical reasons, to a large extent, [teachers with less than three years' experience] are still learning how to put their ideas into practice – they are still developing curriculum, they are still trying to figure out how to work with students in ways that will be effective for them." Darling-Hammond 6350:2-6350:7. Randi Weingarten, head of the teachers' union, conceded that "new teachers, whether they are certified or not certified, still have . . . a lot that they need to learn, to experience." Weingarten 2688:22-25. Granger Ward, former Manhattan high schools superintendent, emphasized that "teaching is a skill of craft, it takes a number of years to perfect. I don't know any person that comes directly out of [] teaching school or otherwise who can go into a classroom and be the best. It really takes several years to really perfect your craft." Ward 3226:11-20. Even Dr. Hanushek, Defendants' expert, agreed that "having at least two years of experience probably improves the quality of a teacher." Hanushek 15951:10-15.

Because of significant turnover in New York City – more than 50 percent of City teachers quit their jobs within six years of starting, Px 1196 at 1; PFOF ¶ 371 – too many City teachers are inexperienced. With a turnover rate of 14 percent per year, nearly 15 percent of the City's teachers had two years' of experience or less. Px 1482 at 12, 74; Lankford 3910:20-3911:13; PFOF ¶ 368. One district had over 20 percent turnover each year. Px 2332A-Rosa

Stmt. ¶¶ 60-62; PFOF ¶ 372. As the trial court found: "The large number of inexperienced teachers – who, like uncertified teachers, are disproportionately assigned to the schools with the greatest number of at-risk students – makes it more difficult for New York City public schools to meet the needs of its students." 187 Misc. 2d at 29; Px 1482 at 12, 72-73, 134-35; Px 2332A-Rosa Stmt. ¶¶ 60-62; Lankford 3985:3-3987:24; 3999:19-4000:15; PFOF ¶¶ 368-72.

Educational Background and Degree Obtained. The quality and reputation of a teacher's undergraduate institution is another indicator of the quality and effectiveness of the teacher. 187 Misc. 2d at 29-30; Px 2900-Young Stmt. ¶ 71; Mills 1188:17-1189:16; Garner 3478:10-18, 3481:21-3482:15; Lankford 3877:7-3879:15; Schmidt 10949:2-23, 10953:6-21; Podgursky 17584:9-17585:23, 17637:16-25; PFOF ¶¶ 342-44. Even defense expert Dr. Podgursky acknowledged the relationship between a teacher's undergraduate institution and teacher quality. Podgursky 17637:16-25. In general, the City's teaching force comes from less-competitive colleges. 187 Misc. 2d at 30; Px 1482 at 11, 46-48, 69, 111, 114-18; Lankford 3942:4-3947:11; Podgursky 17645:13-17; PFOF ¶¶ 382-94.

Defendants point out that a higher percentage of City teachers have a master's degree plus 30 credits than do teachers in some other areas of the state. Px 1482 at 11. But the credential of master's degree plus 30 credits was not advanced ***by a single witness*** for either party as being a meaningful measure of teacher quality. Defendants' expert, Dr. Podgursky, expressly rejected it. Podgursky 17645:24-17646:15. As State Assistant Commissioner of Education Evans-Tranumn explained, there is no way to know what courses a teacher earning credits above a master's degree is taking; a math teacher may be taking courses in interior design while remaining unable to teach math. Evans-Tranumn 1492:22-1493:15; PFOF ¶ 344.

The percentage of teachers with *at least* a master's degree was deemed relevant. Lankford 3877:7-3879:15; Podgursky 17584:7-17585:23. In 1997-98, 16 percent of City teachers held *only* a bachelor's degree or less, to 10.9 percent in the rest of the state and 8.6 percent in the New York City suburbs. Px 1482 at 11, 69; Podgursky 17645:13-17.

C. The Neediest Students Receive The Worst Teachers

Within New York City, the poorest and most needy students are assigned the worst teachers. Px 1225 at 3, 33; Tames 2968:17-2971:9. Dr. Lankford found that the neediest students were the most likely to receive (a) an uncertified teacher, (b) a teacher who had failed the certification examinations, (c) an inexperienced teacher, (d) the least educated teachers, and (e) the teachers who had attended less competitive colleges. PFOF ¶¶ 407-12.[11]

D. The Condition Of The New York City Teaching Force Has Been Created By Decades Of Underfunding, And The Problem Will Only Get Worse In The Future

The State suggests that this situation is somehow the BOE's fault. But the simple truth is that for more than a decade the City's salaries have been too low and its working conditions too harsh, to attract anyone who can teach elsewhere. The evidence presented at trial established that the quality of New York City's teacher pool will not improve until more resources are made available for substantially increased teacher salaries and improved working conditions. Relying on the unconstested testimony of numerous witnesses, including Plaintiffs' labor economist, the trial court properly concluded:

- New York City competes in a common labor market for teachers and other college-educated individuals with the surrounding New York City suburbs; 187 Misc. 2d at 33; PFOF ¶ 414-45;

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[11] Contrary to suggestions made by Defendants at trial, there is nothing the BOE can do to force more qualified teachers to teach in the City's hard-to-staff districts. PFOF ¶¶ 476-78.

- New York City teacher salaries are 20 to 36 percent behind the salaries of suburban teachers; 187 Misc. 2d at 33-34; Px 1 at vi; Px 1165 at 10; Px 1233 at 5, 7; Tames 2998:19-3001:17; Garner 3500:23-3501:8; PFOF ¶ 427;

- New York City teachers work under less attractive conditions than their suburban counterparts; 187 Misc. 2d at 35; Px 1482 at 144, 171; Weingarten 2769:19-2773:11; Lankford 4023:19-4025:14, 4046:11-4049:18; PFOF ¶¶ 441-45;

- Because of its low salaries, New York City attracts, on average, the least-qualified teachers in the relevant labor pool. 187 Misc. 2d at 34; Px 1482 at 172-74, 181-85; Lankford 4034:12-4037:3; PFOF ¶ 423;

- The gap between teaching salaries and non-teaching salaries is larger in the City than it is in surrounding communities. 187 Misc. 2d at 34; Px 1482 at 164-67; Lankford 4018:25-4023:18; PFOF ¶ 434;

- Each year, New York City loses some of its best teachers to the suburbs. Px 1482 at 134, 173-174, 182-185; Dx 19158; and

The problems facing New York City schools in recruiting qualified teachers is likely to worsen in upcoming years. Px 41 at BOE 761524; Px 1186; Px 1214 at 1, 3-5; Px 1225 at 67.

The total number of uncertified teachers rose from 7,817 teachers in the 1991-92 school year to 10,036 teachers in the 1999-2000 school year. Px 1222. The current abysmal situation will only get worse, due to (1) the need to staff newly-mandated state programs such as universal pre-kindergarten; (2) State-mandated improvements in the requirements for certification; (3) a scarcity of college graduates with teaching credentials; and (4) the likely increase in teacher retirements in the near future. PFOF ¶¶ 479-82.

E. New York City Teachers Are Not Given The Support They Need To Succeed

The one hope for improving these unqualified novices is through training. In New York City's schools, professional development is "essential in training and maintaining qualified teachers." 187 Misc. 2d at 31. Experts proffered by *both* Plaintiffs and Defendants emphasized the tremendous impact of professional development on teacher quality and effectiveness. 187 Misc. 2d at 30-31; Px 7 at 52; Px 1043 at 31; Px 1233 at 20; Px 1870 at 10-11; PFOF ¶¶ 510-15.

Professional development can ameliorate the shortcomings of new teachers, keep teachers current in their subject areas, and disseminate techniques for teaching at-risk students.

As the trial court concluded, "[t]he substantial inadequacies of the New York City public school teaching force enhance[] the need for effective professional development programs." 187 Misc. 2d at 31; Px 2900-Young Stmt. ¶¶ 84-85; Px 3083-Lief Stmt. ¶ 51; Cashin 338:25-339:10; Coppin 707:19-711:6; Lief 14989:3-17; PFOF ¶¶ 558-84. But, as the trial court also concluded, "the professional development currently provided to New York City public school teachers is inadequate." 187 Misc. 2d at 31; Px 1233 at 2; PFOF ¶¶ 533-87.

Indeed, the districts with the highest proportions of at-risk students – the very districts where appropriate professional development is critical – have the fewest dollars available for professional development. 187 Misc. 2d at 30-31; Px 807; Px 2900-Young Stmt. ¶ 84-85; Cashin 340:21-342:14, 342:22-344:23, 379:13-16, 543:13-544:7; PFOF ¶¶ 524-25, 558-67. Moreover, professional development in math and science is so deficient that a 1999 study by the New York City Comptroller's Office found that "[p]oor staff development is probably the biggest impediment to math and science education in the City's public schools." Px 1242 at 35; PFOF ¶¶ 550-53, *see also* 187 Misc. 2d at 30-31; Px 3083-Lief Stmt. ¶ 54.

The little professional development that the BOE can afford consists almost exclusively of one-day lectures or workshops, Dx 10422; PFOF ¶¶ 585-86, a form of professional development denounced by The National Commission on Teaching and America's Future as "hit and run workshops [that] do not help teachers learn the sophisticated teaching strategies they need to address [] very challenging learning goals with very diverse populations of students." Px 1870 at 2; PFOF ¶ 586, *see also* Px 2900-Young Stmt. ¶ 85; Dx 10413; Dx 10422; Dx 10425; Dx 10426; Coppin 783:18-786:17, 791:15-795:12, 829:17-831:4; Fruchter 14644:17-14645:14.

As the trial court found, "[t]he evidence demonstrates that professional development is most effective when it is ongoing, tailored to a school's local needs, and conducted in schools themselves rather than at remote locations." 187 Misc. 2d at 31; Px 367, Attachment 1 at 19; PFOF ¶ 529. This professional development is lacking in New York City public schools. 187 Misc. 2d at 31; Px 2900-Young Stmt. ¶¶ 85-86, 88-89; Dx 10014-40 at BOE 700210; Cashin 340:21-342:14, 379:13-16, 543:13-544:7; Chin 4968:14-25, 4972:7-10, 5022:19-25; DeStefano 5530:10-17, 5442:13-16; Fink 7761:9-22, 7773:25-7775:11, 7775:20-7776:6,7858:15-7859:7, 7865:25-7866:4, 8864:2-10; PFOF ¶¶ 543, 549.

F. The Trial Court Was Correct To Decline To Rely In Its Evaluation Of Teachers Upon The Two Internal BOE Self-Evaluation Systems Advanced By Defendants

The trial court rejected the two self-evaluation systems relied upon by Defendants, "U/S ratings" and "PASS reviews," concluding that "these two internal mechanisms . . . are not reliable." 187 Misc. 2d at 31-32. Under the U/S rating system, teachers are reviewed by their principals and receive either a "U" for unsatisfactory or an "S" for satisfactory. 187 Misc. 2d at 32. Receiving an S does not make an incompetent teacher qualified. As explained by former Manhattan High School District Superintendent Granger Ward, U ratings are "really reserved for those people who were the worst of the worst, those people who are actually endangering students in what they were doing in the classroom."[12] 187 Misc. 2d at 32; PFOF ¶¶ 395-400; Ward 3221:7-11.[13]

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[12] Defendants' brief states that even if the trial court was correct in disregarding these unreliable self-evaluative measures, "the waste of millions of dollars on a falsified evaluation process would be just as troubling." Def. Br. at 69. In fact, the U/S and PASS systems have useful purposes (eliminating the worst of the worst teachers and enabling schools to reflect upon their educational efforts, respectively) that have nothing to do with the purposes that Defendants have tried to force upon them.

[13] While belittling the testimony of superintendents on this subject on the ground that teachers are evaluated by principals and not directly by superintendents, Defendants

Because there are usually no candidates to replace an unsatisfactory teacher, administrators must either allow an unsatisfactory teacher to continue, or create a vacancy and hire an even *less* prepared individual. Principals thus give out U ratings to only the worst of the worst. 187 Misc. 2d at 32; Cashin 333:14-334:3; Coppin 667:22-668:23; Ward 3220:20-3222:5; DeStefano 5431:4-5433:22; Santandreu 13723:17-13724:24; PFOF ¶ 396. Second, it is easier to try to work with unsatisfactory teachers to improve their performance than to go through the paperwork required to rate them unsatisfactory. 187 Misc. 2d at 32; Evans-Tranumn 1518:8-11; DeStefano 5428:17-5430:18; PFOF ¶ 397. Third, as Defendants' expert acknowledged, rating a teacher unsatisfactory prevents transfer to another school for three years. 187 Misc. 2d at 32; Px 1155 at 116; DeStefano 5434:13-5435:8; Podgursky 17650:9-17652:4; PFOF ¶ 398. A principal who rates a teacher unsatisfactory ensures that the teacher will remain the principal's problem. DeStefano 5434:18-5435:8.

As set out in detail below, the State completely distorts the PASS reviews. These self-prepared discussion documents were never meant to replace objective measurements of teacher quality.

G. New York City's Administrators Are Not Prepared To Lead New York City Schools

Defendants have not challenged on appeal the trial court's finding that the "BOE has increasingly been unable to fill principal, assistant principal and other administrative positions

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ignore the facts that: (a) superintendents themselves visit classes and directly supervise the principals and teachers, and (b) most of the superintendents who testified at trial were themselves formally principals. Px 2026A-Zardoya Stmt. ¶¶ 4-5, 15; Px 2163; Px 2332A-Rosa Stmt. ¶¶ 3-4, 13, 18, 20; Px 2855A-Lee Stmt. ¶¶ 3, 8-9; Px 2900-Young Stmt. ¶¶ 3, 19; Cashin 227:13-228:23, 237:24-238:5; Coppin 556:10-559:4; Ward 3117:7-13, 3118:19-3119:3; DeStefano 5248:11-5249:21, 5255:2-5256:7, 5383:8-19; Fink 7702:3-14.

with adequately qualified individuals because of low salaries and poor working conditions." 187 Misc.2d at 35. As the trial court found, "administrators play a crucial role in building and maintaining effective schools." 187 Misc. 2d at 35; Px 2855A-Lee Stmt. ¶ 123; Ward 3236:4-15; DeStefano 5445:25-5446:24; Fink 7784:6-18, 7828:17-7829:3; Fruchter 14903:23-14904:9; Walberg 17251:3-16; Podgursky 17627:21-17628:3; PFOF ¶¶ 489-91. In the words of one superintendent, qualified and trained principals and assistant principals "will either make or break a school." Fink 7784:10-18; PFOF ¶ 489.

But the working conditions in the City – including inadequate support and professional development, and relatively large schools falling under the responsibility of one principal – are difficult. The salaries are low; principals and assistant principals can earn tens of thousands of dollars more if they work in suburban districts with superior working conditions. Px 2961 at 7; Px 3083-Lief Stmt. ¶¶ 37-39; Dx 17105 at OMB 701094; PFOF ¶ 492-95. As a result, the City has been unable to hire and retain a sufficient number of qualified principals and other administrators. Px 2026A-Zardoya Stmt. ¶¶ 61, 62; Px 2855A-Lee Stmt. ¶¶ 114, 116, 121; Px 2900-Young Stmt. ¶ 97; Tames 3025:16-3026:16; Ward 3244:23-3245:16; Santandreu 13729:9-19, 13729:25-13730:15; Walberg 17251:13-16; PFOF ¶¶ 492-504. For example, as of November 1, 1999, a total of 1,091 administrator positions were vacant, consisting of 575 assistant principal positions and 212 principal positions. Px 1275; Tames 3018:8-17; PFOF ¶¶ 497-498. Thus, one-fifth of the City's public schools lacked permanent principals. A similar drop is seen with respect to assistant principal applicants. Between 1992 and 1999, the average number of assistant principal applications per position fell from 70 to 26. Px 1269; Px 1272; Tames 3024:15-3025:8; PFOF ¶ 500.

A drop in the quality of the applicants has accompanied the drop in numbers of applicants. Superintendents are now forced to fill positions, not with the "best candidate," but by "settling for what is available." Px 2026A-Zardoya Stmt. ¶¶ 57, 64-66; Px 2900-Young Stmt. ¶ 96; Px 3083-Lief Stmt. ¶ 38; Fink 7832:16-23; Santandreu 13737:10-13740:22; Fruchter 14655:7-10; PFOF ¶ 502.

VI. NEW YORK CITY SCHOOLS LACK ADEQUATE INSTRUMENTALITIES OF LEARNING

For both student and teachers, the final insult is the lack of basic tools for education. "or nearly two decades [the] BOE has struggled to provide adequate instrumentalities of learning to its students." 187 Misc. 2d at 56. There continues to be a severe shortage of essential instructional materials in the New York City public schools, including "desks, chairs, pencils and reasonably current textbooks," *CFE I*, 86 N.Y.2d at 317, as well as library books, science laboratory supplies and instructional technology. PFOF ¶¶ 938-40.

A. New York City Students Lack Adequate Textbooks

The trial court found, and the evidence demonstrated that New York City suffers from a historical and systemic shortage of textbooks that continues to this day: "[A]t least since the early 1980s New York City has endured a chronic shortage of adequate textbooks." 187 Misc. 2d at 57. The level of funding in the City for textbooks has been inadequate for years, making it impossible for schools to purchase and maintain an adequate supply of up-to-date materials.[14] PFOF ¶¶ 949-50. These findings are well supported by the testimony of superintendents and state officials, as well as by the reports of the SED, the City Comptroller and the City Council. Px 1469 at 42-43; Px 2332A-Rosa Stmt. ¶¶ 107, 110; Px 2855A-Lee Stmt. ¶¶ 144-45; Px 3032 at

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[14] Indeed, as discussed below, despite the trial court's suggestion that current funding is adequate, the evidence demonstrates that influxes of funds for new textbooks have failed to alleviate the chronic shortage.

6; Dx 13272 at PCFE 003491, PCFE 003495; Cashin 247:21-248:2, 366:4-11, 504:21-24; Coppin 779:2-4; Hayden 1307:17-21; Chin 4903:16-24; Casey 9962:13-17; Sanford 11411:16-19.

The shortages in some districts are so severe that numerous schools are forced to rely on "classroom sets" of books, whereby a school has one set of texts for all the classes in a given subject instead one book for every student. Px 1469 at 43; Px 2332A-Rosa Stmt. ¶ 102; Zardoya 7048:25-7049:10. Where sufficient quantities of textbooks do exist, the books are often antiquated and ill-matched to students' educational needs. PFOF ¶¶ 955-56. As has been the case for many years, the shortage of adequate textbooks is particularly severe in social studies and the sciences, areas in which knowledge and information change rapidly. PFOF ¶ 956. SED and BOE witnesses provided examples of social studies textbooks that referenced the Eisenhower administration and "the ongoing civil war in Vietnam," Dx 13272 at PCFE 003491; Evans-Tranumn 1389:16-19, and science books published before the first lunar landing. Casey 9962:23-9963:21.

While recent funding increases have provided short-term relief for a chronic shortage, as the trial court properly observed, "there is no structural funding mechanism that gives any assurance that the recent spike in textbook funding will continue." 187 Misc. 2d at 57. As numerous witnesses testified, remedying with the shortage of textbooks requires a substantial, ongoing commitment of additional financial resources. Darling-Hammond 6450:12-24, Sanford 11411:20-23; Santandreau 13719:4-19. At the same time, demands for new textbooks are greater than ever, further exacerbating the textbook crisis. In addition to the pressures of normal wear and tear, the adoption of the Regents Learning Standards has further stretched the City's already thin textbook resources, since textbooks must be replaced to conform to the Standards.

Px 2855A-Lee Stmt. ¶¶ 144-45; Sobol 1075:18-1076:5; Evans-Tranumn 1399:22-1400:3; DeStefano 5462:3-5; Sanford 11411:13-15. The substantial weight of the evidence showed, as the trial court concluded, that "[t]he NYSTL allocation is inadequate to cover the cost of all [instructional] materials." 187 Misc. 2d at 87.

B. New York City School Libraries Are Inadequately Stocked

The long-existing shortage and inadequacies of library facilities in the public schools has been exacerbated by chronic shortages of useful books. The trial court found that "[t]he books in New York City public school libraries are inadequate in number and quality." *Id.* Numerous reports show that the number of books in the New York City schools is well below what other districts provide and well below the American Library Association's ("ALA") national standards. The ALA recommends that elementary school libraries contain 20 books per student, and the state average is 19. However, in those New York City schools that actually have libraries, the average is just nine books per student. Px 1472 at 1; Lief 15002:5-16.

Many witnesses testified that the books that do exist are often antiquated and ill-matched to classroom curriculum. PFOF ¶ 966. For instance, Superintendent Rosa testified that "[m]any of [the] libraries have books that are extremely old, do not support classroom literature, [and] are not adequate in terms of student interest." Rosa 11115:17-11116:7. Superintendent Cashin likewise testified that "[t]he [library] books . . . are inappropriate, antiquated, not current in terms of readability of the materials, the multicultural themes our children should be exposed to." Cashin 303:24-305:8. Not surprisingly, the worst city schools have the worst libraries. Px 1176C at SEDA 0020373; Px 1176D at SEDA 0020425.

The abhorrent condition of libraries in the New York City public schools has changed little during the last decade, Px 3083-Lief Stmt. ¶¶ 30-31, in part because of insufficient state funding. Since 1994, the State has allocated just $4 per student for library materials, including

books, periodicals, videotapes and computer software. Px 27 at 31; Px 518A at 24; Px 1169 at 51. Even the Regents acknowledge that $4 is insufficient to supply schools with these materials, given the increasing cost of books, the move to higher state standards, and the increased demand to purchase computer software. Px 518A at 24. As the trial court properly found, the State's library allocation is "insufficient to assure adequate libraries in the City's public schools." 187 Misc. 2d at 57.

Indeed, to the extent that New York City schools have adequate library facilities and books, it is largely due to private funding. A concentrated effort by a coalition of private groups has substantially improved 150 elementary school libraries over the last decade. Px 27 at 1. But all of the other 490 elementary schools and their 375,000 students suffer from a devastating lack of library support. Px 27 at 29. Middle and high schools, which did not benefit from the private program, are in worse condition. Px 3083-Lief Stmt. ¶ 31.

C. New York City Schools Lack Adequate Instructional Equipment And Classroom Supplies

Based on substantial evidence presented at trial, the trial court properly found that "New York City public schools have in the last two decades suffered from inadequate classroom supplies and equipment," including science laboratory supplies and "basic supplies such as chalk, paper, art supplies, and, in some schools, desks and chairs." 187 Misc. 2d at 57-58. Although the court declined to make a finding with respect to the adequacy of these supplies at the present time, the overwhelming evidence establishes that there is indeed a current systemic lack of instructional materials.

Science Laboratory Supplies. The evidence showed that New York City public school laboratories, where they even exist, lack the most basic supplies and equipment, such as chemicals, specimens, microscopes, beakers and Bunsen burners. Px 1242 at 45; Px 2855A-Lee

Stmt. ¶ 88; Cashin 309:14-310:2, 368:16-369:17; Coppin 630:12-631:8; Evans-Tranumn 1390:3-16; Ward 3196:12-21; Millman 3689:8-11; DeStefano 5338:21-5339:11; Lief 14969:9-19. State and City officials have observed "schools where the children do not have a lab experience at all. There may be, structurally, a lab there, but there are no materials and the faucets don't work and there are no Bunsen burners." Sanford 11410:22-11411:10. A survey of 19 City high school by the City Comptroller concluded that "100 percent[] had substantial equipment deficiencies such as a shortage of gas lines, running water, power packs, microscopes, and beam balances." Px 1242 at iii. The survey determined that the average expenditure for science supplies among the 19 City schools surveyed was $2.02 per student (compared to $10 in suburban districts). Px 1242 at 47-48; Millman 3712:19-3713:4. Even this modest expenditure for science supplies has been far outpaced by the demand for science classes, driven by the implementation of State mandates concerning laboratory time. Coppin 630:12-631:8. Not surprisingly, the lack of adequate laboratory supplies severely inhibits and frequently prevents proper instruction in the sciences. Cashin 309:14-310:2, 368:16-369:17; Coppin 630:12-631:8; Evans-Tranumn 1975:19-1976:2.

Classroom Supplies. Numerous witnesses, including district superintendents, testified that the New York City public schools suffer from a chronic lack of the most basic classroom supplies, such as chalk, markers, copier paper, paper towels and classroom furniture.[15] Weingarten 2742:2-6; Millman 3747:19-3748:6; Darling-Hammond 6450:12-24; Casey 9960:3-10; Santandreu 13570:11-14; Lief 14976:12-19. Systemic shortages are well documented by

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[15] Defendants cite the low number of formal grievances filed under the UFT contract as evidence of the sufficiency of instructional materials. Def. Br. at 75. In doing so, however, Defendants ignore the unrebutted testimony of the UFT president who explained that more grievances are not filed because of the complicated process and

City and State agencies as well. PFOF ¶ 972. In a SURR junior high school, for example, SED reviewers noted that "[s]upplies and materials are inadequate, there were no hands-on materials to supplement instruction." Px 1176C at SEDA 0020321. In another school, reviewers noted an inadequate supply of chairs, so that "[l]atecomers to class did not have seats." Px 1176A at SEDA 0020278.

Many of the worst performing schools in New York City share a chronic lack of basic classroom supplies. Santandreu 13556:18-13557:10; PFOF ¶ 977. SED staff visits to SURR schools have documented a dearth of hands-on supplemental materials, math manipulatives, LEP materials, calculators and even toilet paper and paper towels. Px 1176A at SEDA 0020265, SEDA 0020304; Px 1176C at SEDA 0020321, 0020339, 0020340, 0020356, 0020413; Px 1176D at SEDA 0020425; PX 1176E at SEDA 0020454, 0020462, 0020473, 0020474, 0020493.

Severe shortages in basic instructional supplies arose and persist because teachers in the New York City public schools are provided with inadequate resources to purchase classroom materials. The current allocation is $200 per teacher for general education, an amount that is not sufficient to cover basic classroom needs, particularly in light of the extraordinarily large class sizes in New York City. Px 1169 at 59; Px 2193 at 73; DeStefano 5462:6-17. There is substantial evidence that, in the absence of sufficient funds, teachers turn to an unreliable patchwork of financing – including personal money and revenue from food sales – to provide even the most basic of supplies. Px 1469 at 44; Cashin 246:12-247:10; DeStefano 5462:21-5463:3.

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mixed results associated with filing a grievance, not because districts enjoy sufficient supplies of instructional materials. Weingarten 2795:14-2796:9.

D. New York City Schools Lack Adequate Instructional Technology

The trial court properly found that "instructional technology is a core 'instrumentality of learning' embraced by the Court of Appeals' template." 187 Misc. 2d at 58. The evidence demonstrated a wide consensus among business leaders, policy makers, government officials and educators that a sound basic education in the 21st century requires schools to educate all students in computer technology and related intellectual skills – skills that are imperative for meaningful citizenship and employment. Sobol 1764:7-1767:5; Spence 2312:17-2313:16; Salerno 5680:21-24; Taylor 6138:22-25; Darling-Hammond 6459:22-6460:21; Schmidt 10941:3-18; Levin 12095:5-18, 12107:17-12110:14.

The BOE's 1997 Strategic Technology Plan was carefully reviewed and publicly approved by the state for use in obtaining federal grant money. The Plan concluded that "[o]ur schools must prepare all students to succeed and prosper in the information age and the new global economy, where access to information and ownership of knowledge will be defining characteristics of the 'competitive edge'." Px 1476 at 33.

The trial court properly observed that "[f]or the last decade New York City public schools have failed to provide adequate instructional technology to their students." 187 Misc. 2d at 58; PFOF ¶¶ 1005-06. Current and former superintendents uniformly testified that students in the New York City public schools have not had sufficient access to current technology for many years and continue to suffer from this inadequacy. Px 2855A-Lee Stmt. ¶ 136; Cashin 369:19-21, 370:22-371:2, 533:15-16; Coppin 651:10-16; Ward 3208:8-20, 9910:20-9911:7; DeStefano 5370:20-22; Casey 9968:14-17. The 1999 655 Report echoes this theme, reporting that "[s]tudents in New York City and the Large City Districts had very limited access to the latest instructional technology," and further acknowledges that, "[o]n average, students in public

schools outside New York City, regardless of [need/resource] category, had greater access to microcomputers than did New York City students." Px 1 at 80-81.

Defendants claim there is a "favorable" computer-to-student ratio. Def. Br. at 76. That is not true. In 1997, there were 18.4 computers per 100 students in the rest of the state, compared to 9.2 per 100 students in New York City. Px 1472 at 1. Second, the ratio relied upon by Defendants includes outdated models that cannot run current operating systems or even connect to the Internet. 187 Misc. 2d at 59-60; Taylor 6200:10-6201:16. Contrary to the State's snide suggestion that the trial court was holding itself out as a technology expert, the outdated nature of the computers was based on the undisputed testimony of the former Chief Information Officer of the BOE. The State offered absolutely no testimony about computers, relying entirely upon data put in evidence during Ms. Taylor's testimony.

Finally, there is substantial evidence that even the recent influx of dedicated technology funding has not solved the resource problems that prevent the acquisition and use of instructional technology in the New York City public schools. PFOF ¶ 1018. As the trial court concluded, the recent infusion of funds "has failed to remedy New York City public schools' technological deficit. Moreover, it is unclear whether funding for technological improvements in New York City public schools will continue." 187 Misc. 2d at 59.

VII. BECAUSE OF ITS LACK OF FUNDING, THE BOARD OF EDUCATION HAS BEEN UNABLE TO TAKE ITS CURRICULA AND MAKE THEM ANYTHING MORE THAN PIECES OF PAPER, STATING AREAS THAT STUDENTS COULD LEARN IF THE BOARD HAD THE RESOURCES TO BE ABLE TO TEACH THEM.

The State limits its discussion of curricula to one sentence, claiming that the trial court found that the "BOE curriculum satisfied the constitutional standard." Def. Br. at 72. In fact, what the trial court found (and what the evidence proves) is that while the BOE may have adopted curricula that encompass the skills and knowledge necessary to obtain a sound basic

education, the curricula have not made it to the classroom. A curriculum is just a statement about what *should* be taught. But unless it is matched up with resources, it becomes nothing more than another piece of paper.

For example, the BOE has always had as a basic part of its curricula that students should learn to read before the third grade. But in 1997, over one-third of the City's third graders were effectively illiterate. The BOE's "adequate curricula" did nothing to help those children learn to read. The same problems can be seen in every area of the schools, where the curriculum has nothing to do with the reality of what is being taught.

A. Special Education And ELL

The proportion of uncertified teachers in programs for the severely and profoundly disabled is 25 percent, almost double the rate in the rest of the system, Erber 7579:24-7580:8, and almost half of the bilingual special education programs are staffed by uncertified teachers. Px 2092 at BOE 773814; Px 2166A-Goldstein Stmt. ¶ 27. In March, 1999, the latest month for which data was available at trial, almost 10,000 students were on waiting lists for speech therapy services, and 2,000 were awaiting physical therapy services. Px 2075 at 16, 22. The effects of these inadequate resources on disabled children are often devastating, causing disproportionately high numbers of them to fail to attain reading and math proficiency and obtain high school diplomas, and, in some cases, impacting their physical conditions and ability to communicate. Px 1126 at 203; Px 2166A-Goldstein Stmt. ¶ 29; Erber 7504:2-7507:23; PFOF ¶¶ 1269-72, 1282-84.

English Language Learners are required to pass the English Language Arts Regents Examination in order to obtain a high school diploma. But the BOE lacks the 900 additional English as a Second Language teachers need to provide this instruction. PFOF ¶¶ 1360-62.

B. The Curricula In Arts And Physical Education Are Not Being Taught

Whether or not arts and physical education are "core" subjects,[16] the BOE must provide instruction in these and other mandated subjects to support the teaching of other "core" subjects.[17] Arts and physical education are essential elements of a well-rounded curriculum, as mandated by the State, and are "important means of supporting the teaching of other subject areas that are part of a sound basic education." 187 Misc. 2d at 37. The undisputed benefits of arts instruction for high-needs students, including students at risk of educational failure and English language learners, further underscore the importance of arts education in the New York City public schools. PFOF ¶¶ 1025-28.

The record shows that even recent efforts to restore arts and physical education to the school system have been insufficient in the face of more than two decades of neglect. These programs disappeared from many City schools. PFOF ¶¶ 1034-38. For at least the past twenty years, and continuing to this day, high school arts classes have been offered only to twelfth-grade students in order to conserve the very limited resources available to provide mandated arts education. PFOF ¶ 1032. This policy of deliberate delay is based on the premise that classes will be substantially smaller by the twelfth grade due to the large number of students who drop out, are retained in a grade, or otherwise leave the system. PFOF ¶ 1032. Moreover, a BOE

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16 The trial court found that arts and physical education were not core subjects, a finding that Plaintiffs continue to dispute.

17 Moreover, the BOE is, at considerable expense, required by law to make efforts to satisfy the Commissioner's Regulations that require that these subjects be taught. The State has explicitly acknowledged the critical role of arts and physical education by including each among the seven basic curricular areas that constitute the State Learning Standards. PFOF ¶¶ 1029-30, 1051. In addition, the SED has developed minimum course requirements for arts and physical education, which are set forth in the Commissioner's Regulations. PFOF ¶¶ 1031, 1052.

survey indicates that one-quarter of elementary students in the schools surveyed did not receive any arts education as recently as the 1996-97 school year. Dx 13445 at 20; Dunn 9003:10-13.

Similar problems are seen in physical education. Many schools in New York City currently have no certified physical education teachers, which means that instruction is provided by classroom teachers who have no formal training in physical education and who often are not supervised by licensed instructors. PFOF ¶¶ 1057-58. The availability of materials and equipment currently is insufficient even in the best physical educational programs in the New York City public schools. PFOF ¶ 1059. Many New York City public schools lack gymnasium facilities altogether. PFOF ¶ 1060. Many schools have no play yards or play yards that are too small. PFOF ¶ 1061. As a result of these problems, many New York City public schools do not even offer physical education programs to their students, despite the explicit requirements of the Commissioner's Regulations. PFOF ¶ 1062. To take just one example, in District 14, which one witness testified is typical of districts throughout the system, five of the 20 elementary schools offer no physical education courses. Virginia 5774:2-11, 5816:13-5818:5.

The BOE has always known what it would like to teach. And certainly in the last few years, with the introduction of the Regents Learning Standards setting curricula in seven areas, there is no question that the BOE has identified curricula that, in theory, constitute a sound basic education. But curricula are worthless unless properly implemented. The trial court properly found that, "[t]he problem is not with the content of the curricula, but rather with its implementation." 187 Misc. 2d at 37.

Indeed, the New York City schools offer fundamental proof that a curriculum that is adequate on paper may be worthless in the real life. Thousands of students who spent their early lives in those schools cannot even read at an eighth grade level.

VIII. BY ANY MEASURE THE NEW YORK CITY SCHOOLS HAVE FAILED TO EDUCATE NEW YORK CITY'S CHILDREN

Throughout this brief, we have previewed evidence of the New York City public school system's failure to impart the knowledge and skills necessary for the City's children to function as productive citizens. The evidence is overwhelming in scope and the failure is staggering in its human toll.

The SED, the BOE and education experts all agree about the proper measures for assessing whether a school system is providing its students with an appropriate opportunity to learn: test scores, graduation rates and remediation rates. ***Every one of these measures*** proves that the New York City public school system has failed to provide many of its students with the opportunity to acquire even the most minimal skills. This failure begins in elementary school, continues in middle school and culminates in abysmal high school outcomes:

- By the third grade, the BOE has had four years to teach children to read. More than one third of the City's third graders are functionally illiterate. PFOF ¶¶ 1518-19.

- By the end of middle school, one-third of the City's students still cannot demonstrate minimum competency in literacy and, perhaps as a consequence, they cannot master other core subjects. The City's students consistently score at the bottom on tests used to measure whether they are learning science and social studies. PFOF ¶¶ 1518, 1533.

- By high school, the cumulative effect of too many years of inadequate resources has its final devastating effect. ***More than 40 percent of students who enter the ninth grade do not get a high school diploma.*** Many of those that do lack the foundational skills and knowledge necessary for competitive work and civic responsibility. PFOF ¶¶ 1601-04.

- The failures of the City school system continue to haunt students after high school; more than one half of entering City University students – the vast majority of whom are New York City high

> school graduates – need substantial remediation in English and math. PFOF ¶¶ 1612-14.

These outcome measures provide overwhelming evidence that the New York City public school system is "foundering" and that is has "broken its covenant with students and with society." 187 Misc. 2d at 68. The State says that these abysmal outcomes "arguably indicate that student performance could be improved," and claims that the results of certain tests that were administered by the BOE show that the City's children are doing quite well. Def. Br. at 81-82. In fact, the BOE has eliminated these tests because they failed to measure whether students are learning what they need to know. PFOF ¶ 1569.

The State also accused the trial court of relying "on anecdotal testimony by plaintiffs' witnesses instead of focusing on empirical evidence relating to the City's system as a whole." Def. Br. at 49. This argument can only have been made by someone who never bothered to read the trial record.

We turn now to that record and begin with an extraordinary body of systemic, empirical evidence: ***the final academic outcome of every student who entered the ninth grade in New York City's schools since 1986.*** Px 2481A; Px 2482A; Px 2519; Px 2520. These records are collected in "cohort studies" that follow students as they progress (or frequently fail to progress) through New York City high schools. PFOF ¶ 1596-1598. It is difficult to think of anything more systemic, or more empirical than the cohort studies. And the trial court recognized the power of that evidence when it concluded that "the most telling measures of student performance are the percentage of students who actually graduate and the bundle of knowledge and skills that they possess on the day that they graduate." 187 Misc. 2d at 60.

A. The Cohort Studies: Fifteen Years Of Documenting Educational Failure

Beginning in 1985, almost a decade before this lawsuit started, New York City began to use its computer systems to keep track of what happened to every student who entered the ninth grade in a New York City high school. PFOF ¶¶ 1596-98. The BOE followed these students for seven years after they entered the ninth grade. *Id*. Although some graduated in four years, many others took much longer. Px 2376; Px 3107A; PFOF ¶¶ 1584, 1597-98. And by the end of their seventh year in high school, all of these students had reached age 21. At that point, under state law, they were no longer entitled to a free education. N.Y. Educ. L. § 3202; Px 1251 at BOE 758976; PFOF ¶ 1597.

The BOE reported results for each "cohort" or group of entering ninth graders at the end of four years and the end of seven years. The cohort results for the full seven years included dropouts, students who had dropped out and then returned to school, and students who went to alternative high schools and earned GEDs. Students who transferred to other systems were dropped from the cohort, but otherwise every student was accounted for.

The BOE reported how many students dropped out, how many students received a GED, how many students received a local diploma, and how many students received a Regents diploma. And the BOE has continued to report this every year since 1988. Px 1251 at BOE 758977; Tobias 10364:22-10367:18; PFOF ¶¶ 1596-98.

These cohort reports are virtually unique in educational statistics. As the SED noted in 1991, the "most precise way to determine the number of students who do or do not complete graduation requirements within a given period of time is the cohort methodology." Px 17 at 158. Indeed, the SED is abandoning its flawed methodology in order to adopt the City's more accurate cohort approach. Kadamus 1606:6-24. Accordingly, the State's utterly unsupported

claim that "the court ignored SED's own data regarding the City's drop-out rates" can only be called bizarre. Def. Br. at 41. But stranger still is the State's second argument, that the cohort numbers are inaccurate because they count as dropouts students who have passed their seventh year in high school. *Id.* New York City counts those students as dropouts because under state law they are no longer entitled to a public education, and thus will not be allowed back into school. N.Y. Educ. L. § 3202; Tobias 10366:25-10367:18.

B. The Cohort Results: 30 Percent Dropouts, 10 Percent GED, 48 Percent Local Diplomas, And Only 12 Percent Regents Degrees

The State offers no other comment on the cohort findings. And those findings, standing alone, would support the trial court's findings. They offer empirical evidence of a systemic failure that has persisted for years. PFOF ¶¶ 1596-1606.

Dropouts: 30 percent of the Cohort, or 19,000 per year

The dropout results have not varied widely during the last decade. Each year, about 60,000 to 64,000 students will start the ninth grade in New York City schools. Of those, about 30 percent will drop out. Thus, ***each cohort will lose 19,000 or more students as dropouts.*** Px 2481A; Px 2482A; Px 2519; Px 2520; PFOF ¶¶ 1469, 1598, 1604. As noted by the trial court, "when 30% of students drop out without obtaining even a GED serious questions arise about system breakdown." 187 Misc. 2d at 63.

GED: Ten percent of the Cohort, or 6,400 per year

Of the 60,000 to 64,000 students in the cohort, about ten percent will get GED certificates, usually taking five or more years in high school. Px 2519; Px 2520; PFOF ¶¶ 1602, 1604. The State's brief makes the odd comment that a GED, "in the trial court's opinion," did not prepare students for productive citizenship. Def. Br. at 57. In fact, there was substantial evidence supporting this finding.

For example, Plaintiffs' expert Dr. Henry Levin is one of the nation's most respected labor economists and a specialist in education. He testified that "the job prospects and lifetime earnings of the GED certificates . . . is equal or close to that of high school dropouts." 187 Misc. 2d at 61; Levin 12092:2-7. The college completion rate of GED recipients is approximately two percent and even the armed services do not accept GED recipients. 187 Misc. 2d at 61; Levin 12092:19-12093:23; PFOF ¶ 1610.

Local Diplomas: 48 percent of the Cohort, or about 31,000 per year

About 48 percent of the students received a local diploma. Px 2520; PFOF ¶¶ 1603-1604. This means that they passed the required number of courses, and the Regents Competency Tests ("RCTs"). PFOF ¶ 1587. This Court only needs to know three undisputed facts about the RCTs: (1) passing the RCT in reading requires no more than eighth grade reading skills; (2) passing the RCT in mathematics requires, at most, sixth grade mathematics skills; and (3) the Board of Regents is eliminating the RCTs because they fail to measure whether a student has the skills and knowledge necessary for productive citizenship. 187 Misc. 2d at 61; Px 312 at 5; Kadamus 19266:5-15; Walberg 17202:22-17203:5; PFOF ¶¶ 166-67, 1472.

The undisputed testimony of Dr. Richard Jaeger, a nationally recognized expert in testing, described the limitations of the RCT in reading. The RCT in reading is a "fill in the blank" test, where students are given four words to choose from. Dr. Jaeger testified that this type of test failed to measure the thinking and analytical skills needed to understand jury instructions or ballot propositions. Supp. App. at RA 315-16 (Px 2643A); Px 2547A; Px 2548A; Px 2549A; Px 2551; Jaeger 13440:6-13443:5, 13452:11-13455:13, 13456:9-13460:25; PFOF ¶¶ 203, 1617; *see also* Darling-Hammond 6535:16-23.

The State relies entirely on the testimony of Dr. Herbert Walberg to support the RCTs. Def. Br. at 83. But Dr. Walberg did not actually analyze the RCTs for content or structure, or measure them against a taxonomy of skills, as did Dr. Jaeger. Instead, Dr. Walberg simply ran the RCTs through a computer program he bought from a company in Texas. But even his computerized results did not support the RCTs. He testified that his computer program showed that RCTs tested – at best – eighth grade comprehension skills. Dx. 19298; Supp. App. at RA 547-49 (Dx 19316; Dx 19317); Walberg 17200:11-17203:5. Thus, the only possible value to Dr. Walberg's testimony was to confirm that RCTs measure eighth grade reading skills. 187 Misc. 2d at 61.

The State does not dispute that the RCTs measure only junior high school-level skills. Instead, the State insists that, because the Court of Appeals purportedly found the RCTs to be "aspirational," and because a large percentage of eleventh-graders pass the RCTs, the New York City public schools are providing a sound basic education. Def. Br. at 83. As we explain below, there is absolutely no basis for the State's bizarre claim that an eighth grade education *exceeds* the constitutional threshold.

The State also distorts the RCT passing rates by failing to tell the Court about the attrition that makes any measurement of eleventh grade test scores in New York City meaningless. Of the students outside NYC who entered ninth grade in 1996 and have not dropped out, over 96 percent are in the 12th grade four years later. *Id.* But in New York City less than half of the students who enter ninth grade will enter eleventh grade two years later. 187 Misc. 2d at 67; Px 1151 ;Px 2376; Px 2854A; Px 3107A. Thus, the percentage of New York City eleventh graders passing the RCTs reflects the triumph of a group of tough survivors, not a tribute to the New

York City schools. Px 2376; Kadamus 1611:21-1613:22; Fruchter 14686:23-14687:22; PFOF ¶ 1586.

Regents Diplomas: 12 percent of the cohort, or about 7,700 each year

After eliminating the dropouts, the GEDs, and the local diplomas, about 12 percent of the cohort received Regents Diplomas. Px 2519; Px 2520; PFOF ¶ 1604. There is no disagreement that the skills measured by Regents Diplomas permit graduates to function as effective jurors and voters, and to obtain meaningful employment.[18] Joint App. at 1849 (Def. Findings of Fact ¶¶ 12-13); PFOF ¶¶ 201-04, 1473. But this 12 percent section comes primarily from a few highly selective high schools that receive the elite of the New York City school system. PFOF ¶ 1594. In Manhattan, over 25 percent of the Regents Diplomas come from two high schools: Stuyvesant and LaGuardia School for the Performing Arts. Ward 3290:10-22.

The State perversely points to this 12 percent group as proof that "some children" can receive a decent education. But simply because the New York City schools have not yet made it impossible for anyone to learn does not mean that it is providing all students with an opportunity for a sound basic education.

C. The CUNY Commission Report: Further Evidence Of Failure

There was additional evidence that the New York City schools do not provide an opportunity for students to obtain a sound basic education: The Report of the Mayor's Advisory Task Force on the City University of New York (the "CUNY Report"). Px 311. This Report was prepared by a cross section of business, education, and political leaders and chaired by the former President of Yale University and Dean of Columbia Law School. The Committee

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[18] Of course, some proportion of the students who received local diplomas may have also obtained a sound basic education, but the RCT assessments are of no value in determining what that proportion is.

employed numerous experts and consultants to determine, *inter alia*, why so many graduates of the New York City schools were not prepared for study at CUNY. As the Report explained:

> Most of CUNY's students come directly from the City's public schools. ***About four-fifths of [them] need remediation, and half need it in more than one basic skill.*** If the public schools were doing a satisfactory job, these students would be vastly more successful in college, rates of graduation would be higher, and time to degree would be reduced . . . . The fact that significant numbers of CUNY students are underprepared may not be surprising. Indeed, the poor performance of the City's public schools . . . effectively guarantees this unfortunate circumstance.

Px 311 at 43 (emphasis added); *see also* PFOF ¶¶ 1577-78. The evidence of New York City public school's failure to prepare its graduates for college is staggering:

- 87 percent of all entering CUNY students failed one or more remedial placement tests;
- 55 percent of all entering CUNY students failed more than one remedial placement test;
- Fully half of all entering CUNY students are deficient in reading; and
- Remedial activity at CUNY is roughly three times the national norm for public colleges and universities.

Px 311 at 22, 27.

Ironically, these students obtained their high school diplomas after passing the very examinations that Defendants claim are "sufficiently demanding" and "may *exceed* the Constitution's minimum adequacy requirement." Def. Br. at 83 (emphasis in original). The CUNY Report documents with unmistakable clarity the failure of the RCT examinations to test basic skills. As noted by the Task Force:

> [I]t is the depth of CUNY students' remediation needs, as well as the absolute scale of remediation activity at CUNY, that reveals ***the appalling deprivation of so many entering CUNY students. . . . The scale and depth of remediation at CUNY should be a call to arms for the City's public schools.***

Px 311 at 22 (emphasis added).

The findings of the CUNY Report go unchallenged by Defendants. The report leaves no room for dispute regarding the trial court's finding that (a) "[t]he RCTs do not test the basic literacy, calculating and verbal skills that should be imparted to all high school students," 187 Misc. 2d at 61, and (b) "[t]he majority of the City's public school students leave high school unprepared for more than low-paying work, unprepared for college, and unprepared for the duties placed upon them by a democratic society." *Id*. at 68.

D. Failure In High School: Spending Years In Ninth Grade While Failing Multiple Core Courses

The failure of the City's students to graduate can easily be predicted from their performance in high school. They come to high school unprepared, with a substantial number already overage for their grade. 187 Misc. 2d at 63-64, 67; Px 1248 at BOE 773354; Px 2602 at BOE 773350; Ward 3137:10-20; Fruchter 14678:7-14679:18; PFOF ¶ 1579.

When they do arrive in high school, they are unprepared for even the minimal level of work required by many New York City high schools. Approximately 40 percent of ninth graders in Manhattan and Queens fail three or more classes, usually in such core subjects as science and math. 187 Misc. 2d at 67; Px 1248 at BOE 773353; Px 2603 at BOE 77357; PFOF ¶ 1580.

E. Evidence Of The Failure Of Elementary And Middle Schools

The staggering failure at the high school level is the best evidence of the failure of the system as a whole. These are the students who have had the "benefit" of a full twelve to fifteen years in the New York City Schools. Their failure is a condemnation of those schools. 187 Misc. 2d at 60, 63.

But the trial court had other evidence supporting its conclusions. There was broad empirical evidence, spanning a decade, showing the failure of the City's elementary and middle

schools. There was evidence about the number of schools placed on registration review by the State, schools so bad that they were at risk of being closed down. Virtually every one of those schools has, for the last decade, been in New York City. PFOF ¶¶ 1619-39.

Beyond these worst of the worst, there was broad empirical evidence about the low test scores of students on state tests, and about the poor performance of many districts on the City's standardized norm-referenced tests. 187 Misc. 2d at 64-65; PFOF ¶¶ 1517-34, 1619-39. All of this evidence established a systemic failure in the City's schools.

F. Years Of Failing Scores On State Tests For Elementary And Middle School Students

The State administers two types of tests: the Program Evaluation Tests ("PET") and the Pupil Evaluation Program ("PEP") tests. Both document the failure of the City's schools.

1. Program Evaluation Tests (PET)

A useful measurement tool for evaluating the program of a school is the PET, or Program Evaluation Test. These are tests given to test whether the schools are teaching students the elements of the required curriculum. Tobias 10218:21-10219:2; PFOF ¶¶ 1531-32.

The PET tests show a consistent record of failure. From 1990 until 1996, New York City's average scores were in the lowest quartile for the fourth grade science PET, and never higher than the 16th percentile for the sixth and eighth grade social studies PET. Rank ordering the PET results for 1998 showed that New York City's districts consistently scored at the bottom of the State in PET scores. Tobias 10226:16-10232:19; PFOF ¶¶ 1533-34.

2. The State's Pupil Evaluation Tests In Reading And Mathematics

The SED gives statewide tests in reading and mathematics to students in elementary and middle schools. The elementary school tests are now given in fourth grade, and the middle school tests in eighth grade. Earlier tests were given in the third and sixth grades. Px 2527B.

These tests are created by the State and scored by the State. Tobias 10154:9-14, 10156:4-9, 10190:2-24. They are "high stakes" tests, with real consequences for the schools. Tobias 10221:3-19. These test scores will help determine whether a school is placed on registration review. Whether schools receive additional state aid to help their students will be driven by these test scores. Tobias 10154:15-18, 10156:17-24; Fruchter 14541:11-17.

The State has always used a form of scoring called "criterion referenced scoring." In criterion-referenced scoring, a student is measured against a standard set of knowledge that must be learned, and a score is given based on how much of that knowledge the student can demonstrate on the test. Tobias 10192:14-24, 10263:8-19; Jaeger 13220:9-13221:16; Mehrens 18559:16-18560:6; PFOF ¶¶ 1507, 1509.

The basic scoring level was the State Reference Point ("SRP"), which was set to detect students who are having serious problems and need remedial help. The SRP was not a "passing grade." Px 1 at 4; Sobol 926:12-21; Kadamus 1580:14-18; Hayden 1309:25-1311:3; PFOF ¶ 1510.

The SRP for third grade reading before 1998 is an example. That level was set so low that any third-grader should have been able to reach it. Fruchter 14544:13-18, 14544:6-11; PFOF ¶ 1519. Scoring below the SRP meant a student was "illiterate." Px 2900-Young Stmt. ¶ 41; PFOF ¶ 1519. But as low as the SRP was set, it was still too high for many New York City school children. The percentage of the City students scoring above the reading SRP ranged from 59 to 69 percent among third-graders, and 63 to 74 percent among sixth-graders. Px 2 at 5; Px 6 at 3; Px 10 at 3; PFOF ¶ 1518. The State says that having one out of every three students be functionally illiterate leaves room for improvement. Def. Br. at 81.

In 1998, the State instituted a new set of tests, which were meant to cover a wider range of skills. PFOF ¶¶ 1511, 1525. Scoring was now done in four levels. Px 875B at 6-7; Px 1759 at 2-3; Px 1760 at 2-3; PFOF ¶ 1511. Level 1 indicates "the student has serious academic deficiencies" and "needs the most help to meet the standards"; Level 2 indicates that "the student will need extra help to meet the standards"; Level 3 indicates that "student performance at least meets the standards"; and finally, Level 4 indicates that "student performance exceeds the standards." Px 875B at 6-7; PFOF ¶ 1512.

The State's claim that Level 2 is "basic competency" is wrong. Def. Br. at 21. The SED describes Level 2 as a student who "*need[s] extra help*," and describes Level 3 as "passing." Px 875B at 6-7; PFOF ¶¶ 1511-12. But this is a sideshow, because the real action in New York City is going on in Level 1. These are students with "serious academic deficiencies" who "need the most help." Px 875B at 7; PFOF ¶ 1512. On the fourth grade English Language Arts ("ELA") examination, for example, more than 20 percent of New York City students scored in Level 1 as compared with six percent of students in the rest of the state. 187 Misc. 2d at 65; Px 2506; Tobias 10203:20-10204:14; PFOF ¶ 1525. On the eighth grade ELA test, 17 percent of New York City students scored in Level 1 as compared with five percent of students in the rest of the state. 187 Misc. 2d at 65; Px 2507; Tobias 10204:20-10205:22; PFOF ¶ 1525.

3. New York City's Norm Referenced Scores

The State essentially ignores the mass of evidence showing the failure of New York City's schools and instead claims that the results of certain "norm referenced" tests formerly administered by the BOE prove that the City's students did "well" in comparison with students in other cities. Def. Br. at 82. The basic problem with norm referenced tests, however, is that the tests simply compare a student's performance against the performance of a small sample group selected by the company that created the test. PFOF ¶¶ 1538-1539. ***A norm referenced***

score does not measure the student against an established standard of competence,* e.g.*, can the student read at grade level. Tobias 10262:5-10263:19; PFOF ¶ 1541.

Norm referenced scores are reported in percentiles. When a New York City third grade student scores in the 50th percentile on a reading test, it means that student achieved the score that was achieved by one half of the sample group, *e.g.*, if 50 percent of the sample group scored 25 or less, and the New York student scored 25, he or she would be in the 50th percentile. Tobias 10251:24-10252:9; Mehrens 13219:11-25; PFOF ¶ 1539. But the percentile score by itself does not indicate whether the third grader has achieved minimum standards of literacy, because the percentile score is not based on any objective criterion. PFOF ¶ 1541. In fact, as the State's expert admitted at trial, if the sample group is low performing, then being in the 50th percentile means that the student is low performing. Murphy 17418:12-17419:3.

In the case of the New York City tests, it is possible, however, to make some judgments about the level of reading ability necessary to score in the 50th percentile. The company that created the norm referenced tests hired educational experts to equate the percentile scores with achievement against grade level criteria. The experts determined that ***the 50th percentile was significantly below what those educational experts believed students should have known in their grade levels.*** Dx 19481A; Mehrens 18526:6-18525:21; PFOF ¶ 1555. Thus, the results of even the norm-referenced tests are consistent with every other outcome measure showing that New York City students are not learning what they need to know.[19]

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[19] Another problem with the State's use of the test scores is the heavy reliance on averages. Because of a few high scoring districts, the average score in the City is much higher than in many districts. Mehrens 18603:5-18605:5, 18607:3-18609:21; PFOF ¶ 1574. As Plaintiffs showed, looking at the results district by district shows major problems in many districts, even using the norm referenced scores. PFOF ¶¶ 1520-21, 1527, 1529, 1574. For example, 65 percent of New York City's third graders scored above the SRP in the 1997-98 school year, on average, yet in District 23, only 50 percent scored above the

G. The State Asks This Court To Equate Scores By Different Students On Different Tests In Different Cities, Something That The State's Own Expert Stated Was Improper And That Was Rejected By A Distinguished Panel Of The National Academy Of Sciences

The State goes beyond misusing norm-referenced scores. They ask this Court to adopt as fact something that their own expert witness said was improper. They claim it is legitimate to compare the City's scores to scores in other cities, and thus conclude that New York City is doing a fine job educating its students. Def. Br. at 82. In support of this, they cite to the testimony of Dr. Murphy. *Id.*

But Dr. Murphy is not an expert in testing. And the State ignores the testimony of three witnesses who were experts on testing: Robert Tobias, who has run the Division of Assessment since the late 1980s, has administered the various standardized tests, supervised their purchase, he has worked with the vendors, and is intimately familiar with their problems. Tobias 10086:19-10088:3, 10101:9-10105:10. He testified that it was impossible to compare scores from New York City with the results of tests given in other cities. First, most of those tests are from other publishers, who use different criteria for building the test, different norm groups to score them, and usually have different test taking conditions. Second, those tests are administered to dissimilar student groups under dissimilar testing conditions, as cities differ on who must take them. Tobias 10265:4-10266:18, 10267:15-21; PFOF ¶ 1572.

This testimony was confirmed by the State's own expert on testing, Dr. William Mehrens; and Dr. Richard Jaeger, identified by Dr. Mehrens as one of the nation's leading experts in testing, Mehrens 18558:6-9. Both Dr. Mehrens and Dr. Jaeger testified that one

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SRP. Px 2 at 5, 110-11; PFOF ¶¶ 1518, 1520. Similarly while on average, 21.3 percent of New York City's fourth graders scored in Level 1 on the fourth grade English Language Arts examination, fully 31.9 percent of District 15's fourth graders scored in Level 1. PFOF ¶¶ 1525-27.

cannot "equate" tests from different cities because the various tests and test-taking conditions are simply too different. Mehrens 18587:8-14, 18571:12-18575:4, 18585:9-18587:2; Jaeger 13256:3-18, 13261:10-13266:20, 13254:20-13255:6; PFOF ¶ 1571. Indeed, Dr. Jaeger testified that a task force of the National Academy of Sciences had studied this precise question and had concluded that it was not possible to equate test scores on the various standardized tests. Jaeger 13255:11-20.

That is precisely what the State is doing, however, equating results from different tests in different cities to scores in New York City. The State is thus asking this Court to adopt a position that was soundly rejected by experts for both sides at trial, and directly rejected by a national commission of experts on testing.

H. The SURR Program: The SED's Record Of New York City's Educational Failures

The State completely ignores the existence of the Schools Under Registration Review ("SURR") program, which provides additional evidence of systemic failure. This program was begun in the late 1980s by the SED to identify the "very worst schools" in New York state and provide them with support and help. In identifying those schools, the SED uses a number of empirical measures, including test scores. Sobol 928:20-929:3; Sanford 11404:17-11405:14; Fruchter 14535:4-17, 14537:8-22, 14539:12-20; PFOF ¶¶ 1619, 1628.

Since the SURR program began more than a decade ago, virtually all SURR schools have been in New York City. Px 1 at 20; Px 2976 at 2; Px 3102B; Fruchter 14533:2-8, 14536:12-17, 14549:12-18, 14550:20-14551:6; PFOF ¶¶ 1619, 1627, 1629-30. Ninety-seven of the 105 schools on the most recent SURR list are City schools. Px 2641 at 1; Sanford 11370:10-18; PFOF ¶ 1630. One out of 10 New York City schools is among the very worst schools in the state.

The few SURR schools outside of New York City are high schools. In a profound sign of just how bad the New York City schools have become, these "worst of the worst" high schools have ***higher test scores*** than the ***average*** New York City high school. Px 1 at 178; Px 3 at 178; Fruchter 14551:13-18, 14553:24-14554:3; PFOF ¶ 1631. This reflects a basic truth: The SURR schools may be the worst of the state schools, but there is little difference between a SURR school and the average New York City school. According to the expert testimony of Professor Norman Fruchter, over three hundred additional schools are only marginally better than current SURR schools. Those schools could be placed on the SURR list in the immediate future. Fruchter 14547:17-14548:7; PFOF ¶ 1632.

I. The State's Misguided Reliance On PASS Reviews

Curiously, the State's brief ignores the SURR program while devoting lavish attention to one result of the SURR program: New York City's Performance Assessment in Schools Survey ("PASS"). Def. Br. at 13-14. The PASS survey was created to give these failing schools some framework to guide their attempts to keep from being shut down as educational failures. Px 2379 at 3-4. In another bizarre twist, the State takes these documents – created by schools condemned as failures – and claims that they show that those very same schools are "exemplary" and shining examples of New York City's schools. Def. Br. at 14.

The truth about PASS is not hard to find, except in the State's brief. Throughout the record there is testimony that these are self-assessments prepared by failing schools. As a first step towards recovery they are helpful, but they are necessarily subjective and unreliable measures of whether a school is actually providing a sound basic education. PFOF ¶¶ 1641, 1648-61.

The PASS surveys arose from the SED requirement that poor-performing schools, including SURR schools, prepare Comprehensive Education Plans ("CEPs"). These plans must

show how the schools will address their various problems. Px 2461 at 4; PFOF ¶ 1643. But the worst schools lacked even the basic skills to create such a plan. Indeed, they had no idea what to plan for, since most of the staff had never seen a properly functioning school. As a set of tools to help schools in their self-assessment, the BOE created the PASS reviews. Px 2379 at 3-4; Tobias 10119:14-10120:13; Fruchter 14576:3-14577:7; PFOF ¶ 1644.

The PASS process creates a structured list of various areas that must be considered. It offers suggestions about what a good school should be doing. Tobias 10118:17-10120:10; PFOF ¶ 1644. But the actual PASS survey is completed by a group made up of school administrators, teachers, parents and perhaps an outside observer. Tobias 10132:11-24; PFOF ¶ 1648. The completed survey is then used to help the schools create a CEP. Tobias 10119:14-10120:10; PFOF ¶ 1644.

Although the PASS review was designed as a self-assessment tool for schools, Px 2379 at 3-4; Tobias 10119:14-10120:10; PFOF ¶ 1644, the school personnel were worried that it would be used to evaluate their performance. Accordingly, the PASS review teams have tried to maximize scores rather than accurately assess school progress. Px 2379 at 14; Tobias 10137:15-10138:12, 10141:3-8; Fruchter 14579:14-14580:2; PFOF ¶¶ 1645, 1648.

Beyond this inherent bias towards higher scores, the PASS reviews were completed by school personnel and parents who may have never set foot in an exemplary school and thus had no basis for making an objective judgment. Tobias 10140:8-10141:2; PFOF ¶¶ 1646-47. Perhaps the most compelling evidence of the unreliability of the PASS reviews came from the superintendents who testified about PASS. Every one of these superintendents confirmed that the PASS reviews are not objectively reliable, and are not useful or dependable methods of evaluating schools. PFOF ¶¶ 1657-59.

Contrary to the State's insinuation that Mr. Tobias was not truthful in describing these problems, every one of these difficulties was set forth in a report entitled *The Relationship Between Accountability, Measurement Scale, and Grade Inflation in School Quality Review Ratings*. Px 2379. This report was submitted by Mr. Tobias to the American Educational Research Association in April of 1999. Tobias 10120:17-23. In that report, he stated:

> [T]he reliability of [PASS] scores is … threatened by a number of factors including: inadequate training of review team members; limited experience of review team members in exemplary schools, and continued apprehensions about the underlying purpose of the review process.

Px 2379 at 14; PFOF ¶ 1650-56.

The State nevertheless insists on making the unsupported claim that the PASS reviews provide objective, reliable measures of school quality. Def. Br. at 13-14. But the State's only evidence is the testimony of its expert, Dr. Christine Rossell. Dr. Rossell is a political scientist, not a measurement expert. She had nothing to do with the creation of the PASS reports, the evaluation of the PASS reports, or any objective measurement of the PASS reports. Rossell 16912:15-16913:20; PFOF ¶ 1663.

Instead, Dr. Rossell simply took a collection of PASS reviews and purported to testify about them, although she knew nothing about the schools, nothing about the process, and nothing about how those reports were actually created. Rossell 16912:10-16913:20, 16916:7-9, 16922:18-16923:21; PFOF ¶¶ 1662-65. The lack of any basis for her testimony was dramatically demonstrated when Dr. Rossell testified that Intermediate School 193 was an "exemplary" school, a shining example of what a school should be. Dr. Rossell, who had never been to IS 59 and knew nothing about it, was not aware that IS 59 was at that point being shut down by the State as a complete educational failure. Rossell 16926:25-16928:19.

In fact, *all* of the PASS reports reviewed by Dr. Rossell came from SURR schools. Rossell 16741:11-19, 16925:16-16926:18. And yet Dr. Rossell offered her expert opinion that these schools were just a few improvements away from being exemplary schools, among the finest in the country. The trial court had every reason to reject this unfounded speculation.

IX. THE STATE EDUCATION FINANCE SYSTEM FAILS TO PROVIDE SUFFICIENT FUNDS TO THE NYC BOARD OF EDUCATION

Crumbling buildings, overcrowded schools, massive classes taught by untrained and often incompetent teachers, and almost 250,000 former students who cannot even read at the eighth grade level; this is the New York City public school system. How did this happen, and why have these failures continued for years? It all comes down to money. The New York City schools have not had enough since the 1980s. Because of a funding system that no one understands, and a deal that limits any aid to the City's schools, the State has managed to avoid responsibility for what it has done to the City schools.

The trial court properly found that the Legislature has created a system of education funding that for many years has failed to provide the BOE with enough money to provide its students with a sound basic education. 187 Misc. 2d at 82-90. The BOE has not had enough money because the Legislature precludes it from raising its own revenues, but fails to ensure that the funds received by the BOE from the State and the City are sufficient to provide a sound basic education. In fact, the Legislature has never even attempted to determine how much money is actually needed to provide students in New York City, or anywhere else in the state, with the opportunity for a sound basic education.

A. The Basic Structure Of The State Education Finance System

There is little dispute about the basic structure of the State's system of financing public education. PFOF ¶¶ 1792-1803. The Legislature has created a system of education funding in

New York State that incorporates a combination of state and local funds. On a total, statewide basis, the relative mix of state and local funding has fluctuated over time (*e.g.*, state funding over the last decade has ranged between 38 and 43 percent of total education spending) and varies considerably among districts. Px 2795 at 3. In general, the percentage of revenues from local resources increases with district wealth. PFOF ¶ 1934

There are two components of the state education financing system: (1) state funds provided by the state to local school districts and (2) local funds raised directly by school boards or local municipal governments.

1. State Aid

Defendants do not challenge the trial court's careful and detailed description of the operation of the state aid distribution system, including the court's specific findings concerning individual funding formulas.[20] 187 Misc. 2d at 82-90. In short, the distribution of state aid is an elaborate charade in which a seemingly rational system purporting to address student needs camouflages a simple political deal to give New York City a fixed percentage of state education aid. PFOF ¶¶ 1824-96.

In the mid-1970s, the distribution of state aid was accomplished through the use of just three major aid categories. Px 377 at 31. Over the next 25 years, however, the Legislature transformed this once "elegant" system into what the State Comptroller has described as a "Frankenstein monster" of such Orwellian complexity that the State's Commissioner of

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[20] The trial court's findings concerning the State's system of financing education are based on and supported by substantial documentary and testimonial evidence, including extensive reports produced by the SED, the State Comptroller, the State Division of the Budget and various other State and City agencies and commissions. This evidence is discussed and cited in detail in Part V of Plaintiffs' Proposed Findings of Fact. *See* PFOF ¶¶ 1783-2035.

Education admits that it is a "black box," whose operation even he cannot understand. Px 377 at 31; Px 374 at 3; Mills 1170:9-23; PFOF ¶¶ 1816-17.

By the 1999-2000 fiscal year, the Legislature had created over a dozen different "computerized" formula-based aids that supposedly directed the distribution of approximately 95 percent of the $12.5 billion appropriated as state aid for education. 187 Misc. 2d at 83; Px 377 at 31; Px 2567 at 3; Dx 17274; Dx 19740; Berne 11868:18-24. The remainder is distributed through categorical grant programs and hold harmless mechanisms. Dx 17274; Dx 19740. Each of these formulas generally consists of at least several components that may include a base amount, a student count, a weighting factor and additional multipliers that are combined together, through one or more mathematical calculations, to determine the amount of aid generated for each district. *See, e.g.*, Px 2557 at 47-48; Dx 17274. The written descriptions of the formulas require dozens of pages and multiple obtuse equations. *See id.*

On their face, the various formulas are labeled (and described by the State) to suggest that each is intended to address a particular educational need. For example:

- "Basic Operating Aid" (the largest component of state aid) purports to "help each district meets its expenditures for general operation and maintenance of the school district [including] salaries of administrators, teachers and non-professionals, fringe benefits, utilities and maintenance of school facilities." Dx 17274 at 1.

- "Extraordinary Needs Aid" purports to "target additional funds to school districts to meet needs related to educating concentrations of extraordinary needs pupils." Supp. App. at RA 520 (Dx 17274 at 8).

- "Operating Standards Aid" purports to "fund services and expenses incurred by school districts in helping students improve achievement." Supp. App. at RA 521 (Dx 17274 at 9).

In reality, however, state education aid is distributed according to an unwritten agreement among the Governor and the legislative leaders that allocates a fixed percentage of aid to New

York City, irrespective of the purported purpose of the formulas or actual need. 187 Misc. 2d at 87-88; Px 2662 at 8; Levy 7377:13-7378:6, 7396:23-7417:3, 11348:4-13; Berne 11785:11-11798:6, 11869:15-11871:21, 11880:12-11882:14; PFOF ¶¶ 1824-30. This "share agreement" provides New York City with a fixed percentage of the annual increase in state education aid. The targeted percentage is 38.86 percent, and the State has hit or come very close to this percentage in every annual increase since at least the late 1980s.[21] 187 Misc. 2d at 89; PFOF ¶¶ 1840-65. The State's own witness described this process as "three men in a room." King 21950:2-21951:3; *see also* Px 75 at i (Comptroller's Statement); Px 374 at 2; Px 377 at 31.

The complexity and opacity of the formulas facilitate their manipulation through the use of a sophisticated state aid computer modeling system employed by the Legislature and the Governor to effectuate the share agreement. 187 Misc. 2d at 88-89; Px 3820-Foster Dep. 78:16-80:2; Kadamus 1690:6-24; King 22006:11-23; PFOF ¶ 1831. The manipulations occur by changing various components of the individual formulas to ensure that the total aid distributed meets the share agreement target. Indeed, from year to year, multipliers, weighting factors and other components are changed, eliminated or fine-tuned (sometimes by a few hundredths of a percent) to effectuate the share agreement. Px 1147; Px 3820-Foster Dep. 77:20-78:12; PFOF ¶¶ 1831-39. As the trial court found, "the evidence at trial demonstrated clearly what the State Comptroller has found: 'the formulas are annually 'worked backwards' until the politically

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[21] The direct evidence of this predetermined share of any increase in aid for New York City is data taken from SED aid computer runs. Px 666 at SED 159089; Px 667 at SED 154308, SED 154590; Px 668 at SED 158105; Px 671 at SED 151797; Px 680 at SED 157879; Px 681 at SED 156486; Px 716-A; Px 1146 at SED 129830; Px 2065 at SED 213855; Px 2066 at SED 214663; Px 2446 at 161; Px 2447 at SED 215626; Px 2669 at 89. The SED computer runs show that the Legislature manipulates both the computerized aids and a limited number of categorical programs to hit the desired target for the City. Berne 11885:17-20. For a description of the specific manipulations that were performed by the State each year, *see* PFOF ¶¶ 1843-54.

negotiated 'share' for the City schools is hit in the calculations'." 187 Misc. 2d at 88; Px 2662 at 8.

The trial court's findings, supported by the substantial, unrebutted record of the operation of the state aid system, demonstrate that the distribution of state aid is not based on any determination of the actual needs of any particular district, or of whether the combined state and local contributions are sufficient to provide adequate resources to any particular district. 187 Misc. 2d at 87. While the process purports to address various educational needs, there is no mechanism for determining the actual costs of meeting these needs. PFOF ¶¶ 1866-96. Indeed, the State Budget Director admitted that the State has failed to undertake any analysis to determine whether (1) overall state aid or local spending is sufficient to address student needs, or (2) whether any of the purported purposes of the various formulas has ever been accomplished. King 22003:15-22006:10; PFOF ¶ 1933.

Examples cited by the trial court further demonstrate this misalignment between student need and funding. 187 Misc. 2d at 84-87. A particular defect in the formulas is the failure to account for regional cost differences. In practical terms, this failure to account for regional differences is manifested in the Combined Wealth Ratio ("CWR"), a factor that, in theory, gauges a district's wealth. Px 1147; Px 2567 at 39-62; Berne 11854:5-22. But the "CWR and other formula components that purport to account for district wealth fail to take into account regional costs," 187 Misc. 2d at 85, which vary widely across New York State. Px 469A at 14; Px 534A at 23; Sobol 1039:16-1040:9; Berne 11947:14-11948:24; PFOF ¶ 1908.

This failure is a fundamental defect in the CWR that has been acknowledged for years. Px 469A at 13-14; PFOF ¶¶ 1905-06. Indeed, the SED has itself quantified the differences in regional costs throughout New York State. Px 469A at 14; PFOF ¶ 1906. According to the

SED's own figures, New York City's regional cost ratio is the highest in the state, which means that a dollar buys fewer educational resources in New York City than anywhere else in the state, *e.g.*, a dollar of aid in Albany buys just 74 cents worth of educational resources in New York City, reflecting almost a 34 percent cost increase of resources in the City. Px 469A at 14; PFOF ¶¶ 294, 1907. Defendants' own expert, Dr. James Guthrie, agreed that, when distributing aid, a fair finance system should take regional costs into account. Guthrie 21219:13-21226:8.

The effect of the system's failure to account for regional costs is clear. For example, the BOE must pay substantially more to purchase real estate and construct school facilities than districts in the rest of the state due to high land and labor costs. Px 469A at 8; Zedalis 4533:5-4534:15; Spence 2326:9-2330:3; Szuberla 19442:6-13, 19496:11-19498:7; PFOF ¶ 298. New York City also must spend more to attract and retain quality personnel in an area with high professional wage costs and the highest cost-of-living in the country. PFOF ¶ 296. The realities of the regional labor market dictate that the New York City public school system must recognize and respond to the high personnel costs associated with doing business in the City and surrounding suburbs. PFOF ¶¶ 296-97. When cost of living is factored into teacher salaries, New York City ranks 92nd out of 100 cities nationally. Px 3557; Podgursky 17815:24-17816:7. As these examples demonstrate, the current system's failure to account for regional cost differences is one of the fundamental reasons for its failure to properly align resources with student need.

Beyond this failure, however, the evidence shows that the funding formulas themselves in practice do not align funding with student need. The largest category of computerized aid, Basic Operating Aid, includes a wholly arbitrary base amount ($3,900) that has remained unchanged for years, and various multipliers and adjustment mechanisms that have no apparent relationship

to any general measure of student or district need. Berne 13156:16-21; Wolkoff 18301:24-18302:9; Guthrie 21241:24-21242:4; PFOF ¶¶ 1867-76. For example, "Total Aidable Pupil Units," the student counting mechanism employed in calculating Basic Operating Aid, includes weights purportedly related to meeting certain educational needs. Dx 17274 at 1-5; PFOF ¶ 1873. But the actual weights themselves are arbitrary and bear no relationship to the cost of meeting any particular educational need. Berne 11853:21-25; Wolkoff 18295:21-18301:9; Guthrie 21233:6-11; PFOF ¶¶ 1874-75.

Similarly, Class Size Reduction Aid includes a complex formula that includes different multipliers for New York City, the other Big Five school districts and the rest of the state. Px 2567 at 61-62. At trial, the State offered no justification for these differences and provided no basis to conclude that the amount appropriated is sufficient to reduce class sizes in any particular district by any specific number of students. PFOF ¶¶ 1878-79. In fact, neither the Legislature nor the Executive Department has apparently made any effort to determine the cost of reducing class sizes in New York City or in the rest of the state to meet the Legislature's target of no more than 20 students in the lower elementary grades. King 22002:8-18; PFOF ¶ 1879. In addition, as discussed above, the evidence actually shows that the cost of reducing class sizes in New York City to State-mandated levels is substantially higher than the funds currently allocated for it.

The history of Extraordinary Needs Aid ("ENA") demonstrates how the disconnect between need and funding has a particularly adverse effect on New York City. PFOF ¶¶ 1880-81. The Legislature added ENA to the state education budget as a formula aid in the 1993-94 school year, purportedly to address the educational needs of at-risk students. Px 681 at SED 156486; Px 2567 at 5. ENA is distributed according to a formula based on the number of at-risk

children in a district; New York City has a majority of the State's at-risk children, and New York City has received the majority of ENA since it was implemented. PFOF ¶ 1809. ***But the introduction of ENA had absolutely no effect on New York City's share of state education funds.*** In five of the seven years before ENA was enacted, New York City received its fixed 38.86 percent of the increase in state aid determined by the share agreement, and in the six years since ENA, New York City's share of the increase in state aid has been exactly, or close to 38.86 percent.[22] During that time, New York City's share of total state aid rose just 0.85 percent. Px 2064 at 14. Not surprisingly, there is no evidence in the record that the ENA formula provides sufficient funds to meet the educational needs of at-risk students. In fact, the Board of Regents has consistently found that the State has failed to ensure that sufficient funds are provided to meet the needs of at-risk students in New York City and throughout the state. Px 1 at 167. The purported purpose of ENA, like the purported purposes of all the formulas, is a charade; New York City's share of state aid is fixed by the share agreement, not by an assessment of need.

As these examples show, the record fully supports the trial court's finding that "the formulas have been altered to effect a particular distribution of State aid and not for any reason keyed to the educational goals supposedly embodied in the formulas." 187 Misc. 2d at 89.

2. Local Education Funds

Pursuant to state law, all but five of the state's more than 680 school districts are fiscally "independent" districts; the Legislature has granted local school boards in the these districts the authority to levy property taxes to directly support education. Px 2027 at i-ii, 4. By contrast, the Legislature has dictated that the school districts in the state's five largest cities (New York City, Buffalo, Yonkers, Syracuse and Rochester) shall have no independent revenue generating

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[22] These percentages appear on the face of State budget documents. *See supra* note 21.

authority. Px 2027 at i-ii, 4; Berne 11812:10-23. These "Big 5" school districts are considered "dependent" districts because they must depend on the local municipal government to raise and appropriate the local share of their education funding. *Id*. By command of the Legislature, therefore, the New York City school board is forced to rely on allocations made by the City government from revenues collected by the municipal finance system and from state education funds paid to the City. Px 3082B-Sweeting Stmt. ¶ 16.

Most of the state's local school districts rely principally on property taxes to finance school budgets: The statewide average share of local spending provided by property taxes exceeds 79 percent, Px 2984 at 2, and is close to 90 percent in many districts. Px 2027 at i. Property tax revenues tend to be stable over time and provide a predictable revenue stream to districts. Rubenstein 11756:7-11.

By contrast, only 37 percent of the municipal revenue pool from which New York City allocates funds for education is raised through property taxes. Px 2984 at 2; Px 3082B-Sweeting Stmt. ¶ 94. New York City relies instead on a variety of income, sales, business and other taxes that are more susceptible to business cycles and are particularly dependent on the City's financial sector. PFOF ¶¶ 1953-56.

Reflecting periodic swings in the City's economic fortune, the City's contribution to public education has fluctuated considerably since at least the City's extraordinary fiscal crises of the mid-1970s. Px 3179 at IV; PFOF ¶¶ 1956, 1975-81. Consequently, the BOE has been subject to what the SED has described as the "destructive impact" of economic cycles "which destroy the professional knowledge-building and skill accumulation of individual schools and of the system as a whole." *Id*. The BOE has been periodically required to make substantial cuts in

programs, personnel and facilities as the result of City and State budget cuts. Px 1132 at 11; Dx 10695 at 7; Spence 2059:2-2060:15.

In recent years, as its economy has prospered, the City has devoted an increasing percentage of its budget to education. The City now spends approximately 20 percent of its locally generated revenue on education. Px 2680; Rubenstein 11518:11-11519:6. Despite this increase, however, the City continues to spend a much lower percentage of its budget on education than the state average, and its per capita contribution remains well below the state average. Dx 19399; Wolkoff 18107:4-18108:24; PFOF ¶ 1981.

In their two-page purported summary of "local education funding," Defendants suggest that this disparity proves that the City is awash in wealth that could be tapped in order to adequately fund City schools. Def. Br. at 97-98. As discussed below, even if this assertion were true, the State could not avoid liability for its failure to ensure that the combination of local and state funds provided to the BOE is sufficient. The trial court properly rejected the State's claim on this point. 187 Misc. 2d at 91-97.

The record actually demonstrates that the State has fostered and tolerated an education finance system that, in the case of New York City, relies too heavily on a fiscally unstable, heavily burdened, high-taxing and heavily indebted local finance structure to make up the difference between state funding and what is necessary to provide adequate resources to the City's public schools. PFOF ¶¶ 1947-2010. The record demonstrates that:

- New York City's tax structure, dictated by the State, is particularly sensitive to cyclical changes in the economy, which forces the City into periodic budget crises. PFOF ¶¶ 1952-56.

- The City must provide funding for an extraordinary range of municipal services, some of which, including public assistance and Medicaid, are mandated by state law. The City's per capita costs for municipal services are higher because: (1) the demand for such

services is greater in the City; (2) the costs for goods and services are generally higher in the City; and (3) the State imposes higher per capita costs on New York City for services such as Medicaid and public assistance. PFOF ¶¶ 1957-62.

- Periodic budget crises, arising, at least in part, from the significant cyclical swings in the City's economy, combined with the need to fund extensive municipal services, have forced the City to take on a heavy debt burden, which limits the BOE's ability to take on debt to fund its capital program. PFOF ¶¶ 1963-74.

- New York City residents and businesses are highly taxed. City residents pay a higher rate of combined income and property taxes than the state average, and City businesses are among the most heavily taxed in the country. PFOF ¶¶ 1991-96. Indeed, the State ignores the fact that City residents pay high taxes in claiming that the percentage of the City's tax revenues devoted to education is lower than the state average. Def. Br. at 98. This is not because City residents are undertaxed, but because the non-education demands on the City are so great. PFOF ¶¶ 1957-62. Moreover, the Legislature has recently unilaterally eliminated or approved the reduction of certain local taxes; the State can hardly complain about a purported lack of tax effort when it is a party to tax reductions. PFOF ¶ 1802.

As described above, more than 20 yeasrs ago, the Legislature enacted a toothless "maintenance of effort" law that requires New York City to maintain a certain amount of funding for the BOE, based on prior year funding amounts. In practice, however, this law has had little or no effect on the City's contribution to the BOE. Kadamus 1680:14-1681:25; Berne 11817:22-11819:12; PFOF ¶ 2006. The law applies to all funds (local, state and federal) within the New York City budget and has never been invoked to justify or require an increase in local education funds. Berne 11817:22-11819:10. Indeed, when the SED determined in 1991 that the City had failed to comply with the law, the State failed to take any action. The Board of Regents has repeatedly called for reform of the maintenance of effort law. Px 444 at 26-27; Px 676 at GOV 020820; Kadamus 1681:14-25.

B. Insufficient Funding

The BOE's public school expenditures for fiscal year 1999 (the most recent year for which expenditures were available when the trial record closed) totaled $9.8 billion, or $8,957 for each the City's 1.093 million public school students.[23] Px 3114 at 11-12. Pursuant to state and federal mandates, the BOE expended nearly $2.5 billion on special education services. *Id.* at 10. Consequently, per capita spending for the City's approximately 1 million general education students was $7,220. *Id*. State aid in FY 1999 comprised 42.7 percent of the total budget; the City contributed 47 percent of the budget and the remaining 10 percent came principally from the federal government. *Id*. at 12. In absolute terms, there has been a substantial increase in total spending by the BOE, and in the State and City contributions, over the last decade.

Focusing on these numbers, the State's defense of the state education finance system rests largely on its contention that New York City's total per capita spending on education is currently so high that it must be enough to provide a sound basic education. Def. Br. at 66. As a corollary, the State claims that state education aid to New York City is sufficiently high to meet its constitutional obligation. *Id*. The trial court properly rejected these simplistic arguments, which ignore the substantial, largely unrebutted evidence that for a very long time the BOE has not had sufficient funds to provide a sound basic education and that, as a result, hundreds of thousands of children have been subjected to the gross inadequacies described above. 187 Misc. 2d at 90-91. This evidence includes the following facts:

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[23] Total BOE expenditures for FY 1999 were $10.45 billion, which included $658 million for services provided by the BOE to students in non-public schools. Px 3114 at 10.

1. Over The Last Decade, Real Dollar Increases Have Been Small, At Best, And Available Dollars Have Not Purchased Enough Resources

Despite recent increases in real dollars, the BOE's expenditures have not significantly increased over the last decade, when adjusted for inflation and increased enrollment. Px 2857; Px 3082B-Sweeting Stmt. ¶¶ 9-15; Px 3145; Px 3160B-Donohue Stmt. ¶¶ 9-16; Px 3179 at 38; PFOF ¶¶ 2018-21. Defendants do not challenge the results of three studies showing that from 1990 to 1999, real spending increased by, at most, $174 per pupil, and may have decreased by as much as $215 per pupil. Px 2857; Px 3145; Px 3179 at 38.

In addition, it is clear that the money spent by the BOE since at least the late 1980s has not been sufficient to pay for the resources necessary to provide a sound basic education. The BOE has been unable to hire and train enough qualified teachers and administrators, build enough classrooms, maintain sufficient libraries and laboratories, maintain facilities that provide sufficient heat, light and air, provide sufficient programs and services to meet the needs of its at-risk and special needs students, ensure the safety of its students, or purchase sufficient books, supplies and technology. Indeed, during much of that time, the BOE was forced to cut resources: libraries and laboratories were closed or fell into disrepair, teachers were fired, literacy programs were cancelled and music and art were eliminated throughout much of the system. PFOF ¶¶ 935-80.

Recent increases have not been sufficient to make up for these cuts or otherwise provide the resources necessary to provide a sound basic education. And the increases have not come about because of any fundamental change in the structure and operation of the state education finance system to align resources with need, for example, but are the fortuitous result of recent (and obviously transitory) budget surpluses. 187 Misc. 2d at 90; PFOF ¶ 68.

Nor does the existence of modest BOE budget "surpluses" provide any basis to conclude that the BOE has had sufficient funds to meet its needs. In recent years, surpluses of one to three percent have resulted from sound budgeting practices that require the BOE to allocate slightly more money that it anticipates spending. PFOF ¶ 1736. The surpluses arise, therefore, not because the BOE has more money than it needs to buy all of the resources necessary to provide a sound basic education, but because it has implemented a rational spending plan for the money it does have. 187 Misc. 2d at 90-91; PFOF ¶ 1736. Moreover, the "surpluses" are simply rolled over into to the next year's budget, which supports the BOE's multi-year budget planning, Px 1160 at BOE 780669-70; Px 1164 at BOE 766568-69; Spence 2178:23-2180:15, a practice lauded at trial by the State's own finance expert. Wolkoff 18285:2-25. Moreover, the New York State Financial Control Board, which oversees the BOE's finances, has recognized that the BOE's surplus policy provides a "clear example of the rationalization of education finance and deserves commendation and support." Px 1164 at BOE 766569.

2. There Is No Evidence That The BOE Has Misspent Vast Sums

As the trial court found, "[t]he evidence did not show that large sums were lost to corruption and fraud," 187 Misc. 2d at 92, and "Defendants presented little evidence concerning BOE's alleged wasteful spending on administration." *Id*. at 93. On appeal, the State does not seriously challenge this finding, or the trial court's findings concerning the magnitude of specific instances of fraud or inefficiency. Although the State points to a litany of alleged improprieties, Def. Br. at 15-17, 94-95, the State nowhere attempts to quantify the magnitude of the supposed waste.[24] In fact, the few examples cited on appeal are insignificant in comparison to the BOE's overall expenditures. *Id*.

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[24] In fact, the State's basis for its argument, the reports of the Stancik Commission, actually demonstrates little more than isolated and anecdotal incidents of wrongdoing, typically

Defendants point to the BOE's overreferral of students to costly special education programs as evidence of waste and inefficiency. Def. Br. at 94. Ironically, the cause of this overreferral is the very deprivation for resources for general education students in City schools that is the subject of this litigation. 187 Misc. 2d at 96; Px 2102 at 7; Px 2166A-Goldstein Stmt. ¶ 33; Px 2177 at 18; Px 2189; Coppin 606:8-21; Alter 9680:9-9681:11, 9684:20-9685:7; PFOF ¶¶ 1226, 1252-63. The evidence at trial demonstrated that addressing the problem of overreferral to self-contained special education programs will result only in a redirection of funds, and not a reduction, since federal and state laws require additional supports and services to be provided to students who are currently in special education classes if they are transferred to a less restrictive environment. 187 Misc. 2d at 96-97; Coppin 609:25-610:8; Erber 7575:9-7576:18; Goldstein 8427:4-9; Alter 9732:8-11; PFOF ¶¶ 1285-1303.

Defendants also challenge the BOE's use of bilingual programs rather than English as a Second Language ("ESL") programs on the ground that bilingual programs are "less effective and more expensive." Def. Br. at 94. Yet the only evidence presented by Defendants in support of this point is a preliminary, incomplete study from six years ago that was not designed to judge whether ESL is superior to bilingual education, and is not appropriately used for that purpose. Dx 12215; Hernandez 9258:17-9260:11, 9293:19-9296:22; Tobias 10146:5-10152:8, 10709:21-10711:5; Rossell 16993:4-16995:19; PFOF ¶ 1384. Moreover, the uncontroverted evidence establishes that there are a variety of bilingual and ESL programs offered to English language learners in New York City public schools, and that ESL programs are generally *more expensive*

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by individuals, that implicate "thousands of dollars." *See, e.g.*, Dx 10025-41 at NYS 000280; PFOF ¶¶ 1740-45. As the trial court found, Defendants provided no evidence of systemic mismanagement and corruption. 187 Misc. 2d at 92-93.

than bilingual programs. Px 1984-Hernandez Stmt. ¶ 22; Donahue 15292:11-15295:21; PFOF ¶ 1386.

Defendants argue that the BOE's policies related to facilities are "[p]articularly inefficient and wasteful." Def. Br. at 94. As discussed, the evidence shows that the failure of the BOE to allocate funds for preventive and corrective maintenance has been the result of inadequate funding and the State's own incentive structure, not the BOE's inefficiency. 187 Misc. 2d at 94; PFOF ¶¶ 718-25, 1734. Defendants' efforts to portray the SCA as wasteful and inefficient further undermine their case because it is the State – which created the SCA and established its rules – that must bear responsibility for its inefficiencies. 197 Misc. 2d at 94; N.Y. Pub. Auth. L. §§ 1725-47; PFOF ¶¶ 931-32.

Defendants finally claim that "fraud and corruption have long been rampant in [the] BOE." Def. Br. at 95. To the extent the Defendants were able to present any evidence of fraud and corruption at trial, these represented only isolated instances involving small numbers of employees or schools, and impacting only a tiny fraction of the multi-billion dollar BOE annual budget. 187 Misc. 2d at 92-93; Dx 10025-41 at NYS 000280; PFOF ¶ 1741. Moreover, the evidence established that whenever the Office of the Special Commissioner of Investigation has uncovered evidence of fraud or corruption at the BOE, the BOE has responded quickly and effectively to remedy the problem. Dx 19568 at 7; Dx 19569 at 11; Dx 19570 at 11; Stancik 21825:17-21826:7, 21827:4-13, 21856:3-21858:11; PFOF ¶ 1743. The evidence further demonstrated that the BOE has undertaken comprehensive reform efforts on its own initiative to address potential problems of fraud and corruption. Supp. App. at RA 350-RA518 (Dx 10025-19); Dx 19570 at 19; Stancik 21829:11-21, 21847:7-21850:2; PFOF ¶ 1745.

Indeed, the evidence shows that the New York City public school system is unique in the degree to which the details of its finances, including its budgeting and spending decisions, are subject to public scrutiny. Donohue 15544:10-25; PFOF ¶¶ 1749-63. For example, the BOE publishes School Based Expenditure Reports that document costs on three separate levels: the system as whole, each community school district and each school. Px 3160B-Donohue Stmt. ¶ 33, 37; s*ee also, e.g.,* Px 3114. The Expenditure Reports show actual school-level expenses for teachers, textbooks, supplies and services, as well as allocations for district and system expenses. *See, e.g.,* Px 3114 at 130-206. In addition to extensive internal reviews, the BOE's finances and programs are subject to external review by a wide variety of City, State and non-public monitors, which produce voluminous reports concerning the BOE's operations. Px 1187 at 796260; Spence 2111:16-2112:2, 4166:23-4167:8; Donohue 15146:5-12, 15547:15-23; PFOF ¶¶ 1755-63. The State had access to all of these reports, as well as the massive discovery undertaken to prepare for trial, yet it could not prove or quantify any substantial sums lost to fraud or inefficiency, and it does not attempt to do so on appeal.

The State's attempt to prove waste through comparison with the Catholic schools, Def. Br. at 43, 66, is likewise not supported by the record. First, the State offered virtually no evidence from which any useful comparisons could be made. The State called only one witness with any responsibility for Catholic schools in New York City, and his responsibilities were limited to the Diocese of Brooklyn and Queens. Moreover, the witness admitted that he could not provide the court with the total cost of educating students even in that Diocese. The only per-pupil expenditure amounts offered by the State were based on oral estimates for which the State failed to provide any backup data, and which (1) failed to account for the substantial state, local and federal assistance provided to the Diocese and its students, and (2) failed to include the

costs of providing after school and summer programs (which are included in public school per capita costs). Puglisi 19357:14-17; PFOF ¶ 1773. In addition, as the trial court found, a comparison of per capita spending between the Catholic school system and the New York City public school system is of little probative value given the substantial differences between the two systems. 187 Misc. 2d at 91. PFOF ¶¶ 1773-76.

3. New York City's Per Capita Expenditures Are Below The State Average, Although It Has A Higher Percentage Of At-Risk Children And Faces Higher Costs

New York City is unique among major U.S. cities in spending less on education than the statewide average. PFOF ¶ 2030. Generally, urban districts spend more than other districts because they face higher costs and enroll larger percentages of high need students. Px 2775; Px 2779; Berne 11935:18-11939:8. New York City has the highest regional costs in the state, and it has one of the highest concentrations of at-risk students. Yet, in recent years, the City has spent nearly $1,500 less per pupil than the state average, and at least $4,000 less than the average in the surrounding suburban counties, even though those districts face similar regional costs and have very low concentrations of at-risk students. Px 1 at 79, 82; PFOF ¶¶ 2024-29.

4. New York City Receives Substantially Less State Aid Than Districts With Similar Needs

Numerous studies undertaken by the SED demonstrate that New York City receives hundreds of dollars less in state aid per pupil, and hundreds of millions of dollars less as a school district, than districts throughout the state that have the same or, in some cases, an even lower concentration of at-risk students. PFOF ¶¶ 1914-26. In fact, as the trial court found, the SED's own comparison of school districts according to their Needs/Resource Capacity Index ratios shows that New York City, a high-need district, receives substantially less state aid than districts with similar needs. 187 Misc. 2d at 87; Px 1 at 82; PFOF ¶ 1916. Reviewing the results of these

studies, the Board of Regents concluded that New York City "has never enjoyed State Aid increases that reflect the cost of educating all students to levels accepted in the rest of the state." Px 2064 at 3. Similarly, the SED has concluded that these studies show that "***[r]egardless of the pupil need or resource definition used, the evidence of under funding in . . . New York City is compelling.***" Px 2061 at 6 (emphasis added).

In sum, the record fully supports the trial court's finding that the magnitude of spending does not, by itself, provide any evidence that the money available to the BOE has been sufficient to provide a sound basic education.

X. THE STATE EDUCATION FINANCE SYSTEM HAS A DISPARATE RACIAL IMPACT ON NEW YORK CITY SCHOOLCHILDREN IN VIOLATION OF THE IMPLEMENTING REGULATIONS OF TITLE VI

In concluding that the state education finance system has the effect of improperly discriminating against minority students on the basis of their race in violation of the implementing regulations promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; 34 C.F.R. § 100.3(b)(2), the trial court relied upon intuitive, straightforward and virtually unchallenged evidence of disparate racial impact. Put simply, although New York City educates three out of every four minority schoolchildren in New York State, the City receives substantially less funding per student, on average, than other districts. 187 Misc. 2d at 102; PFOF ¶¶ 2044-54.

At trial, Plaintiffs met their burden of establishing a *prima facie* case of disparate racial impact by establishing three simple facts: "(1) 73% of the state's minority public school students are enrolled in New York City's public schools, (2) minority students make up approximately 84 percent of New York City's public school enrollment, and (3) New York City receives less

funding per capita, on average, than districts in the rest of the state."[25] 187 Misc. 2d at 102; Px 1 at 118, 124; PFOF ¶¶ 2044-54. Indeed, Defendants themselves provided ample evidence of disparate racial impact in the distribution of state aid. Dr. Michael Wolkoff, Defendants' finance expert, calculated the average per-pupil state aid for students in New York City and in the rest of the state. Using the most recent available data from the SED, Dr. Wolkoff's analysis showed that in the 1996-97 school year, New York City received $4,004 in state aid per attending pupil and $3,507 per enrolled pupil, while districts in the rest of the state averaged $4,099 per attending child and $3,867 per enrolled child. Dx 19385 at 5, 14; Dx 19386 at 5, 14; Wolkoff 18353:7-18357:25; PFOF ¶ 2045. Likewise, for the 1995-96 school year, Dr. Wolkoff's analysis showed shortfalls in New York City of $149 per attending pupil and $443 per enrolled pupil compared to the averages in the rest of the state. Dx 19383 at 6, 14; Dx 19384 at 6, 14; Wolkoff 18351:18-18354:5; PFOF ¶ 2046.

This disparity continued to exist as this case went to trial. The estimates of the New York State Division of the Budget for the 1999-2000 school year predicted that New York City would receive $4,236 in state aid per enrolled pupil while districts in the rest of the state would receive $4,475 per enrolled student. Dx 19740 at 1-2; PFOF ¶ 2048. For that school year alone, then,

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[25] These are precisely the facts that the Court of Appeals held would support a finding of disparate impact:

> If, as alleged, the State allocates only 34% of all State education aid to a school district containing 37% of the State's students (81% of whom are minorities comprising 74% of the State's minority student population), then those minority students will receive less aid as a group and per pupil than their nonminority peers who attend public schools elsewhere in the State, irrespective of how the City suballocates the education aid it receives.

CFE I, 86 N.Y.2d at 324.

New York City's aid shortfall amounted to approximately $255 million.[26] Px 2669 at 170; PFOF ¶ 2048.

Underscoring the validity of these per capita funding comparisons, the trial court also found that the statistical regression analyses presented by Plaintiffs' expert Dr. Robert Berne "are probative evidence of disparate impact and provide independent proof of disparate impact." 187 Misc. 2d at 107. These analyses confirmed the intuitive evidence of disparate racial impact by demonstrating statistically significant disparate impact in 58 out of 60 regressions encompassing two years' worth of subject data. 187 Misc. 2d at 108; Px 2704 at 1-8; Berne 11994:7-11996:13; PFOF ¶¶ 2054-56. Although Defendants attempted to discredit Dr. Berne's analyses, the trial court properly dismissed these criticisms as unconvincing and "highly counter-intuitive." 187 Misc. 2d at 108; PFOF ¶¶ 2057-65.

After Plaintiffs established their *prima facie* case of disparate impact, Defendants failed to meet their rebuttal burden of demonstrating a substantial legitimate justification for the State's practice. 187 Misc. 2d at 109-13. As the trial court found, Defendants were unable to demonstrate that providing the overwhelming majority of minority school children in New York State with less education funding than other children in the state is related to any "educational necessity," or that it bears any "demonstrable relationship to classroom education." *Id*. at 109 (citing *Georgia State Conf. v. Georgia*, 775 F.2d 1403, 1418 (11th Cir. 1985)). Moreover, Defendants' asserted justifications – that the system is wealth equalizing, that basing funding on enrollment figures encourages districts to keep attendance up, that distributing transportation and building aid on a reimbursement basis is justified, and that the fund formulas account for student needs – are wholly negated by the record. *Id*. at 109-13; PFOF ¶¶ 2082-2104.

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[26] As discussed above, the shortfall in purchasing power is actually much greater due to the

ARGUMENT

Standard Of Review

It is not clear from the State's argument what standard of review it expects this Court to apply. Although the State provides the usual citations setting forth the general rules of appellate review, Def. Br. at 51, the State is silent as to how those rules ought to be applied in this case.

Two factors make this case unusual on appeal: First, the Court of Appeals gave very specific direction in *CFE I* concerning the factual issues it expected the trial court to resolve, and it provided general guidance concerning the standard that should be applied to those facts. 86 N.Y.2d at 317-19. Second, the trial court presided over a seven-month trial, observed more than 70 witnesses and questioned several of them itself, examined over 5,000 submitted exhibits and more than 23,000 pages of transcripted testimony, and issued a carefully considered 182-page opinion.

The boilerplate citations advanced by the State suggest that the State expects this Court to essentially retry this case and review all of the trial court's findings *de novo*. In fact, given the circumstances of this case, it is certainly reasonable for this Court to give due regard to the trial court's findings, and it should not overturn those findings "unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence." *K.I.D.E. Assoc., Ltd. v. Garage Estates Co.*, 280 A.D.2d 251, 253 (1st Dep't 2001); *see also 300 East 34th St. Co. v. Habeeb*, 248 A.D.2d 50, 55 (1st Dep't 1997) ("Although an appellate court enjoys a power to review the record as broad as that of a trial court, 'due regard must be given to the decision of the Trial Judge who was in a position to assess the evidence and the credibility of witnesses.'") (citations omitted).

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regional cost differences in areas throughout the state. 187 Misc. 2d at 105, 107.

Moreover, given the procedural posture of this case and the issues in dispute, the State's citations concerning burden of proof and presumption of constitutionality are of questionable relevance. As to individual fact issues, *e.g.*, what percentage of students drop out of the City's high schools, the ordinary civil preponderance of the evidence standard must apply, as the State readily admitted below. It is clear, however, that there are very few facts in dispute.

The principal issue is whether the largely undisputed facts prove that the New York City schools have failed to provide a sound basic education, and, if so, whether there is a connection between that failure and the state education finance system. As the Court of Appeals made clear in *CFE I*, "[i]n order to satisfy the Education Article's mandate, the system in place must at least make available a . . . sound basic education." 86 N.Y.2d at 315 (internal quotations omitted). Accordingly, Plaintiffs here have the two-fold burden of establishing: (1) "a failure to provide a sound basic education to New York City school children"; and (2) "a causal link between the present funding system and any [such] failure." *Id.* at 318. The State readily admitted below that Plaintiffs' burden on these issues was a preponderance of the evidence. Joint App. at 2189 (Def. Trial Evid. Vol. ¶ 344) ("Therefore, to succeed on their claim, plaintiffs must prove, by a preponderance of the evidence, that the proximate cause of any alleged failures . . . is insufficient funding.").

I. THE TRIAL COURT'S RATIONAL, CAREFULLY CONSIDERED AND FACTUALLY-BASED STANDARD IS FAITHFUL TO THE COURT OF APPEALS' TEMPLATE, AND THE STATE'S PROPOSED ALTERNATIVE IS MEANINGLESS

The Court of Appeals directed the trial court to determine the meaning of a sound basic education on the basis of a fully developed factual record and to apply that standard in judging whether the New York City public school system provides a sound basic education. *CFE I*, 86 N.Y.2d at 317. The trial court followed this instruction faithfully and adopted a rational, reasonable and carefully considered standard:

> ***A sound basic education consists of the foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment.***

187 Misc. 2d at 17-18.

The State cannot accept this standard because, when measured against it, the city school system surely fails. So the State seeks to demonize the trial court, accusing the court of crafting "its own vision of what an educational system should provide" and claiming that the court's standard is a radical departure from the State Constitution and the rulings of the Court of Appeals. Def. Br. at 57.

In fact, the trial court's standard is, as the Court of Appeals explicitly commanded, well-grounded in an extensive factual record concerning the meaning of a sound basic education. And the trial court's standard is consistent with the intent of the framers of the Education Article, who clearly recognized that the state's schools must, at a minimum, prepare students for responsible, economically productive citizenship, and that the nature of such preparation would surely evolve to keep pace with technological and social change.

For its part, the State pretends that the Court of Appeals never instructed the trial court to undertake any fact-finding concerning the meaning of a sound basic education. And the State insists that the Court of Appeals prescribed a standard so low that, under it, the children of New York State are not entitled to a high school education or preparation for a decent job, and even an eighth-grade education is "aspirational."

The reason for the State's effort to deny any substantive meaning to the Education Article is clear: if that clause has any substantive meaning, then the gross inadequacies described in the Statement of Facts could never be held to satisfy the State's constitutional obligation. The State, therefore, proposes a standard that has no meaning all, suggesting that a constitutional violation occurs only if what happens in the schools amounts to "no education at all." Def. Br. at 56.

There is no basis for this hollow "standard" in the record, the rulings of the Court of Appeals or the constitutional history.

A. The Trial Court Faithfully Followed The Direction Of The Court Of Appeals

In *CFE I*, the Court of Appeals clearly and explicitly directed the trial court to determine the meaning of a sound basic education after the "the development of a factual record." 86 N.Y.2d at 317. Only then, said the Court, could "this issue be fully evaluated and resolved." *Id.* To guide the trial court in this task, the Court provided a "template reflecting our judgment of what the trier of fact must consider in determining whether [the State] has met [its] constitutional obligation." *Id.* at 317-18. This template suggested that the trial court consider whether students are being provided:

> ***[T]he opportunity to acquire the basic literacy, calculating and verbal skills necessary to enable [students] to function productively as civic participants capable of voting and serving as jurors.***

Id. at 318.

The Court cautioned, however, that this template was not an "attempt to definitively specify what the constitutional concept and mandate of a sound basic education entails. Given the procedural posture of th[e] case, an exhaustive discussion and consideration of the meaning of a 'sound basic education' is premature" and must await discovery. *Id.* at 317.

As part of its template conception of a sound basic education, the Court of Appeals also offered a list of resource "essentials" that were so obviously necessary to provide the opportunity to acquire a sound basic education (however it was ultimately defined) that they could be identified without any discovery. *Id.* As a starting point pending the development of a full record, the Court identified the following essentials:

- Minimally adequate physical facilities and classrooms that provide enough light, space, heat and air to permit children to learn. *Id*.

- Minimally adequate instrumentalities of learning such as desks, chairs, pencils and reasonably current textbooks. *Id.*

- Minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies. *Id*.

- Sufficient, adequately trained personnel. *Id*.

The definition of a sound basic education ultimately adopted by the trial court and its list of resources necessary to provide the opportunity to acquire that education retains the essence of the Court of Appeals' template. The trial court's modest modifications are fully supported by the extensive record concerning the meaning of a sound basic education.

B. The Court's Definition Of A Sound Basic Education Is Fully Supported By The Record

> ***A sound basic education consists of the foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment.***

In adopting this definition, the trial court made three principal modifications to the Court of Appeals' template: (1) it used the term "civic engagement" to embrace a concept of productive citizenship, including voting and serving on a jury; (2) it included a specific reference to "sustaining competitive employment," following the Court of Appeals' recognition of the need to prepare students to "function productively"; and (3) it substituted "foundational skills" for "basic literacy, calculating and verbal skills" to summarize its findings concerning the minimum amount of skills and knowledge required to prepare students for civic engagement and competitive employment. These modifications embrace the Court of Appeals' basic template, while providing a final definition that accurately reflects the broad consensus among New York State's (and the nation's) teachers, education officials, business and political leaders and

academic experts about the minimum level of skills necessary to prepare students for productive citizenship.[27]

The State now apparently agrees that a sound basic education must prepare students for some form of civic engagement and for some form of low-level employment. At trial, the State had insisted that because the Court of Appeals' template definition purportedly did not include a specific reference to preparation for the workforce, schools were not required to prepare students for any form of employment. Joint App. at 1849-50 (Def. Proposed Findings of Fact ¶¶ 12-13), 1953 (Def. Post-Trial Br. at 34). On appeal, the State appears not to challenge directly the trial court's finding that preparation for the workplace is a "universally understood purpose of public education." 187 Misc. 2d at 15. This finding is supported by (1) common sense, (2) the extensive testimony of both parties' expert witnesses and the state's most senior education officials, (3) numerous reports of state and national education agencies and commissions that reflect a wide and long-held consensus that a minimally adequate education must prepare students for competitive employment.[28] PFOF ¶¶ 134-60. This finding is also consistent with

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[27] Defendants read *CFE I* to limit a sound basic education to an education that is "truly minimal." Def. Br. at 56. The Court of Appeals, however, never used such an abstract phrase. Instead, it consistently equated a sound basic education with an "adequate education," as it explicitly held in the companion case decided the same day as *CFE I*, *Reform Educational Financing Inequities Today ("REFIT") v. Cuomo*, 86 N.Y.2d 279, 284 (1995). In *CFE I*, the Court's invocation of the term "minimal" was always directly related to the concept of "adequacy." Thus, the Court held that a sound basic education must include "minimally *acceptable* educational services and facilities," 86 N.Y.2d at 316, and that it must provide a "minimally *adequate* educational opportunity." *Id.* at 319 (emphasis added).

[28] As the trial court pointed out, a common sense reading of the template provided by the Court of Appeals, which includes the phrase "function *productively* as civic participants capable of voting and serving on a jury," embraces the concept of workforce preparation. 187 Misc. 2d at 14-15.

the unanimous conclusion of all other state courts that have considered this issue. 187 Misc. 2d at 15 & n.11.

Now, the State's principal objection appears to be that the trial court's conception of the "foundational skills" necessary for civic engagement and competitive employment exceed what the State describes as the Court of Appeals' standard of "minimal adequacy." To support this objection, the State distorts the trial court's limited, carefully considered findings, attributes findings to the court that it never made and then attacks these ersatz findings.

C. The Trial Court's Actual Findings Concerning Foundational Skills

With respect to civic engagement, the court found that citizens need "the intellectual tools to evaluate complex issues," including "verbal, reasoning, math, science and socialization skills" in order to exercise their responsibilities "capably and knowledgeably."[29] 187 Misc. 2d at 14. With respect to sustaining competitive employment, the court found that citizens need the skills and knowledge necessary to "move beyond" low-level service jobs. *Id.* at 16. To permit public school graduates to move beyond such jobs, the schools must provide "a more rigorous formal

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[29] Noting that the "Court of Appeals invoked voting and jury service as synecdoches for the larger concept of productive citizenship," 187 Misc. 2d at 13, the trial court utilized the more comprehensive phrase "civic engagement" which encompasses not only voting and serving on a jury, but also participating in local civic activities such as school board affairs, discussing and deliberating with others on issues of public policy, petitioning one's elected representatives and otherwise exercising fully the rights of free speech and assembly. *Id.* at 14.

The record includes substantial evidence that preparing students to participate capably and knowledgeably in civic affairs, including voting and serving on a jury, is (and has long been) one of the fundamental purposes of public education. For example, a decade-long series of national education summits convened by the successive Presidents of the United States beginning in 1989 (and attended by senior New York State education and business leaders) included the concept of informed civic participation as a primary purpose of education. PFOF ¶¶ 183-86. In New York State, the development of statewide curriculum standards by the SED rests, in part, on a consensus that the public schools must prepare students for the broad responsibilities of citizenship. PFOF ¶¶ 189-93.

education" than was necessary in the past, and students must be well-grounded in literacy, science and mathematics. *Id.* at 16.

The trial court's conception of "foundational skills" is fully supported by the record, which includes extensive evidence concerning the skills needed to prepare students for productive citizenship. Much of this evidence was developed by the Board of Regents and the SED over the last decade as part of a comprehensive and exhaustive effort to identify the skills students need to function effectively as citizens and workers. This effort was part of a national standards movement initiated in 1989 at the National Education Summit convened by President George Bush to address the cumulative findings of numerous governmental and private sector commissions that identified "a rising tide of mediocrity" in American public schools. PFOF ¶¶ 142-43. To reverse this tide, the participants (reflecting a wide national consensus) recommended, *inter alia*, that states develop academic content standards. Sobol 913:11-916:18; Schwartz 2542:18-21; Jaeger 13619:6-12; PFOF ¶¶ 142-45; 182-88.

To develop such standards in New York, the Commissioner of Education convened committees of teachers, principals, subject-matter experts and a wide variety of interested citizens from business, industry (including union representatives), the professions and various communities throughout the state. PFOF ¶ 169. The work of the committees, combined with extensive deliberation by the SED, led in 1997 to the Regents' adoption of "Learning Standards" in seven areas of study. PFOF ¶ 174. As part of the task of developing the Learning Standards, the committees explicitly considered the skills and knowledge that students would need to function productively as citizens and to obtain competitive employment. Px 1948 at 8-9, 63-65; Sobol 973:8-22, 1053:11-16; Darling-Hammond 6460:14-21, 6472:12-6473:17, 6480:9-13; Levin 12110:22-12117:13; PFOF ¶¶ 189-207.

The committees concluded that in order to function effectively as productive citizens, students needed "strong skills and knowledge," including reasoning and analytical skills. Px 1032 at 1; *see also* Mills 1146:22-1147:9; Darling-Hammond 6460:14-21. The skills and knowledge identified by the committees reflect a general accord that the demands of the modern workplace and the demands placed upon voters and jurors have raised the *minimum* level of literacy, verbal and calculating skills that are considered necessary to function productively.

This accord is reflected in numerous state and national studies. PFOF ¶¶ 141-51. For example, the CUNY Report concluded that the minimum skills necessary for competitive employment in New York City have increased substantially over the last decade; many jobs require "people with computer skills who are literate, can write, and are well-grounded in science and mathematics." Px 311 at 17. As Dr. Linda Darling-Hammond explained, "90 percent of jobs . . . require at least a high school education and a level of technical skill in managing technology, text and various kinds of content specific competencies that we used to expect of only about 50 percent of employees in 1950." Darling-Hammond 6460:5-13; *see also* Levin 12095:5-12097:22, 12136:4-12137:11.

The Chief Financial Officer of the Verizon (formerly Bell Atlantic), which employs tens of thousands of New York State residents, provided direct evidence of the rising minimum level of skills necessary to secure competitive employment. Virtually all of the company's 9,000 management positions require a college education. Salerno 5671:24-5672:25. Traditionally, the company's 33,000 craft positions have been available to non-college graduates. Salerno 5680:25-5681:25. Increasingly, however, the technical sophistication of many of these craft jobs requires and has attracted two- and four-year college graduates. Thus, high school graduates

must now compete with college graduates for an increasing number of jobs at the telephone company. Salerno 5680:25-5683:17.

The State also claims that the trial court required that "all students be able to obtain jobs that are maximally sophisticated – intellectually, technologically or otherwise." Def. Br. at 59. In fact, the trial court very explicitly rejected this proposition, noting that its conception of a sound basic education was in the "middle ground" between the extremes of (1) preparing students only for low-level jobs paying the minimum wage, and (2) ensuring that most students attend elite universities in preparation for lucrative careers. 187 Misc. 2d at 15.

With respect to civic engagement, the record includes extensive evidence concerning the minimum skills voters and jurors need to understand recent ballot propositions, newspaper reports regarding current events, and jury charges from recent New York State civil cases. *See, e.g.*, PFOF ¶¶ 198-203. This evidence demonstrates that, at a minimum, voters and jurors should have analytic reading skills, the ability to support ideas with evidence, and a reasoning process capable of understanding evidence and applying it to a conclusion. Darling-Hammond 6460:14-6491:7, 6516:9-23; PFOF ¶¶ 198-201.

As the trial court recognized, the Court of Appeals obviously meant something more than meeting the legal qualifications to vote or serve on a jury when it included these activities within its template definition. Clearly, the Court meant that public education must prepare students to vote or serve as jurors "capably and knowledgeably." 187 Misc. 2d at 14. Indeed, the Court of Appeals in other cases has recognized that, apart from meeting the statutory requirements, a juror:

> [a]t a minimum . . . must be able to understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations and

> comprehend the applicable legal principles, as instructed by the court.

People v. Guzman, 76 N.Y.2d 1, 5 (1990). Moreover, the Court of Appeals has recently initiated a process of jury reforms that encourage jurors to become more actively engaged in consideration of evidence. *See, e.g.,* Uniform Rules for Jury Selection and Deliberation, Part 220 (authorizing jurors to take notes, to receive juror notebooks and to review written copies of the court's charge); *see also* "The Jury in the New Millennium: Special Edition on Juries," 73 J. N.Y. State Bar Assoc., No. 5 (June 2001).

Defendants exaggerate and distort the trial court's holding by claiming that it would require voters and jurors to have a "sophisticated understanding of, or expertise in" DNA, statistical analyses and convoluted financial fraud, as well as a "mastery of complex legislative and policy issues." Def. Br. at 58-59. In fact, the trial court simply listed these areas as examples of the issues that confront jurors and voters, but it did not expect expertise in any of these areas. The trial court clearly did not expect jurors and voters to resolve difficult questions of science or policy, but to have the skills and knowledge necessary to comprehend basic texts confronted in the exercise of civic responsibilities. It was these texts – *e.g.*, ballot initiatives and jury instructions – that were placed in evidence and analyzed by the parties' experts, not scientific texts or political science journals.

The trial court rejected the State's claim at trial that preparation for the responsibilities of civic engagement may be satisfied with the equivalent of a junior high school education, or less. The State's experts attempted to support this claim with a purported textual analysis of popular newspapers; with polls showing that since most voters obtain their information from television and radio, they don't need to be able to comprehend ballots or other written texts; and with the opinion that uninformed jurors can rely on the education of their fellow jurors. Dx 19290; Dx

19293; Supp. App. at RA533 (Dx 19294); Rossell 16874:4-25, 16883:23-16886:24; Walberg 17220:10-11. The trial court properly refused to find credible this testimony intended to support the proposition that in our democracy, citizens need not be capable of directly comprehending the basic information they are asked to evaluate on the ballot or in the jury room.[30]

In addition, the record includes substantial evidence that the skills necessary to function as a capable and knowledgeable juror include many skills that are necessary to function productively in the workforce. As Dr. Henry Levin explained:

> [There is a] merger between the requirements for being a good citizen, being able to evaluate arguments, being able to gather information, being able to gather new phenomena, being able to work with others . . . problem solving, decision-making, evaluation of issues, those become common to the preparation of both citizens on the one hand and workers on the other.

Levin 12119:3-11.[31]

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[30] Defendants can cite no authority for the very low threshold of voter and juror skills they ask this Court to accept as a constitutional standard because their position is inconsistent with any realistic notion of the level of skills citizens need to function capably in a democratic society. The United States Supreme Court has stated that the electoral process "depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973). Similarly, the Washington Supreme Court declared that "[e]ducation plays a critical role in a free society. It must prepare our children *to participate intelligently and effectively* in our open political system to ensure that system's survival." *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978) (emphasis added); *see also Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1356 (N.H. 1997) ("[P]ublic education . . . plays . . . a seminal role in developing and maintaining a citizenry capable of furthering the economic, political, and social viability of the State."); *Brigham v. State*, 692 A.2d 384, 393 (Vt. 1997) ("[E]ducation [is] essential to self-government.") (citation omitted).

[31] The State falsely claims that Dr. Levin testified that "most new jobs or job openings will be in occupations that require relatively low skills and education." Def. Br. at 59. In fact, the quoted statement dated from 1985, and Dr. Levin testified that, based on new data, "the rapid growth of the economy in the last seven or eight years has profoundly changed the demand for workers." Levin 12205:17-25.

In short, the trial court's conception of "foundational skills" is reasonable and fully supported by the record. With respect to voting and jury service, the court's requirement that students have the ability to exercise their duties as jurors and voters capably and knowledgeably reflects a reasonable expectation that students have the ability to comprehend the basic texts of public life, such as ballot propositions and the instructions of judges, and to apply basic analytical skills in the comprehension of major issues. With respect to competitive employment, the court's finding that schools must provide an opportunity for students to move beyond low-level service jobs requires, in concrete terms, that students have a fair chance of getting a job at the telephone company.

D. The Trial Court Did Not Adopt The Regents Learning Standards

Although the State complains generally throughout its brief that the trial court's standard sets the bar too high, its principal specific complaint appears to be that the trial court adopted the Regents Learning Standards ("RLS" or "Standards"), rather than some undefined lesser measure, as the benchmark of a sound basic education. In fact, the trial court explicitly declined to adopt the RLS wholesale as the measure of a sound basic education. The court explained that some of the specific standards exceed "basic skills and knowledge" and that fully adopting the RLS would "essentially define the ambit of a constitutional right by whatever a state agency says it is." 187 Misc. 2d at 12.

The State claims that the trial court did not really mean what it said, because the State has discerned the trial court's true intent by parsing a single sentence found later in the opinion, in which the trial court states that obtaining a Regents diploma "actually demonstrates that [students] have received a sound basic education." 187 Misc. 2d at 62. According to the State, this statement reveals that the trial court actually used the RLS to determine whether the New York City schools are providing a sound basic education. Def. Br. at 57. This claim is based on

a gross and glaring misunderstanding of the record and a complete distortion of what the trial court actually wrote.

The quoted sentence appears in a discussion of the abysmal graduation rates for the New York City public schools. The trial court cites statistics showing outcomes for the years 1994-99 indicating the number of local diplomas, Regents diplomas, GEDs and dropouts. The obvious point the trial court was making was that, of the three types of high school degrees traditionally available in New York State, only the Regents diploma indicated *ipso facto* that a student had obtained a sound basic education. The trial court did not find that a less rigorous measure of academic achievement than the Regents diploma requirements might not also demonstrate that students had obtained a sound basic education. But the trial court found that the other two degrees – the local diploma and the GED – simply did not measure the skills and knowledge necessary for students to become productive citizens. 187 Misc. 2d at 60-64.

This finding is fully supported by the record, including the substantial evidence concerning the development of the RLS. PFOF ¶¶ 163-88. The Regents had originally employed the RCTs years ago primarily for the purpose of identifying students in need of remediation – the tests measure competency at a junior high school level. They "were never intended to be a measure of what a sound basic education ought to be." Sobol 1000:6-12. After an extensive analysis of the skills students need to prepare for productive citizenship highlighted the deficiencies of the RCTs, the Regents decided to phase them out. In explaining this decision, the Commissioner of Education noted that:

> [T]he math [RCT] is only arithmetic . . . you can't get into an apprenticeship program without algebra, you certainly can't do college level work; you can't understand technology . . . so it is not minimal – it is not minimally acceptable.

Mills 1222:13-21.

At trial, the State insisted that the RCTs were an appropriate benchmark for measuring whether schools are providing a sound basic education. Joint App. at 1850-51 (Def. Proposed Findings of Fact ¶¶ 16-17). ***Now, on appeal, the State advances the incredible proposition that the Court of Appeals considered the skills and knowledge measured by the RCTs to be "aspirational" and that the RCT standard "may exceed the Constitution's minimum adequacy requirement."*** Def. Br. at 83.

Of course, the Court of Appeals never made any such finding. There is not one reference to the RCTs in *CFE I* and no basis at all to conclude that the Court had made any determination as to whether the RCTs exceeded the constitutional minimum. ***In fact, the Complaint before the Court in CFE I on the State's motion to dismiss contained no specific information about the RLS (which had not yet been adopted) or the RCTs; rather, it referred to other, very specific regulations in effect at the time which required that schools provide certain resources, such as minimum ratios of guidance counselors or certain numbers of library books***.[32] *See* Joint App. at 214-17 (Am. Cmpl. ¶¶ 49-62). It was in regard to these

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[32] In *Levittown Union Free School District v. Nyquist,* 57 N.Y.2d 27 (1982), the Court of Appeals indicated in dicta that the constitutional standard for a sound basic education should be fully equated with the "the State-wide minimum standard of educational quality and quantity fixed by the Board of Regents." *Id* at 38. Relying on that language, Plaintiffs, in their complaint in *CFE I,* had alleged non-compliance with numerous concrete minimum standards of the Regents and the Commissioner of Education, such as guidance counselor ratios and numbers of library books. *See* Joint App. at 214-17 (Am. Cmpl. ¶¶ 49-62). It was in response to this situation that the Court of Appeals stated that "many of the Regents' and Commissioner's standards exceed notions of a minimally adequate or sound basic education – some are also aspirational – prudence should govern utilization of the Regents' standards as benchmarks of educational adequacy. 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." 86 N.Y. 2d at 317. The Court of Appeals' call for "prudence" clearly was meant to correct an over-reliance or total equation of the standards with constitutional requirements based on its *Levittown* dicta; it certainly did not mean to preclude or discourage proper reliance on standards to inform a constitutional adequacy analysis.

regulations – and not to the RLS that were not even in effect, or to the RCTs, which are tests, not standards – that the Court of Appeals was speaking when it said that *some* of the Regents' and Commissioners' *standards* are "aspirational." *CFE I,* 86 N.Y.2d at 317. In short, it is simply wrong to claim that the *CFE I* decision reflects any judgment by the Court concerning the RLS or the RCTs.

It is also wrong to claim that the trial court did not heed the Court of Appeals' direction to use "prudence" in considering Regents' standards as benchmarks for constitutional adequacy. The trial court scrupulously followed these instructions with respect to the RLS, specifically identifying certain standards as exceeding the requirements for a sound basic education and others as falling well within the constitutional standard.[33] 187 Misc. 2d at 11-12. In carefully considering evidence concerning adequate education compiled by the SED and the Regents in developing the RLS, and taking account of the fact that passage of examinations based on them have now become a *sine qua non* for obtaining a high school diploma in the State of New York, the trial court gave appropriate consideration to the relevant findings of the executive agency

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[33] Learning Standards for English Language Arts, Standard 1, Commencement, which the trial court specifically found to "fall well within a sound basic education," provides that:

> Students will listen, speak, read, and write for information and understanding. As listeners and readers, students will collect data, facts, and ideas; discover relationships, concepts, and generalizations; and use knowledge generated from oral, written and electronically produced texts. As speakers and writers, they will use oral and written language that follows the accepted conventions of the English language to acquire, interpret, apply, and transmit information.

Px 318 at 1. Learning Standard for Mathematics, Science and Technology, Standard 4, Commencement, which the trial court held to exceed a sound basic education, deals with advanced items like the physical structure of the nucleus of an atom. Px 320.

with expertise in the area. Carefully considering – but not fully adopting – the RLS was the prudent constitutional approach called for by the Court of Appeals in *CFE I.*

The trial court's analysis of decisions from other state courts demonstrates its careful approach to the RLS. 187 Misc. 2d at 9. Courts in other states have adopted detailed substantive criteria to define constitutional concepts of education adequacy. The Supreme Court of Kentucky, for example adopted seven specific adequacy goals, ranging from "knowledge of economic, social and political systems" to "sufficient grounding in the arts." *Rose v. Council For Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989). Here, the trial court specifically rejected the Kentucky approach, although it had been followed by at least three other state high courts, as inconsistent with the Court of Appeals' holding in *CFE I.* 187 Misc. 2d at 9-10. Instead, the trial court adopted the term "foundational skills," which, as it explained, obviously recognizes that students need a basic but broad range of interrelated knowledge and cognitive skills to function productively as civic participants.[34] 187 Misc. 2d at 15. In that respect, it is

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[34] The Supreme Court of North Carolina, the only other state high court besides the New York Court of Appeals to have adopted the specific phrase "sound basic education" for interpreting the requirements of its constitution's education clause, also utilized a definition of basic skills that, while short of Kentucky's "state of the art" definition, also listed a number of specific adequacy standards. It held that:

> [A] "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

completely consistent with Court of Appeals' template definition and the substantial evidence presented at trial concerning the meaning of a sound basic education.

E. The State's Proposed "Standard" Is No Standard At All

The State's proposed standard for judging whether school districts are providing a sound basic education is that ***"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."*** Def. Br. at 56. Before this appeal, the State had never proposed this standard in public. At trial, no witness for the State espoused or supported it. As far as we can determine, no elected or appointed state official has ever advocated or approved this standard. Now, on appeal, this proposed standard is buried in the middle of a paragraph, hidden between citations that, tellingly, do not include the Court of Appeals' decision in *CFE I*, its most recent decision interpreting the Education Clause. *Id*.

The State is right to bury this "standard," for it is based on the premise that the Education Clause has no substantive meaning, a premise that was squarely rejected by the Court of Appeals in *CFE I* and is at odds with New York constitutional history. And it is a standard that permits the State on this appeal to claim that the State Constitution does not require schools to provide students with the skills and knowledge necessary to be productive citizens, get a decent job, or obtain a high school diploma.

Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997). In *Leandro*, the North Carolina Supreme Court, like the New York Court of Appeals in this case, remanded the matter to the trial court to determine whether students in the plaintiff districts were receiving the opportunity for a sound basic education in accordance with these requirements. *Id.* at 261. In *Hoke County Board of Education v. State*, No. 95 CVS1158, 2000WL1639686 (N.C. Sup. Ct. Oct. 12, 2000), the trial court held that the plaintiffs were being denied such an opportunity. *Id.* at *91-*92.

Although the State does not describe its standard in this way, there is no question that this is what its standard means, for if the sixth- and eighth-grade skills measured by the RCTs are "aspriational," then students have no constitutional right to an education that will prepare them to meet high school graduation requirements. And if they have no constitutional right to a high school diploma, they certainly have no right to anything other than the very lowest level jobs. In short, the State proposes a meaningless standard that would deprive the courts of any responsibility to redress any failings in the state's schools except, apparently, the actual or effective closing of schoolhouse doors.

Although the Court of Appeals specifically directed that the meaning of a sound basic education must be determined on the basis of a factual record, *CFE I*, 86 N.Y.2d at 317, the State does not even provide one cite to the record of this case to support its "standard." Instead, the State claims to find support for its meaningless standard in *Levittown* and constitutional history. In *Levittown,* the Court of Appeals dismissed a claim that inequalities in school funding among the state's school districts violate the Constitution. 57 N.Y.2d at 46. *Levittown* did not concern the basic claim at issue here – that the New York City school system has failed to provide its students with an *adequate* education. The Court of Appeals first considered this claim in *CFE I.* In that decision, the Court made clear that the Education Clause has qualitative meaning. Thus, even before discovery, the Court's template definition anticipates, at the very least, a qualitative assessment of whether schools are providing the opportunity for students to "function productively as civic participants." *CFE I,* 86 N.Y.2d at 316. This concept clearly means something more than simply determining whether students are receiving "no education at all."

In addition to ignoring *CFE I,* the State also misreads the constitutional history of the Education Clause. The State claims that the framers were concerned only with the "limited

purpose" of ensuring the continued presence of schools throughout the state and were not concerned with the quality of education provided inside those schools. Def. Br. at 28. And the State claims that the Education Clause was not intended to impose any "new obligations on the Legislature."[35] *Id.* at 29.

In fact, the framers of the Education Clause understood that providing an adequate education to all students would impose significant obligations on the state Legislature and that the concept of "adequacy" must evolve to keep pace with societal changes. As the State acknowledges, the Education Clause had its origin in the "common school" movement of the late 19th century. Def. Br. at 28-29. This movement sought to replace the prior patchwork of town schools partially supported by parental contributions, church schools, "pauper schools" and private schools with a "school common to all people [that] would be open to all and supported by tax funds." Lawrence A. Cremin, *American Education: The National Experience 1783-1876,* 138 (1980); *see also* Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* (1983).[36]

When the Constitutional Convention of 1894 convened, New York State had a number of common schools in place, but it lacked an adequate system. As one delegate explained:

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35 The only case the State cites for this proposition, *Judd v. Board of Educ.* 278 N.Y. 200 (1938), concerned a section of the Education Clause concerning aid to religious education and had nothing to do with the section of the Education Clause at issue in this case. *Id.* at 200. The Court's holding in *Judd*, barring public funding of transportation to parochial schools, was nullified by the Constitutional Convention of 1938. *See Board of Educ. v. Allen*, 20 N.Y.2d 109, 115 (1967)

36 This reform met fierce resistance both from those who believed that "education merely gave rise, on the part of those born to inferior positions, to futile aspirations," Newton Edwards & Herman G. Richey, *The School in the American Social Order* 299 (2d ed., 1963), and from those who opposed the system of statewide school regulation that accompanied these reforms. Ellwood P. Cubberley, *Public Education in the United States* Ch. 7 (2d ed., 1934).

> [The proposed education clause] makes it imperative on the state to provide *adequate* free common schools for the education of all the children of the State . . . the reason of this first section is, that there are places in the State of New York where *the common schools are not adequate* and not numerous enough to provide education for all the children.

4 *Revised Record at Constitutional Convention of 1894* at 695 (emphasis added); *see also id.* at 711 ("But gentlemen who know the common schools know well that however good work they may have done in the past, they come far short of filling the place which they ought to fill.")

There is no question that the delegates acknowledged that the common schools envisioned by the Education Clause would provide an education adequate to meet contemporary needs. In their report to the Convention, the drafters of the Clause explained:

> Whatever may have been [the common schools'] value heretofore . . . their importance for the future cannot be overestimated. ***The public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before.*** . . . [T]he highest leadership is impossible without intelligent following, and . . . the foundation of our educational system must be permanent, broad, and firm, if the superstructure is to be of real value.

5 *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 3) (emphasis added).

The framers also understood that "the rising generation" must also be prepared by the common schools for productive engagement in the state's economy. The Education Committee Report to the 1894 Constitutional Convention recognized the importance of education "not only for the intellectual but also for the material prosperity of the State of New York." 5 *Revised Record at Constitutional Convention of 1894*, at 694; *Report Submitted by Committee on Education and Funds Pertaining Thereto* (Aug. 23, 1894) (Doc. No. 62 at 2). The report further declared that "the connection is manifest between the improvement and growth of [the state's]

schools and its material prosperity." *Id.* at 697. The report's conclusions were widely supported by the Convention's delegates, who noted, for example, that education was "the chief foundation upon which the superstructure of wealth and prosperity of the state was built." 3 *Revised Record at Constitutional Convention of 1894*, at 732.[37]

The constitutional record, therefore, makes clear that the framers created a dynamic Education Article and that they anticipated, as the trial court recognized, that "the definition of sound basic education must evolve" to reflect the public and economic needs of the state. 187 Misc. 2d at 16.[38]

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[37] It is also clear that the common schools were intended to prepare students to be civically engaged in the public affairs of their time. As Horace Mann, the founder of the common school movement put it:

> Under our republican government, it seems clear that the minimum of this education can never be less than such as is sufficient to qualify each citizen for the civil and social duties he will be called to discharge; such an education as . . . is indispensable for the civil functions of a witness or a juror; as is necessary for the voter in municipal and in national affairs; and finally, as is requisite for the faithful and conscientious discharge of all those duties which devolve upon the inheritor of a portion of the sovereignty of this great republic.

McDuffy v. Secretary of Exec. Office Of Educ., 615 N.E.2d 516, 555 (Mass. 1993) (quoting *The Massachusetts System of Common Schools: Tenth Annual Report of the Massachusetts Board of Education* 17 (1849)).

[38] Virtually every other state court that has defined a conception of adequate education under its state constitution's education clause has agreed. *See, e.g., Leandro*, 488 S.E.2d at 255 (N.C. 1997) (holding that framers of education clause intended to allow students to "participate fully in society as it existed in his or her lifetime"); *McDuffy*, 615 N.E.2d at 555 (Mass. 1993) ("Our Constitution, and its education clause, must be interpreted 'in accordance with the demands of modern society or it will be in constant danger of becoming atrophied'."); *Claremont School Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) (holding that contemporary adequacy standards must be pegged well above a nineteenth century "reading, writing and arithmetic" level); *Seattle School Dist.*, 585 P.2d at 94 (Wash. 1978) ("That which may have been 'ample' in 1889 may be wholly unsuited for children confronted with contemporary demands."); *Robinson v. Cahill*, 303 A.2d

F. The Trial Court's Identification Of Essential Resources Is Fully Supported By The Record

In order to provide an opportunity for students to obtain the foundational skills necessary to become productive citizens, the trial court found that schools must provide certain essential resources. The trial court confirmed that the resources identified before discovery by the Court of Appeals were essential and that certain additions were necessary based on the extensive evidence concerning resources presented at trial. Overall, it held that the following resources are needed to provide students with the opportunity for a sound basic education:

- **Sufficient numbers of qualified teachers, principals and other personnel;**
- **Appropriate class sizes;**
- **Adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum;**
- **Sufficient and up-to-date books, supplies, libraries, educational technology and laboratories;**
- **Suitable curricula, including an expanded platform of programs to help at risk students by giving them more "time on task";**
- **Adequate resources for students with extraordinary needs; and**
- **A safe, orderly environment.**

187 Misc. 2d at 114-15.

On appeal, the State does not challenge the trial court's specific findings that each of these seven categories of resources is essential to provide students with the opportunity to obtain a sound basic education. Indeed, the State failed at trial to offer any proof or argument that any

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273, 295 (N.J. 1973) (holding that "[t]oday, a system of public education which did not offer high school education would hardly be thorough and efficient").

of these resources are not essential, or what resources, if any, might be essential. Now, on appeal, the State argues that the original list of resources identified by the Court of Appeals as part of the template in *CFE I* is definitive, since it is against this list that the State purports to assess on appeal whether the New York City public schools are providing a sound basic education. Def. Br. at 65-84. The State has simply chosen to ignore the Court of Appeals' direction that the definitive specification of "what the constitutional concept and mandate of a sound basic education entails" could come "only after discovery and the development of a factual record." *CFE I*, 86 N.Y.2d at 317.

The State complains in general terms that the trial court's "standard" far exceeded the "standard of 'minimal adequa[cy]'" it purports to find in the Education Article and the Court of Appeals' decisions, but the State does not claim that any one of the seven resource categories identified by the trial court actually exceeds this purported standard. In fact, there is no basis in the record to challenge the inclusion of any of these resources in a list of essentials necessary to provide a sound basic education.

Before turning to the specific resources, it is important to note that the trial court, following the lead of the Court of Appeals, identified the essential resources by category only, without specifying how much or what level of any particular resource is required in order to meet the constitutional minimum. 187 Misc. 2d at 114-15. This approach is appropriate because, as the record in this case makes clear, the specific circumstances of each district must be considered in determining the adequacy of any particular resource, or the overall adequacy of all resources. For example, as the evidence concerning class size demonstrates, what class size is "appropriate" may depend on the educational needs of the students, the ability and training of the teachers, the availability of other resources such as guidance counselors and remedial assistance, and the

cumulative sufficiency of resources provided to students over several or more years. Thus, the appropriate class size in a district with few at-risk students that provides well-qualified teachers and substantial support services in modern facilities may be higher than a district with a high percentage of at-risk students taught by inexperienced, inadequately trained teachers without access to sufficient services to address the extraordinary educational needs of their students.

We turn now to a brief discussion of each of the seven categories of essential resources identified by the trial court:

1. Teachers, principals and other personnel. The evidence at trial rendered it beyond dispute that qualified teachers, principals and other personnel are crucial to student opportunity. The Court of Appeals' presumption in the original template that a "sufficient number of adequately trained teachers" is essential was clearly supported by the trial record.

2. Appropriate class sizes. The commonsense relationship between small class sizes and improved student performance, endorsed by recent policies of both the State and the federal government, was strongly validated by the findings of the Tennessee STAR project and other extensive evidence presented at the trial. The evidence further established that while class size reductions benefit all children, children at risk of academic failure benefit the most from small class sizes. 187 Misc. 2d at 53-54.

3. Facilities. The trial record also substantiated the Court of Appeals' presumption that inadequate physical facilities, like the hundreds of deplorable school buildings in New York City, deny students sufficient light, space, heat and air, and deprive them of science labs, libraries, gymnasiums, music and art rooms and modern technology. These inadequacies, and the unconscionable overcrowding that impedes class-size reduction, clearly undermine student learning. Moreover, since more than 75 percent of New York City's schools are not accessible

to students with physical disabilities, the trial court properly required that buildings not only be adequate, but also "accessible." *See* 29 U.S.C. § 794; 42 U.S.C. § 12132; 28 C.F.R. § 150; 34 C.F.R. § 104.22 (requiring school districts to ensure accessibility to all programs and services).

4. Instrumentalities of learning. Based on the indisputable need for libraries, laboratories, and computer technology in order to provide the foundational skills students need today, the trial court added these specific items to the template's specification of "desks, chairs, pencils and reasonably current textbooks." The State does not dispute this need.

5. Programs for at-risk children. In adapting the Court of Appeals' identification of "basic curricula," the trial court added a specific reference to "an expanded platform of programs to help at risk students." 187 Misc. 2d at 37. The evidence summarized above, leaves no doubt that, at-risk children require additional resources in order to obtain a sound basic education, as the State agreed at trial. For at-risk children, these resources, which may include after-school or summer programs or small group literacy programs, are an essential part of the curriculum. Without them, too many children simply will not learn to read or write. These programs, therefore, are an inherent part of any "basic curricula" intended to impart minimal competency. 187 Misc. 2d at 37.

The State does not directly challenge the proposition that at-risk children require additional resources, or that the types of programs identified by the trial court actually help at-risk children to achieve minimum levels of academic proficiency. Instead, the State claims that the trial court would require the Legislature "to erase the differences in performance between the disadvantaged and the non-disadvantaged, no matter the cost" and impose an "obligation to eradicate all . . . socioeconomic disadvantages." Def. Br. at 106-07.

This is absolute nonsense. First, it is disingenuous, at best, for the State to advance this argument on appeal when its own expert at trial provided extensive testimony concerning his success, as the superintendent of two large urban school districts, in significantly reducing the gap between "the disadvantaged and non-disadvantaged." Def. Br. at 106. He did so, in part, by introducing an extensive array of programs for at-risk children.

Second, the Court of Appeals explicitly held in *CFE I* that measures of student performance, while helpful, would not be dispositive in the determination of whether an *opportunity* for a sound basic education had been provided to students. Of course, nothing in the trial court's ruling departs from that holding, and nowhere does the trial court guarantee that all at-risk students will reach at any specific level of achievement, or require the Legislature to equalize test scores or eradicate the socioeconomic conditions that give rise to educational disadvantages. Instead, by requiring that schools provide appropriate programs for at-risk children, the trial court is simply recognizing the undisputed fact that there are curricular measures that can effectively provide the *opportunity* for at-risk children to overcome educational disadvantages that inhibit learning. In short, because at-risk children need these programs to have any meaningful opportunity to be adequately prepared for undertaking their civic responsibilities and to compete in the workplace, the programs are an inseparable part of the "basic curricula" identified by the Court of Appeals. 187 Misc. 2d at 37.

6. Resources for students with extraordinary needs. The record includes substantial evidence demonstrating that students with physical and mental disabilities require additional resources in order to meet their educational needs. PFOF ¶¶ 1265-76. Federal and State laws specifically require that additional programs and resources be provided to these

students. *See, e.g.*, 20 U.S.C. § 1401, *et seq.*; N.Y. Educ. L. § 4201, *et seq.* The State does not dispute this need.

7. Safe orderly environment. Community superintendents and other witnesses at trial established conclusively that a safe and orderly school environment is essential for teaching and learning. PFOF ¶¶ 1442-1448. Governor Pataki, in proposing new programs to reduce the threat of school violence, clearly agreed. Px 2552 at 4; *see also* Px 1027 at 7-8. There can be no serious objection to including the need for a safe orderly environment in the final list of education essentials.

II. NEW YORK CITY PUBLIC SCHOOL STUDENTS DO NOT RECEIVE THE OPPORTUNITY FOR A SOUND BASIC EDUCATION

The gross inadequacies described in the Statement of Facts require little analysis. Collectively and cumulatively, these inadequacies have deprived hundreds of thousands of New York City children of the opportunity to obtain "the foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment." And, as the gross record of failure revealed in the measures of student outcomes starkly reveals, the New York City public school system "has deficiencies so debilitating that it is tantamount to no education at all" for many of the city's children. Def. Br. at 56. In short, the evidence proves that the New York City public school system fails to provide the opportunity for its students to receive a sound basic education, whether judged by the trial court's standard or the State's proposed "standard." The record fully supports the trial court's finding that:

> The majority of the City's public school students leave high school unprepared for more than low-paying work, unprepared for college, and unprepared for the duties placed upon them by a democratic society.

187 Misc. 2d at 68.

The State's attack on the trial court's findings is notable for what it avoids. The State ignores much of the evidence concerning the adequacy of resources, it ignores the collective and cumulative effect of resource inadequacies, and it ignores virtually every measure of student outcome. Instead, the State applies an extremely selective, distorted and ahistorcal analysis to support its claim that the education provided in New York City's public schools "far exceeds" the constitutional standard. Def. Br. at 65.

Education is unquestionably a cumulative process in which student achievement is affected not only by the resources that are available in any particular year, but also by the resources that have been provided to that student over the course of the student's time within the system. What a student knows by the end of twelfth grade is a function of what she learned during her entire education. For example, a lack of exposure to qualified teachers in kindergarten through eleventh grade undoubtedly significantly controls twelfth grade performance. This common-sense truth was well supported at trial by experts presented by both Plaintiffs and Defendants.

For example, Defendants' own expert, Dr. John Murphy, explicitly agreed "that the effects of an educational system are cumulative on children." Murphy 16630:2-5; *see also* Darling-Hammond 6477:7-24. Dr. Murphy's opinion reflected his own experience as a school superintendent during which he observed that students who received additional resources beginning in kindergarten had greater improvement in test scores than children who did not begin receiving such resources until second grade. As Dr. Murphy explained, "[t]he youngsters at the higher grade were impacted by a different environment in the first couple of years of school, and so there was a problem of compensating for those differences." Murphy 16630:16-19; *see also* Px 3376. Dr. Murphy's testimony is consistent with the testimony of Plaintiffs'

expert, Dr. Darling-Hammond, who explained that the curriculum frameworks that formed the basis for the RLS were developed on the premise that "education is a cumulative activity and so everything that's represented at the commencement level [of the Learning Standards] really begins much earlier." Darling-Hammond 6477:14-17.

The evidence presented at trial consisted of facts relating to the resources and conditions provided in the New York City public school system generally over the thirteen-year period beginning with the entry into kindergarten of the Class of 1999, the last class to be eligible to graduate high school before trial commenced. The trial court's holding that the New York City public school system did not meet the constitutional minimum was therefore based upon evidence of the cumulative nature of education.

The evidence demonstrated that the Class of 1999 was, throughout its years in the New York City school system, denied the opportunity for a sound basic education. Children entering kindergarten in the Fall of 1986 faced an educational future of:

- **Dilapidated Buildings.** It was as early as 1988 that the Legislature itself declared that New York City facilities were in "deplorable physical condition." New York City Construction Auth. Act, L. 1988 c. 738 § 1. These deficiencies have never been remedied.

- **Oversized Classes.** Average class size for kindergarten in 1986 in New York City was 24.3 students a class. By the time the Class of 1999 was in fourth grade in 1990, average class size in New York City was 27.3 and, by the time they were eligible for history and government in high school, average class size had risen to 30.6. Px 1 at 31.

- **Unqualified Teachers.** For every year of their schooling, the Class of 1999 had at least a one-in-nine chance of being taught by an uncertified teacher for each class and an even greater chance of being taught by an inexperienced or otherwise unprepared teacher. PFOF ¶¶ 320-29.

In light of these consistent deficiencies, it is not surprising that by graduation day in June 1999, half of the Class of 1999 had failed to receive a diploma. (If past trends hold, ultimately more than 30 percent of them will leave school without a diploma.) Supp. App. at RA305 (Px 1251 at Table 6, p. 22); Px 2490A; PFOF ¶ 1601.

In total, the evidence presented at trial demonstrated that the New York City public schools unquestionably fail – and have failed for more than a decade – to provide their students with the seven categories of resources that the trial court identified after consideration of the trial record and review of the template outlined by the Court of Appeals in *CFE I*. Moreover, the negative effect caused by each category of inadequate resources is compounded by the inadequacies of the other resources. For example, teachers who are already unqualified are made even less effective when they are placed in over-sized classes. Over-sized classes are even more difficult to manage and instruct when they are held in inadequate facilities and without the benefit of appropriate textbooks or classroom supplies. A curriculum, no matter how well designed, cannot be implemented without qualified teachers, appropriate class sizes, and adequate facilities and instructional materials.

The testimony of Dr. Lester Young, the Superintendent of District 13, succinctly summarizes the overwhelming evidence showing the devastating effect of the collective and cumulative denial of adequate resources. Dr. Young, a former teacher and SED official, has spent thirty years observing and working in schools throughout New York City and the rest of the state. He described the educational triage that must be performed by New York City educators:

> At the classroom level . . . teachers who have large classes of at-risk students are not able to devote enough time to the needs of all their students. When additional resources have been made available, I have observed that teachers must choose who among

> many needy students will receive these services, because there is never enough money to provide adequate services to all needy students.
>
> At the school level . . . principals must decide which classes will be provided with qualified teachers, because too many teachers in most of our schools are not properly prepared for effective classroom instruction. I have observed principals deciding which classes should receive up-to-date textbooks, because there was not enough money to buy books for every class.
>
> At the district level . . . there has never been enough money available to allow superintendents to provide qualified teachers in every classroom; to provide adequate, functioning facilities in every building; to reduce class sizes to level necessary to meet properly the needs of our students; and to provide the extended day, extended school year and other academic support services that our at-risk students clearly require.

Px 2900-Young Stmt. ¶¶ 14-16.

The State, as it must, asks this Court to ignore this overwhelming evidence and instead focus on narrow arguments about isolated, frequently distorted facts that ultimately have nothing to do with assessing the quality of the education provided to New York City public school students. The State pretends that each of the resources it does discuss exists independently of other resources and that these resources can be viewed in snapshot fashion, divorced from any cumulative and collective effect. So the State is not concerned about what happens to children over time in the New York City public school system or about the relationships among resources. But this approach makes no sense – a public school system affects children over time and through the sum of the resources that it provides. That is the only way to judge the New York City public school system.

The absolutely dismal condition of the New York City public schools is laid out in detail in the Statement of Facts, as are the reasons why the State's arguments are unpersuasive. Below, we simply review these facts in relation to the trial court's seven-part resource outline.

As the analysis below demonstrates, the trial court committed no errors in applying the facts of the New York City public school system to the constitutional standard. Faced with the extensive factual record before it, the trial court reached the only conclusion it could: New York City students have been denied a constitutionally acceptable education.

A. New York City Students Are Denied The Resources Necessary For The Opportunity To Obtain A Sound Basic Education

Analyzed under the trial court's standard (or even under Defendants' "no education at all" mockery of a standard), the New York City public schools fail to provide the resources necessary to provide New York City students with an opportunity for a sound basic education.

Sufficient Numbers of Qualified Teachers, Principals and Other Personnel. New York City schools are staffed with too many unqualified personnel and, taken as a whole, the New York City teaching force does not provide even "minimally adequate teaching." In an effort to avoid the undeniable, the State seeks to downplay the testimony of the superintendents and other BOE and SED officials to take the stand, as well as the systemic statistical analysis presented by Dr. Lankford, and instead seeks to focus on the U/S ratings and the PASS evaluations, both of which were, wholly discredited by the very educators responsible for them. Meaningless reviews do not change the fact that, as a result of being unable to offer competitive salaries, the BOE is compelled to staff its classrooms with unprepared and unqualified teachers, some of whom Defendants' own paid expert classified as "terrible." Murphy 17439:12-17441:12

Appropriate Class Sizes. The State's "argument" regarding class size focuses on a collection of unproven theories (all of which are discussed and rejected above in the Statement of Facts) as to why classes in New York City are not smaller than they are. Defendants do not – nor could they – actually contest the two findings of the trial court that are central to the

examination of class size. First, Defendants offer no response to the collective conclusion of educators, experts and the federal and state governments that class size matters and is particularly important to the effective education of at-risk students. Second, Defendants do not contest the fact that many classes in New York City are simply enormous. For example, 72.3 percent of the students in sixth through eighth grades (148,869 children) were in classes of 28 or more. Px 2107C; Px 2108G; Px 2108H; Px 2108I. While no hard-and-fast rule can be used to determine what is and what is not an acceptable class size in every situation, the evidence unquestionably demonstrated that in every grade and every district, these two findings are all that are needed to reach the conclusion that the New York City school system would move closer to being able to offer the opportunity for a sound basic education if it were able to dedicate increased resources to class-size reduction in the form of both additional teachers and physical space.

Adequate and Accessible School Buildings with Sufficient Space to Ensure Appropriate Class Size and Implementation of a Sound Curriculum. Systemic evidence of pervasive and historical deficiencies in New York City public school facilities, as well as the findings of every authority – including the Legislature, the SED and the Board of Regents – that has examined the deplorable condition of New York City school facilities, unquestionably established that these facilities are in unacceptable condition. Ignoring this overwhelming evidence, Defendants focus their discussion of facilities on (a) the Building Condition Assessment Survey, which they then mischaracterize and misuse, (b) educationally unworkable proposals to transfer students from school to school and to have students attend schools in shifts (based both on time of day and month of year), and (c) a flawed and convoluted statistical

analysis that ran counter to common sense and the unanimous testimony of knowledgeable educators.

None of Defendants' arguments change the fact that hundreds of thousands of students attend schools in classrooms that lack minimally sufficient light, space, heat and air, or that hundreds of schools suffer from one or more of three fundamental deficiencies: (1) serious disrepair; (2) extreme overcrowding; and/or (3) a lack of essential educational facilities such as working science labs, adequate libraries, gymnasiums, and dedicated music and art rooms. Directing increased resources to facilities would unquestionably assist the New York City public school system in its effort to provide New York City students with a sound basic education.

Sufficient and Up-to-Date Books, Supplies, Libraries, Educational Technology and Laboratories. Again, instead of focusing on the overwhelming evidence that instrumentalities of learning are lacking in the New York City schools, Defendants focus on the discredited PASS reports to suggest that all of the superintendents and other witnesses who testified on this subject (and whose testimony was accepted by the trial court) are simply wrong. The State then points, again contrary to fact, to what it terms the "sheer amount of money" spent in this area as proof that all needs have been met. Def. Br. at 75. Nowhere in this simplistic analysis is there any honest discussion of what these materials actually cost or of the fact that the money discussed was provided for only a limited amount of time without guarantee of renewal.

The actual evidence on instructional materials demonstrated that New York City suffers from a historical and systemic shortage of textbooks, library books, science laboratory supplies and instructional technology that continues to this day. With respect to textbooks, even in the rare circumstances in which sufficient quantities do exist, the books are often antiquated and ill-matched to students' educational needs. Many schools do not even have libraries and in those

that do, the books are too few and often outdated. Indeed, these same schools suffer from a chronic lack of the most basic classroom supplies, including chalk, markers, copier paper, paper towels and classroom furniture. Science laboratories lack the most basic supplies and equipment, such as chemicals, specimens, microscopes, beakers and Bunsen burners.

Suitable Curricula, Including An Expanded Platform of Programs To Help At-Risk Students By Giving Them More "Time on Task". Defendants' suggestion that the trial court found the New York City curriculum satisfactory, Def. Br. at 72, can only be a purposeful effort to ignore both the actual findings of the trial court and the evidence on this issue. As the trial court found, while New York City may have available a suitable curriculum, the overall state of the New York City school system prevents this curriculum from being successfully implemented. A system that lacks sufficient numbers of qualified teachers, that is burdened with overly large class sizes, that fails to offer its students adequate facilities, and that cannot provide sufficient instructional materials simply cannot offer its students the opportunity to learn the materials mandated by even a well-designed curriculum.

The City's inability to provide necessary "time on task" to hundreds of thousands of students at risk of educational failure further impedes the delivery of the most basic curricula and is one of the most glaring and systemic implementation failures. The State's education policy must be guided by the understanding, promulgated by the Regents and the SED and recognized by the trial court, that "all children can attain the substantive knowledge and master the skills expected of high school students." 187 Misc. 2d at 23; Px 1 at 3; Px 21 at 123; Px 519 at 3. Having acknowledged that all children can learn, the State must provide programs that aid children at risk to ensure that each child has a meaningful opportunity to obtain a sound basic education in order to satisfy its constitutional obligation. These programs, necessary to

effectively deliver curricula and to provide hundreds of thousands of at-risk students in New York City with the opportunity for a sound basic education, are mandated by Article XI of the State Constitution.

Resources for Students with Extraordinary Needs. Although federal and state laws mandate a range of extra supports and services for students with disabilities and English language learners, the evidence at trial showed that massive numbers of students with these extraordinary needs are not receiving them. Thousands of students with disabilities are on waiting lists for mandated services, half of the bilingual special education programs are staffed by uncertified teachers, teachers are not available to provide the increased amount of English language arts services the state requires to prepare English language learners to meet the new Regents examinations, and disproportionately high numbers of disabled and ELL students fail to meet minimum proficiency standards or to obtain high school diplomas. Nowhere in its brief does the State contest these facts.

A Safe, Orderly School Environment. Despite the fact that New York City currently employs more than 3,000 security officers and expends more than $100 million annually on this need, PFOF ¶ 1448, the city's public schools are still subject to the extensive crime, violent gangs, and a drug culture that are endemic to poor urban centers. These urban security problems not only undercut the creation of a climate conducive to teaching and learning, but they also negatively impact the already severe problems of personnel recruitment and retention. The State does not contest that a safe, orderly environment is essential to a sound basic education and cannot be obtained in New York City without sufficient funds.

Outcomes. Although academic results are not the determining factor in assessing whether a school system provides an opportunity for a sound basic education, Defendants

concede that the academic performance of New York City students is at least a relevant inquiry in this case, arguing that test scores and other outcome measures support their claim that the city's schools meet the constitutional standard. The basic facts relating to the failure of New York City's school system to educate its students are not in dispute; the only dispute is about the meaning of that failure. It is undisputed that in 1998 over 37 percent of the city's third graders were illiterate. But to the State, these figures "arguably indicate that student performance could be improved." Def. Br. at 81. It is undisputed that over 40 percent of the students entering ninth grade will still be unable to do sixth-grade math or eighth-grade reading after spending seven years in New York City public schools. But to the State, sixth-grade math skills and eighth grade reading skills are "aspirational." Def. Br. at 83.

It is undisputed that 67 percent of the members of the ninth-grade class who do receive a high school diploma will receive a "local diploma" that does not even guarantee they are able to read or do mathematics at high school levels. It is undisputed that many of these students lack the skills for more than low-level service jobs. But to the State, that is acceptable because there probably are not enough higher level jobs for them. And any suggestion that this system perpetuates discrimination – because it favors those whose wealth and background allows them to compensate for the school system's failures – is irrelevant because "deficiencies in student performance that are attributable to socioeconomic conditions extrinsic to the education system are not relevant." Def. Br. at 62. After all, "no district in the nation . . . has achieved the goal of eliminating the gap between disadvantaged and non-disadvantaged children." Def. Br. at 107.

If this Court is prepared to hold that illiteracy is "arguably" a sign that improvement is possible, that eighth-grade reading and sixth-grade math skills are "aspirational," and that the failure to prepare disadvantaged students for anything more than the lowest entry-level jobs is

acceptable, given their socioeconomic backgrounds, then the trial court erred. But if something more than that is required, then the record overwhelmingly supports the trial court's conclusion that outcomes show that the New York public school system is not providing a sound basic education.

B. The Trial Court Correctly Applied The Sound Basic Education Standard To The Facts Presented At Trial

Defendants' brief purports to outline four legal errors committed by the trial court in its application of the standard for a sound basic education to the facts presented at trial concerning the New York City educational system. Def. Br. at 61-64. In essence, Defendants advance the following baseless arguments:

1. The trial court impermissibly failed to rely upon systemic evidence;

2. The trial court improperly referenced evidence concerning districts outside of New York City;

3. The trial court should have attributed the failure of New York City children to the fact that many of them are poor; and

4. The trial court should have afforded the Legislature the presumption that the school system in New York City is constitutional.

These arguments are belied by the facts and the law.

First, the trial court's decision unquestionably relies on systemic evidence for each and every one of its substantive findings. Preliminarily, all of the court's findings were supported by the observations of the state and city officials responsible for overseeing the entire school system, including the testimony of ten superintendents, who, in total, were responsible for the education of approximately 323,000 students in 336 city schools. Px 1410; Px 1604; Supp. App. at RA306 (Px 1849); Px 2026A-Zardoya Stmt. ¶ 19; Px 2332A-Rosa Stmt. ¶ 27; Px 2855-Lee Stmt. ¶¶ 2, 16; Px 2900-Young Stmt. ¶ 33; Cashin 266:2-4; Coppin 554:2-9; Santandreu

13512:14-22. With respect to teachers, the trial court's findings were based upon certification, salary, educational status, and experience data for every single New York City teacher, and certification test score data for 95 percent of all certified teachers to have joined the system since 1992. Lankford 4636:12-4638:15; PFOF ¶ 375.

With respect to facilities, the court's findings were based on the reports of numerous government commissions and authorities and the comprehensive Building Condition Assessment Survey. 187 Misc.2d at 40-43. With respect to class size, the court had before it comprehensive data concerning the actual size of New York City classrooms. Px 1833A; Finn 8092:14-20, 8093:24-8094:5. With respect to instructional materials, the court's findings were based on systemic state documentation and the testimony of BOE officials, the SED official who oversees the City's more than 90 SURR schools, a representative of the City Comptroller's office which monitors system-wide expenditures, and the former Chief Information Officer for the BOE, among others. PFOF ¶¶ 954-58, 966-68, 972, 977, 1000-01, 1005. Finally, with respect to academic outcomes, the court's findings were based on more than 15 years of cohort data concerning New York City high school graduates and dropouts and on test data for every student in the city schools. It is therefore systemic evidence that established that New York City students are not receiving the opportunity for a sound basic education.

Second, no error was committed by the trial court's specific and limited references to the facts related to districts outside of New York City. These references in no way convert the standard from being one about adequacy into one about parity. Plaintiffs do not contend – and nothing in the trial court's decision so much as suggests – that the constitution grants New York City students the right to the ***same*** quality of education made available to students elsewhere in the state. The trial court's references to districts outside of New York City were for specific and

limited purposes. For example, teacher salaries outside of New York City become relevant when New York City is shown to lose in its competition with other districts for qualified personnel. Moreover, comparative data was offered by Plaintiffs and relied upon by the trial court to show that it is feasible for a school system to provide a sound basic education. If other districts are able to have qualified teachers, adequate facilities, ample supplies and proper class sizes, there is no reason New York City cannot do the same.

Third, the trial court did not err in refusing to give up on the majority of New York City students simply because they are poor or live in disadvantaged neighborhoods, as Defendants suggest it should have done.[39] As discussed in detail above, while children who live in poverty, do not speak English, or come from a home of recent immigrants face added challenges to academic success, the evidence at trial unambiguously demonstrated that all children (except a small percentage who suffer from serious individual disabilities) can succeed educationally if suitable resources and services are made available. Moreover, nothing in the trial court's decision wavered from the Court of Appeals' emphasis upon opportunities rather than results. At-risk students are entitled to an expanded platform of services so that they may be provided with an opportunity for a sound basic education, not to guarantee any particular level of academic success.

Finally, the State's argument that the Court of Appeals in *CFE I* recognized a presumption that minimum educational standards established in certain state statutes must be

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[39] The State's reference to *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073 (7th Cir. 2001), is shockingly misleading. *People Who Care* was a desegregation case in which the court no more than commented that the ***federal*** Constitution does not afford citizens the right to demand that a state educational system address the effect of demographic and socioeconomic factors on a student's preparedness to learn. Equally misleading is Defendants' reference to a passage in *Levittown* that concerns nothing more

given special deference by the Court, but that any additional standards enacted by the Regents should be ignored, is simply nonsense. First of all, the Court of Appeals established no presumptions as to sources of standards in *CFE I.* Rather, as discussed above, the Court articulated a template and directed the trial court to further develop it based on the trial record.

Second, the artificial distinction between legislative standards and Regents' standards suggested by Defendants has no basis in law or in educational practice; the standards governing public education are a seamless web of statutes and regulations, all given equal force of law by Education Law section 207. That statute provides that the regulations of the Commissioner of Education and the Regents, if not countermanded by the Legislature, are deemed to be the official policy of the State of New York. If, to use Defendants' inappropriately disparaging term, the Regents "ratcheted up" the constitutional floor by proclaiming higher standards, Def. Br. at 63, then this was done with the full acquiescence of the Legislature and the Governor, who have repeatedly endorsed them.

III. THE TRIAL COURT PROPERLY FOUND THAT PLAINTIFFS ESTABLISHED A CAUSAL LINK BETWEEN THE PRESENT FUNDING SYSTEM AND THE FAILURE OF THE NEW YORK CITY SCHOOLS TO PROVIDE A SOUND BASIC EDUCATION

In *CFE I*, the Court of Appeals determined that "[i]n 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 to New York City school children." 86 N.Y.2d at 318. The Court said the gross inadequacies alleged in the Complaint, "if proven, could support a conclusion that the State's public school financing system effectively fails to provide for minimally adequate educational opportunity." 86 N.Y.2d at 319.

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relevant to this case than an interpretation of the Equal Protection Clause of the ***federal*** Constitution and its applicability to municipal overburden.

The gross resource inadequacies and educational failure described in the Statement of Facts arise from a lack of money to pay for better qualified teachers, adequate facilities, additional programs for at-risk children and other educational essentials. These additional resources are not required simply to "improve" educational opportunities, as the State claims, but to provide the minimum opportunity required by the State Constitution. The state education finance system has no mechanism to ensure that the BOE has sufficient funds. There is no question, therefore, that the trial court properly found that there is a causal link between the present funding system and the failure of the New York City public school system to provide a sound basic education.

The State ignores the clear causation standard set forth by the Court of Appeals and claims that the trial court erred because:

- It failed to consider whether the funds currently available to the BOE are sufficient. This misstates the opinion, and ignores the record.
- It failed to credit the opinions of the State's experts that money has no effect on student outcomes. In fact, the real world evidence and all expert analyses – including the State's – clearly established that "money matters."
- It held the State, rather than the City and the BOE, ultimately responsible for the New York City public school system's failure to provide a sound basic education. Apart from the irony of this argument (the State successfully moved to have the City and the BOE dismissed from companion litigation), the State's claim has been explicitly rejected by the Court of Appeals and is inconsistent with the State's virtually complete control over the operation and finances of both the City and the BOE.

There simply is no question that money matters, that the BOE has not had enough money, and that the state education finance system is a principal cause of this deficiency. Although actions of the City and the BOE may also have contributed to the gross failures of the New York City public education system, and additional remedies (other than reform of the education

finance system) may be necessary to reverse those failures, the Constitution imposes the ultimate responsibility to ensure a sound basic education squarely on the State.

A. Defendants' Claims That The New York City Public School System Has Sufficient Funding Are Based On Flawed Analysis

In the face of the overwhelming evidence presented by Plaintiffs demonstrating that New York City lacks sufficient funds to provide its students with a sound basic education, Defendants point to overall spending figures in a purported effort to show that New York City schools are awash in money. Def. Br. 89-92. In essence, Defendants' claim that because the New York City school system has a budget in the billions of dollars, it must have enough money. The trial court properly rejected this argument.

1. It Costs More To Educate Children In New York City Than It Does To Educate Children Elsewhere

When New York City's per-pupil expenditures are (a) adjusted to account for the city's high cost of living, (b) adjusted to reflect the additional educational resources required by New York City's at-risk students, and (c) compared to surrounding suburban districts (with which New York City must compete for personnel), the record leaves no room for dispute that New York City schools lack adequate funding to provide their students with a sound basic education. 187 Misc. 2d at 96.

As discussed above, it simply costs more to educate children in New York City than it does to educate children in almost any other place in this country. First, the cost of doing any business in New York City is high. It costs more to acquire land, to construct buildings to purchase services and hire personnel.[40] It also costs more – $100 million annually – to maintain

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[40] Defendants' case largely ignores the cost of living issue. Dr. Hanushek, Defendants' only witness to touch on the concept of cost of living, relied upon an index that grouped Rochester, Buffalo, Syracuse, and New York City together and gave them all the *same* cost indicator – plainly an absurd approach. Hanushek 16026:20-16027:4, 16034:3-17;

the safety of the New York City urban schools. Second, New York City schools must educate a significant number of at-risk children who cost more to educate than students whose socioeconomic and demographic backgrounds do not place them at risk of academic failure. Murphy 16650:12-17, 16651:7-9; Hanushek 15944:18-22; Guthrie 21197:23-21198:7; PFOF ¶¶ 278, 291.

Defendants' gross comparisons of New York City's annual spending with that of other districts across the country are entirely meaningless. Moreover, nowhere in Defendants' brief do they acknowledge that New York City's per-pupil spending is substantially *below* the statewide public school average, Px 1 at 82; PFOF ¶ 1766, nor do they note that New York City public schools spend less than many northeastern urban school districts, including Boston, Newark, Hartford, Buffalo, and Pittsburgh. Murphy 16661:4-16665:6; Px 3382; Px 3478; PFOF ¶ 1766.[41]

PFOF ¶ 1767. The proper methodology would have been to adjust New York City's spending in absolute dollars by its cost of living as set forth in a *city-by-city* cost of living index. Had Defendants used the AFT city-by-city index – according to which New York City has the highest cost of living of 100 large cities studied, Podgursky 17809:19-17811:4, 17821:10-19; PFOF ¶ 437 – Defendants would have demonstrated that New York City spends far less in real dollars than its peers around the country.

[41] The trial court properly precluded Defendants' expert, Dr. James Smith, from testifying regarding the opinions of *other educators* as to whether the BOE could provide a sound, basic education to New York City students using current funding levels. It is elementary that such testimony constitutes inadmissible hearsay. *See* 57 Jur. 2d Evidence and Witnesses § 258; *see also Hambsch v. New York City Trans. Auth.*, 63 N.Y.2d 723, 725 (1984). The case of *Freitag v. New York Times*, 260 A.D.2d 748 (3d Dep't 1999) – curiously cited by Defendants in support of the alleged admissibility of Dr. Smith's testimony, Def. Br. at 90 n.24 – clearly demonstrates that Dr. Smith's testimony was properly excluded:

> One expert referred to conversations he had with other people employed in similar occupations, but the Board rejected the expert's reliance on these . . . conversations. Inasmuch as the "professional reliability" exception is clearly inapplicable and the people with whom the expert conversed were not subject to cross-examination.

2. Defendants Presented No Systemic Evidence Of Inefficiency Or Corruption In The New York City Public School System

As discussed in detail above, Defendants' allegations that the BOE is plagued by "waste, ineffectiveness, and to some degree, fraud" are entirely unsupported by the record in this case. Def. Br. at 94. Contrary to Defendants' claims that the BOE spends inordinate sums inefficiently, the evidence demonstrates that the BOE spends (1) far less money per pupil than the state average, (2) a smaller proportion of its budget on administrative expenses than the state average, and (3) a greater proportion of its budget on direct instruction than the state average. 187 Misc. 2d at 97; Px 1 at 82; Px 3179 at IV; Berne 12545:19-12546:2; PFOF ¶¶ 1732, 1766, 1768. Despite the extraordinary transparency of the BOE's finances, Defendants failed to identify at trial any systemic examples of fraud or mismanagement.

B. Sufficient Additional Funds Spent Appropriately Would Enable New York City's Public Schools To Provide A Sound Basic Education

The trial court found overwhelming evidence that increased funding could be used to provide a sound basic education. The State claims that the trial court "relied on plaintiffs' mostly anecdotal evidence." The State goes on to claim that:

> 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.

Def. Br. at 88.

None of this is true. First, conclusive and systemic proof that money properly directed will bring New York City's public schools up to the constitutionally mandated level was offered by dozens of SED and BOE witnesses with intimate knowledge of the school system. Second,

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Id. at 749, 687 N.Y.S.2d at 811.

evidence from nationally respected experts in educational research and practice established that money matters. PFOF ¶¶ 1685-93. Those experts identified specific programs that would improve the education of students. *Id.* Using sound statistical methods they showed a significant improvement for at risk students with relatively small expenditures. *Id.* That testimony was confirmed by the State's own experts, who agreed on the theory and on the application of those resources. Hanushek 15944:18-22; Guthrie 21197:23-21198:7; PFOF ¶¶ 278, 291.

The State's argument is reduced, finally, to claiming that the trial court should have ignored all of the evidence offered by Plaintiffs and by dozens of knowledgeable witnesses, and instead accepted without question the State's interpretation of the testimony of its two well-compensated experts, Dr. Eric Hanushek and Dr. David Armor, neither of whom had ever analyzed the New York City school system before being hired in this case. PFOF ¶¶ 1696, 1699. The trial court, which is given broad discretion in accepting expert testimony, properly rejected this flawed and meaningless testimony. *See Amon v. New York,* 68 A.D.2d 941, 942 (3rd Dep't 1979); *People v. Piquion,* 283 A.D.2d 233, 233 (1st Dep't 2001).

C. The Testimony Of Dozens Of Knowledgeable BOE And SED Witnesses Established That Money Matters

As discussed in detail in the Statement of Facts, these very requirements identified by numerous witnesses as necessary to provide a sound basic education – such as qualified teachers, ample curricular programs, appropriate class sizes, adequate facilities, and effective school leaders – cannot be effectively provided at the constitutionally required level absent additional funding directed to the New York City public schools. Better teachers, smaller classes and more time in school cost money.

These are expressly needed here where the current state of education falls well below the constitutional minimum. Plaintiffs seek these improvements not merely to improve education in New York City but to bring it to the level of a sound basic education.

D. The Trial Court's Findings Were Strongly Supported By Evidence From Nationally Recognized Experts In Education And Research, By Evidence About Results Of Programs In New York City Schools, And Even By Testimony From The State's Own Experts

The testimony of the BOE and SED witnesses who know the New York City system best is alone sufficient to satisfy Plaintiffs' burden of establishing that additional money well spent could raise the level of the New York City public schools to the constitutional minimum. No "expert" testimony is needed to establish such a basic and commonsensical fact. Nevertheless, expert testimony was offered and, as the trial court found, it also favors Plaintiffs. When statistical studies are properly performed and controlled, they conclusively demonstrate that money matters.

1. The Testimony Of Dr. David Grissmer, Which Was Ignored By The State, Firmly Supports The Trial Court's Conclusions

Dr. Grissmer, a senior researcher with the RAND Corporation, offered detailed evidence based on years of analysis of national data that money does matter. PFOF ¶¶ 1687-93. In particular, he showed that money spent on disadvantaged students has a profound beneficial effect. PFOF ¶ 1688. The State ignored this testimony.

The analysis by Dr. Grissmer focused on the results of the National Assessment of Educational Progress ("NAEP"). Grissmer 9353:7-9354:20. His analysis directly contradicts the State's tired cant that billions of dollars have been spent on education in America with no result. Def. Br. at 101-04. He showed that NAEP scores of disadvantaged students rose dramatically during the period 1970 to 1996. Px 2197A; Px 2197B; Px 2199G; Px 2199H; Grissmer 9359:15-9360:6, 9361:20-9362:11, 9364:3-7, 9364:17-9366:19, 9367:13-24. That

improvement was missed by people who only looked at the national average scores, which included students in middle-class and wealthy school districts.

Dr. Grissmer also analyzed when students started school and how resources affected their test scores over time. PFOF ¶ 1689. There was a strong relationship between the money spent on students in their early years and their test scores:

> [I]n order to intervene in achievement, you can't intervene when kids are in high school as effectively as when kids are younger . . .. [O]nly kids that entered school around 1970 got the benefit of whatever programs and policies that began to be implemented around 1970. You had to be in school for your entire career under a new set of policies in order to get substantial score gains.

Grissmer 9376:13-22; PFOF ¶ 1689. He also found a leveling off of score gains due to lower scores from students who had first started school in the 1980s, when educational spending was cut back. Grissmer 9377:15-23.

Finally, Dr. Grissmer testified about his analysis of the most recent, and highly detailed, NAEP data. His analysis showed direct positive effects of prekindergarten, lower class size, and additional resources for teachers. Grissmer 9426:15-9427:9; PFOF ¶ 281, 1691. He found that these additional resources had the greatest impact on scores from students of low socioeconomic status. Px 2272QQ; Px 2272VV; Grissmer 9449:24-9452:8, 9644:23-9646:8. He explained the theory confirmed by these results: additional time spent by a qualified teacher directly teaching children improves their education. Smaller classes increased the time a teacher spent dealing with individual students, compared to keeping order. Additional resources allowed teachers to spend more time actually teaching. This additional instructional time is particularly important for at-risk students. Grissmer 9466:20-9468:11, 9479:6-11; PFOF ¶ 1691.

Dr. Grissmer also explained why there was a limited effect of additional resources on students from higher socioeconomic levels. Grissmer 9387:23-9388:4. Those students get adult

help outside of school. They have access to books, and live in homes where English is spoken regularly. Even when they are not in school, they are taken to museums or other educational institutions. If the schools fail to provide elements required for a basic education, there is usually enough wealth and education in higher income groups to make up for that failure. But if the schools fail to provide an education for low socioeconomic level students, they have nowhere else to go. 187 Misc. 2d at 21-23; Grissmer 9468:21-9469:4; PFOF ¶ 617.

2. The State's Own Experts Supported Causation

The State, not surprisingly, also ignores the testimony of defense expert Dr. John Murphy, the school district superintendent who achieved a significant increase in the performance of economically disadvantaged students. Dr. Murphy testified that preschool programs, full-day kindergarten, extended day, Saturday classes, and extended school year programs were all crucial to closing the performance gap between students from different socioeconomic levels. Murphy 16650:6-21; PFOF ¶ 1076.

Dr. Murphy's opinions, and his experience, were shared by many of the State's other experts. Dr. Walberg agreed that after-school programs, Saturday programs, and summer school can all improve learning. Walberg 17258:9-17259:22; PFOF ¶ 1076. Indeed, he testified that after-school programs can compensate for deficiencies in the "curriculum of the home." Dr. Christine Rossell also agreed that time on task, *i.e.*, the time spent actually learning, was the best predictor of student achievement. Rossell 16905:21-24; PFOF ¶ 1076. Indeed, even Dr. Hanushek, one of the two experts upon whom the State asks this Court to base its entire causation holding, admitted that improving the quality of teaching will improve the education of the students. Hanushek 15948:8-15949:8. Dr. Podgursky confirmed this. Podgursky 17267:12-20.

Taking into account this expert testimony, the trial court had an overwhelming theoretical and practical basis for concluding that there is "a causal link between funding and educational opportunity" when increased funding is spent on extended time, smaller classes, and better teachers. 187 Misc. 2d at 75-76.

3. Evidence About Results Of Programs In New York City, Including Extensive Testimony About Results In The Schools Of District Two, In Manhattan, Supported Causation

As set out in the Statement of Facts, there was extensive evidence about specific programs and services in New York City that increased performance. For the most part, the State ignores this evidence, except to advance the astonishing claim that it is irrelevant to this Court whether individual children learn to read as a result of Reading Recovery.

There is no basis for the State's claim that the experience of District Two proves that money does not matter. While it is obvious that many of the students in District Two (located in the most wealthy area of Manhattan) enjoy educational advantages not available to at-risk students, the State focuses exclusively on specific cash expenditures in School Based Budget Reports. In fact, those reports show that the BOE focuses its limited funds on schools with a high degree of poverty and poor test scores. PFOF ¶ 1635. But this does not mean that students in District Two actually have fewer resources devoted to their education; substantial private resources flow to District Two.

Outside support for District Two comes from a variety of sources. Parents provide substantial financial support to the schools. Fink 7799:7-7800:16, 7801:21-7802:4. This is a district where a benefit flea market makes $100,000 a year, where a PTA donates $200,000 a year, Fink 7800:17-7801:24, and where parent groups pay for enrichment teachers and textbooks. Fink 7801:12-7802:9. In addition, virtually every school has a partnership with a

major corporation or non-profit group. Fink 7786:5-23. Many schools all receive direct grants from private and non-profit sources. Fink 7732:11-19, 7773:7-20, 7789:22-7790:9.

Far from supporting the State's claims that money doesn't matter, evidence concerning resources in District Two shows that money does matter. District Two spends over six percent of its budget on professional development, and would like to spend up to 20 percent, even though it has a higher percentage of certified and experienced teachers than many other districts. PFOF ¶¶ 581-82. This money is used to pay for master teachers, staff developers (trained teachers), constant visitation (requiring substitutes), training schools where teachers come to learn the best techniques, and constant communication. PFOF ¶¶ 570-77. District Two pays for this program with an outside grant, PFOF ¶ 579, and by slashing other programs from the official budget, knowing that the parents will pick up the slack. PFOF ¶¶ 569, 580.

Even with these resources, although District Two is one of the City's highest performing districts, it still cannot meet the State's standard that it have 90 percent of its students reading at the State Reference Point for literacy. Outside of New York City, most school districts meet this standard. Px 2 at 5, 110; Px 4 at 51; Px 6 at 51; Px 8 at 51.

4. The Trial Court Properly Rejected The Flawed And Ultimately Meaningless Opinion Testimony By The States Two Expert Witnesses: Dr. Eric Hanushek And Dr. David Armor

Ultimately, the State's argument on causation comes down to a request that this Court ignore the testimony of dozens of knowledgeable witnesses in favor of the deeply flawed testimony of two experts. The trial court's refusal to accept this same invitation hardly constitutes error.

In advancing this argument, the State essentially asks this Court to ignore common sense and accept statistical analyses that purport to "prove" that unqualified teachers, overcrowded classrooms and dilapidated buildings have no effect on whether or not a district is providing a

sound basic education. This Court does not have to accept testimony that defies logic and common sense, and that is based upon statistics that, because they are not supported by any reasonable underlying theory, are "empty." Grissmer 22357:17-21. Courts throughout the United States have already rejected such claims. PFOF ¶ 1679.

5. The Trial Court Properly Rejected The Testimony Of Dr. Eric Hanushek, Who Asked Meaningless Questions, Ran Computerized Analyses Of Data He Did Not Prepare And Did Not Even Understand, And Came Up With Conclusions That Even He Did Not Believe

The State relies heavily on the testimony of Dr. Eric Hanushek. But Dr. Hanushek never said that increased funding could not result in increased performance. Indeed, he agreed that money, properly spent, could have that effect. Hanushek 15940:24-15943:13. He agreed that smaller classes could have an effect and that teacher quality could have an effect. Hanushek 15948:8-15950:14, 15970:23-15973:5. All that he said at trial was that the statistical manipulations of data that he ran did not show a statistically significant correlation in New York City's public schools. It is not surprising that, in a system that has been starved of funds for years, it is difficult to find systemwide effects of increased funding.

Dr. Hanushek's opinions rest entirely on the use of regression analysis, a statistical tool used to study relationships between diverse phenomena. Dr. Hanushek's regressions suffer from numerous methodological flaws, many of which were cited by the trial court. 187 Misc. 2d at 74-75; PFOF ¶¶ 1700-09, 1715-21. One of his most significant errors was in comparing outcomes and resources in a single school year. Dr. Hanushek purported to draw conclusions about the effect of money by comparing Regents diploma rates with spending in the twelfth grade. He compared elementary school test results with average spending in the same year. In both cases, he failed to account for the cumulative nature of education. 187 Misc. 2d at 74;

PFOF ¶ 1701. For this reason, his analysis is, as Dr. Grissmer testified, "noncredible." Grissmer 22426:7-22427:12.

The State tries to resurrect Dr. Hanushek's analysis by claiming that "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." Def. Br. at 105. This claim was never made below. Dr. Hanushek never even hinted that he assumed any of that to be the case, or that he even considered the issue. It is, in fact, completely false.

First, the record is replete with statements about the variations between years. The State proudly claims that there were significant increases in funding during the years since 1993. PFOF ¶¶ 2011-14. The testimony is clear that the massive influx of computers into the schools, as part of Project Smart, took place in the last two years. PFOF ¶¶ 1012-13. Beyond those overall increases, the testimony is clear that budgeting between schools changes from year to year. Px 3114 at 315; PFOF ¶¶ 1704-05. For example, changes in test scores, student population and demographics, or changes in state and city mandates (*e.g.*, class size reduction), affect per-pupil expenditures.[42]

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[42] The State's assertion that students stay in the same school year after year is also demonstrably false. There was significant evidence presented at trial concerning the very high mobility rates of New York City's students, particularly in high poverty or high minority areas. Px 1 at 128; Px 19 at 10; Px 791 at 1; Evans-Tranumn 1405:15-1406:16; PFOF ¶ 250. The State also claims that if there were differences, "it would be expected to *overstate* the correlation between resources and performance as often as it *understated* it." None of the State's experts ever suggested this was a legitimate argument. The State's claim requires that all changes in spending over the years be random. But the record is clear that the changes were anything but random. For example, the City's allocation process intentionally sends resources to poorly performing schools.

6. The Trial Court Properly Rejected The Biased And Meaningless Testimony Of Dr. David Armor

The State also relies heavily on regressions conducted by Dr. David Armor, a professional witness. Contrary to the State's claim, Dr. Armor is not a professor at George Mason University. He holds a part-time untenured lecturing position there. Armor 20615:10-16. He left academics generally in the 1970s because of intense opposition to his views on mandatory desegregation. Armor 20614:25-20615:19; 20615:25-20616:8. He now makes over half of his income testifying as an expert witness in cases such as this one, primarily for the State's trial counsel, Sutherland Asbill & Brennan. Armor 20611:4-20614:12; PFOF ¶ 1695.

Dr. Armor conducted an elaborate manipulation of student performance data. He claimed that when he "leveled the playing field," New York City's students were doing as well as anyone else. He said that there was no connection between student performance and a variety of resource measures, as well as overall per pupil expenditures.

In "leveling the playing field," Dr. Armor looked at the raw scores of students in New York City on state and City tests. He looked at the socioeconomic backgrounds of each of those students and calculated how much better he thought each low socioeconomic class student would have scored if they had been born into a wealthier family. And he then added that extra score to each student's actual test score. Having done this analysis, Dr. Armor announced that he had "leveled the playing field," eliminating class differences. Armor 20450:6-20453:25.

There is a name for what Dr. Armor did. If a schoolteacher in an impoverished school believes that her students are at a disadvantage, and gives them a few answers to the questions so they can improve their test scores, this would be called cheating. If a student broke into a computer and added extra points to test scores to adjust for class differences, that would be

called cheating. Simply because this is being done by an expert witness for the State does not make it anything less.

The State tries to justify this analysis by pointing to the "Similar Schools Analysis" prepared by New York City. Px 2373 at BOE 769546. But that analysis does not adjust the students' test scores and then pretend the students can actually read or do math. The test scores are presented accurately. The Similar Schools Analysis simply provides, as one basis for comparison, the average performance of students in similar schools. PFOF ¶ 1711.

a. Dr. Armor Studied The Effect Of Resources In The Same Year As The Test Result, A Comparison Of Very Little Value

Dr. Armor looked at the scores of fifth graders, sixth graders and eighth graders. The achievement of these students is overwhelmingly due to their earlier experience. But Dr. Armor did not measure that earlier experience.

Once again, in support of their expert, the State on appeal makes arguments that Dr. Armor never made. As with Dr. Hanushek, they say the resources were the same over the years, and students all stayed in the same schools. Def. Br. at 105. This was false with Dr. Hanushek, and it is false with Dr. Armor. Indeed, Dr. Armor's very analysis destroys this claim. He was forced to look at different sets of schools to get his sixth grade test results, because many New York City school districts have moved the sixth grade to middle school. By definition, those students were not in the same school year after year. Nor were the eighth grade students, whose test scores Dr. Armor manipulated, in the same school year after year. Thus, the State's first argument is false on its face, rebutted by its expert's testimony.

Dr. Armor also made no attempt to adjust for the skewing effect caused by the use of parent resources to make up for the lower budgets in wealthier districts in New York City. Nor did he attempt to adjust for the skewing effect resulting from the City's yearly allocation of

additional funds to schools that had performed poorly on tests in the last year. It is therefore not surprising that his results reflect budgeting priorities in a particular year, rather than the cumulative effect of good or bad teaching.

Drs. Grissmer and Berne, experts in educational research, condemned Dr. Armor's study results as flawed and ultimately meaningless. PFOF ¶¶ 1701-02. On that basis alone the court properly rejected it.

b. Dr. Armor Deliberately Chose To Analyze Data That He Knew Had Very Little Impact On The Quality Of Education

Dr. Armor was a man on a mission, and his mission was to avoid finding any evidence that money could improve student performance. To that end, he chose variables that were deliberately low in value. He looked at teachers with experience over 5 years, when the unanimous testimony – including from Dr. Hanushek – was that the pivotal point was teachers with less than 2 years of experience. PFOF ¶¶ 340, 1713.

The State makes the claim that "because the five-year period Dr. Armor used encompasses the two- and three- year periods claimed as relevant . . . one would expect his study to reflect at least some significant correspondence" with results. Def. Br. at 109. This argument was also never made at trial, and for good reason. It makes no sense. Dr. Armor was combining into one measurement both experienced and inexperienced teachers. He was combining districts that have teachers with 4 or 5 years in front of a classroom with New York City schools where there are teachers who have never been in a classroom before. A measurement that does not distinguish between a teacher with five years in the classroom and a total novice is meaningless.[43]

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[43] Dr. Armor made the questionable data choice. PFOF ¶¶ 1696-97.

E. The State Retains Ultimate Authority For Ensuring That The New York City Public Schools Provide Their Students With The Opportunity For A Sound Basic Education

Defendants further seek to avoid responsibility for their educational system by shifting blame from the state, where the constitution vests it, to New York City. Def. Br. at 95-99. The trial court properly rejected this argument. 187 Misc. 2d at 79-80. As a matter of law, under our constitutional scheme, the State is ultimately responsible for ensuring that adequate resources are provided in the state's schools. *Id.*; PFOF ¶¶ 1792-97. As a matter of fact, the actual structure and operation of the state finance system demonstrates that local education funding choices, particularly in New York City, are directly controlled or strongly influenced by state action. PFOF ¶¶ 1798-1802.

There is no question that public education is the constitutional responsibility of the State. The Court of Appeals has long interpreted Article XI, Section 1 of the New York State Constitution to impose the ultimate responsibility for education on the state. As the Court of Appeals explained in sustaining the complaint in this case, "We recognized in *Levittown* that the Education Article imposes a duty on the *Legislature* to ensure the availability of a sound basic education to all the children of the State." 86 N.Y.2d at 315. Indeed, the Court recognized that the State's responsibility not only extends to making "prescriptions" regarding the configuration of the state system, but also to ensuring that adequate resources are available in the schools. *Id*. at 316-17; *see also* PFOF ¶ 1793 n.4363.

The State has broad authority over local governments to carry out its constitutional responsibilities with respect to education, including the authority to force local governments to raise and allocate funds for education. This authority was made clear by the Court of Appeals in upholding the Legislature's authority to require New York City to maintain education spending

at a specified portion of its city budget. In rejecting a constitutional challenge to the "maintenance of effort" statute setting forth this requirement, the Court explained that:

> [T]he legislation does not run afoul [sic] [of] the home rule provisions of the Constitution. Education is expressly made a State responsibility (N.Y. Const., art. XI, § 1), and is explicitly exempted from home rule restriction (art. IX, § 3, subd. (a), par. (1)). ***We have held that education is a State concern, and that legislation dealing with matters of State concern even though of localized application does not violate the constitutional home rule provisions.***

Board of Educ. v. City of New York, 41 N.Y.2d 535 (1977) (citations omitted) (emphasis added).

Whatever authority local governments exercise over education, therefore, is authority delegated by the State, since every local government is an "instrumentality of the general government of the state, [and] it exercises powers of government which are delegated to it by the Legislature." *Brown v. Board of Trustees of Sch. Dist. No. 4*, 303 N.Y. 484, 488 (1952); *see also* PFOF ¶ 1795 n. 4366. Indeed, Defendants' current effort to shift responsibility for any constitutional failure of the City of New York is inconsistent with their successful effort to prevent the City and local community school districts from participating in this case. In *City of New York v. State of New York*, 86 N.Y.2d 286 (1995), a companion case to the *Campaign For Fiscal Equity* litigation, the Court dismissed New York City's efforts to mount a constitutional challenge to the State finance system on its own behalf. The Court held that the city was merely the state's agent and had no independent capacity to sue the state for a violation of the Education Article. The Court explained that:

> Constitutionally as well as a matter of historical fact, municipal corporate bodies – countries, towns and school districts – are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents.

86 N.Y.2d at 289-90.

Given their prior efforts to preclude the City of New York from challenging the state education finance system, it is not surprising that Defendants made no effort to join the city as a party, even as they offered evidence in this case clearly intended to show that the city's actions could absolve the State of any liability. But Defendants cannot have it both ways, claiming that the state bears the constitutional responsibility for education in order to deny the city standing in a related case, while blaming the city in this action for any constitutional fault. The Court of Appeals has made clear that the state has both the constitutional authority and responsibility to ensure that adequate resources are provided to local schools, and the State cannot abdicate its authority or shift its responsibility to local governments.[44]

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[44] A long line of cases, preceding *CFE I*, confirm that although education in New York State is a partnership between State and local authorities, ultimate responsibility for the education of the state's children lies with the State itself. *See Lanza v. Wagner*, 11 N.Y.2d 317, 326 (1962) ("[I]t has long been settled that the administration of public education is a State function to be kept separate and apart from all other local or municipal functions. Although members of the Board of Education in a city perform tasks generally regarded as connected with local government, they are officers of an independent corporation separate and district from the city, created by the State for the purpose of carrying out a purely State function and are not city officers within the compass of the Constitution's home rule provisions.") (internal citations omitted); *Daniman v. Board of Educ.*, 306 N.Y. 532, 542 (1953) ("[P]ublic education is a State and not a municipal function and . . . it is the policy of the State to separate matters of public education from the control of municipal government.") *rev'd on other grounds, Slowchower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Divisich v. Marshall*, 281 N.Y. 170, 173 (1939) ("If there be one public policy well-established in this State it is that public education shall be beyond control by municipalities and politics."); *Hirshfield v. Cook*, 227 N.Y. 297, 301 (1919) ("Public education is a state and not a municipal function. Boards of education are branches of the state government charged by the state with the administration of its educational system.") (citations omitted); *Board of Educ. v. Board of Educ.*, 23 A.D.2d 805, 806 (4th Dep't 1965) ("It is well established that education is a State function not within the scope of local legislation.") (citations omitted); *Cohen v. State of New York*, 52 Misc. 2d 324, 326 (Sup. Ct. Bronx County 1966) ("The Appellate Division has held that 'the power of the Legislature over the educational system of the State is plenary. It may allocate functions among units of the educational system in accordance with its judgment as to what will best serve the educational interests of the State'.") (citations omitted); PFOF ¶¶ 1793-97.

The State's claim that the City of New York has failed to provide sufficient funds for education, even if true, provides no basis for the State to avoid liability. First, the state created the system of education finance that forces the BOE to rely on the municipal government for nearly one-half of its budget. The State clearly has the authority to change this relationship or to require the city to fulfill whatever obligation is necessary to provide the BOE with sufficient funds. Indeed, the state exercises direct control over the city's taxing authority. PFOF ¶¶ 1798-1803. Ultimately, the city's ability to raise additional revenues by levying taxes or incurring debt is subject to the will of the state Legislature. N.Y. Const. art. III, § 1 and art. XVI, § 1 (vesting all legislative power – including taxation – in the state senate and assembly). The city's ability to levy taxes is derivative: the State dictates not only what taxes the city may levy, but the structure of the city's tax schemes as well. Px 2672 at 36-43; Px 2859 at 13-15; Rubenstein 11557:15-11558:19, 11561:24-11562:6; PFOF ¶¶ 1801-02. Indeed, the Court of Appeals has itself recognized that "the City of New York [has] no inherent taxing power, but only that which is delegated by the State," and that such delegation must be within the expressed limitations of the enabling legislation. *Castle Oil Corp. v. City of New York*, 89 N.Y.2d 334, 338-39 (1996) (citations omitted).

Second, the State's attempt to ward off responsibility for the failures of the New York City public school system under the flag of "local control" simply cannot be reconciled with the extraordinary extent of the State's direct involvement in the financing, organization and operation of the New York City public school system, including its control over municipal finances used to fund the system. Having so greatly influenced the current structure and condition of the City system, the State cannot avoid responsibility for its current inadequacies.

The State wrongly suggests that the trial court's decision absolves the city or the BOE of responsibility. To the contrary, the trial court's remedial order anticipates a State-imposed "system of accountability." 187 Misc. 2d at 115. The trial court did not absolve any level of government, but rather, insisted that the State require that all levels of government carry out their responsibilities.

Finally, the State also misconstrues the trial court's analysis of the state aid distribution system. The Court of Appeals directed the trial court to consider whether there was any causal connection between any constitutional inadequacies in the City school system and the state education finance system. The description of the process by which state aid is distributed is directly relevant to that inquiry because, as the trial court found, the process fails to account for student need. This process is a direct cause of why the BOE does not receive sufficient funds to provide a sound basic education. The trial court's description of the process is hardly "judicial intervention." Indeed, the trial court did not condemn the process, but the result.

IV. PLAINTIFFS CAN ENFORCE THE DEPARTMENT OF EDUCATION TITLE VI IMPLEMENTING REGULATIONS THROUGH SECTION 1983 AND THE TRIAL COURT'S FINDINGS SHOULD BE AFFIRMED

The evidence presented at trial overwhelmingly supports the trial court's finding that the state education finance system has "the effect of subjecting individuals to discrimination because of their race, color, or national origin" in direct violation of the Title VI implementing regulations promulgated by the Department of Education (the "DOE"). *See* 34 C.F.R. § 100.3(b)(2); 187 Misc. 2d at 99-109. Defendants do not challenge this finding.[45] Instead,

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[45] Defendants openly admit that they make no arguments about the merits of Plaintiffs' Title VI claim. *See* Def. Br. at 34 n.13. Instead, Defendants' brief contains only a single conclusory sentence that "[t]he evidence at trial did not support this claim." *Id*. at 113. Plaintiffs respectfully submit that for this reason alone the court should affirm the trial court's findings on this issue. *See Rubin v. Rubin*, 67 A.D.2d 856, 857 (1st Dep't 1979) ("Although plaintiff has appealed from the order confirming the referee's report and

Defendants argue that this Court should reverse the trial court's Title VI findings in light of a recent United States Supreme Court decision holding that there is no implied private right of action under Title VI to enforce implementing regulations promulgated by federal agencies. Def. Br. at 113-115 (citing *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001)). However, in making this argument, Defendants completely ignore well-established precedent, unaffected by the *Sandoval* holding, that allows Plaintiffs to enforce the DOE regulations through their claim under 42 U.S.C. § 1983. Joint App. at 224 (Am. Cmpl. ¶ 84). Section 1983 itself creates a private right of action for the "deprivation of rights, privileges, or immunities secured by the constitution and laws," and, in this case, the DOE Title VI implementing regulations[46] create rights that Plaintiffs may enforce through a Section 1983 action.

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holding him in contempt, he has not submitted any brief on these issues. Accordingly, we deem his appeal abandoned."); *see also Calm Lake Dev., Inc. v. Town Bd. of Farmington*, 213 A.D.2d 979, 980 (4th Dep't 1995) (holding that the failure to brief an issue constitutes abandonment of that issue); *Lamphear v. State of New York*, 91 A.D.2d 791, 791 (3d Dep't 1982) ("[T]he State's failure to raise the issue of negligence in its brief is tantamount to an abandonment of that issue.") (citation omitted). However, should the Court be so inclined, for a comprehensive discussion of the merits of Plaintiffs' Title VI claim, *see* PFOF ¶¶ 2036-2104.

[46] Congress enacted Title VI as part of the Civil Rights Act of 1964. Codified as 42 U.S.C. § 2000d, Section 601 of Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 602 of Title VI in turn authorizes "[e]ach Federal Department and agency which is empowered to extend Federal financial assistance to any program or activity . . . to effectuate the provisions of section 2000d of this title . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. Under this grant of authority, the DOE adopted Title VI implementing regulations which provide that a recipient of federal education aid "may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 34 C.F.R. § 100.3(b)(2).

A. *Alexander v. Sandoval* Does Not Preclude CFE From Asserting A Disparate Impact Claim Under Section 1983

While *Sandoval* does bar suit directly under the DOE's Title VI implementing regulations, no language in the *Sandoval* opinion – and no authority cited by Defendants – prevents Plaintiffs from asserting the same Title VI disparate impact claim under 42 U.S.C. § 1983. As the *Sandoval* majority opinion makes clear, courts are "bound by holdings, not language," 121 S. Ct. at 1517, and the holding of *Sandoval* is itself clear: "Neither as originally enacted nor as later amended does Title VI display an intent to create a free standing private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists." *Id.* at 1523.

Indeed, the plaintiffs in *Sandoval* did not even assert a cause of action under Section 1983. *See Sandoval v. Hagen*, 7 F. Supp. 2d 1234, 1252 n.15 (M.D. Ala. 1998) ("[T]he Plaintiffs in the case at bar are not asserting Title VI rights via § 1983 . . . . Rather, Plaintiffs contend they have a direct cause of action under Title VI and its implementing regulations."). The majority opinion in *Sandoval* further acknowledges that the Court's decision addressed only the plaintiffs' implied right of action theory: "[t]he petition for writ of certiorari raised, and we agree to review, only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation." 121 S. Ct. at 1515.

Moreover, Justice Stevens' dissenting opinion in *Sandoval* makes clear that the majority's opinion does not prevent Plaintiffs from enforcing the DOE regulations through Section 1983: "[T]o the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport. *Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief.*" *Sandoval*, 121 S. Ct. at

1527 (Stevens, J., dissenting) (emphasis added). Indeed, the *Sandoval* majority did not challenge Justice Stevens' position.

In any event, a review of the jurisprudence relied upon by the Court in *Sandoval* itself reveals the distinction in the judicial analysis required to divine congressional intent to create a private right of action under a federal statute, and the very different question of congressional intent to create such a remedy under Section 1983. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990) (recognizing "different inquiry" to determine whether suit may be filed under Section 1983 than whether underlying statute allows a private cause of action). Indeed, not only does the legal analysis differ, each is driven by substantively different policy concerns. The Supreme Court has increasingly admonished that it will not recognize an implied right of action unless there is significant evidence that Congress intended to allow such a suit, and the Court's opinion in *Sandoval* is largely devoted to determining whether such congressional intent existed under Title VI. *See Sandoval*, 121 S. Ct. at 1520-23; s*ee also South Camden Citizens In Action v. New Jersey Dep't of Envtl. Prot.*, 145 F. Supp. 2d 505, 517 (D.N.J. 2001) ("[T]he Court limited the question decided in *Sandoval* to determining whether Congress intended to create a private *remedy* to enforce § 602.") (emphasis in orginal). In determining whether an implied right of action exists – as opposed to whether an action may be brought under Section 1983 – the fundamental principle of separation of powers prohibits the judiciary from assuming the legislative task of defining statutory remedies without evidence that Congress intended to authorize a private right of action. *See Wilder*, 496 U.S. at 508 n.9 ("The test [in implied right of action cases] reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes.") By contrast, "these separation-of-powers concerns are not present in a § 1983 case." *Id*.

B. The DOE Title VI Implementing Regulations Create Rights That Are Enforceable Under Section 1983

Administrative regulations, such as the DOE Title VI implementing regulations, can create rights that are enforceable through a Section 1983 action. In this case, the DOE regulations easily satisfy the standards for Section 1983 applicability.

1. Section 1983 Provides A Private Remedy For Defendants' Violations Of Plaintiffs' "Rights, Privileges, Or Immunities"

Section 1983, by its terms, creates a private remedy for the violation of "rights, privileges, or immunities."[47] This private remedy is available even in cases where the statute underlying the Section 1983 action does not expressly or impliedly provide for private vindication of the right it creates. In *Wilder*, the Supreme Court explicitly recognized that there is a "different inquiry" for determining whether a suit may be brought under § 1983 than if the same underlying statute allows a private cause of action, and that "[b]ecause § 1983 provides an alternative source of express congressional authorization of private suits, . . . these separation-of-powers concerns [that are implicated in implied-cause-of-action analysis] are not present in a § 1983 case." 496 U.S. at 508 n.9 (citation and internal quotations omitted).

Instead, the Supreme Court has announced a different, two-step inquiry for determining the availability of a Section 1983 action:

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[47] 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> First, the Plaintiff must assert the violation of a federal right . . . . Second, even when the plaintiff has asserted a federal right, the defendant may show that Congress "specifically foreclosed a remedy under § 1983," by providing a "comprehensive enforcement mechanis[m] for protection of a federal right."

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989) (citations omitted). In light of Section 1983's presumption in favor of enforcing federal rights, a plaintiff need not demonstrate that Congress specifically intended for a particular right to be enforceable under it. Rather, a Section 1983 plaintiff need only comply with the three-part test most recently set forth by the Supreme Court in *Blessing v. Freestone*, 520 U.S. 329 (1997):

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

Id. at 340-341 (citations omitted). The Court has emphasized that "apart from [some] exceptional cases, § 1983 remains a generally and presumptively available remedy for claimed violations of federal law." *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994). Once a plaintiff identifies a federal right in accordance with the *Blessing* factors, there arises "a rebuttable presumption that the right is enforceable under § 1983." *Blessing*, 520 U.S. at 341. This presumption may only be rebutted if the defendant demonstrates, in accordance with the second part of the *Golden State* test, that "Congress 'specifically foreclosed a remedy under § 1983' . . . [either] expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983." *Blessing*, 520 U.S. at 341 (quoting *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1984)).

2. Administrative Implementing Regulations Are Enforceable Through A Section 1983 Action

Regulations adopted by administrative agencies pursuant to a congressional grant of authority that meet the *Golden State* and *Blessing* standards, such as the DOE implementing regulations at issue in this case, are enforceable under Section 1983. In *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983), a majority of justices clearly believed that the Title VI disparate impact regulations at issue in that action were enforceable through Section 1983. *See id*. at 608 n.1 (Powell, J., concurring) ("[I]t would seem that the regulations may be enforced only in a suit pursuant to 42 U.S.C. § 1983."), 638 n.6, 645 n.18 (Stevens J., dissenting) ("Because respondents acted under color of state law in making appointments, *§ 1983 authorizes a lawsuit against them, based on their violation of the governing administrative regulations*.") (emphasis added). Indeed, Justice Stevens stated that "it is clear that the § 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes *and regulations having the force of law*."[48] *Id*. at 638 (emphasis added); *see also Wright v. City of Roanoke*, 479 U.S. 418 (1987) (Brooke Amendment to the Housing Act of 1937 and the

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[48] Justice Stevens' reference to "regulations having the force of law" is taken from the Supreme Court's decision in *Chrysler Corp. v. Brown*, 441 U.S. 218, 301-302 (1979). In *Chrysler*, the Court held that regulations may have "the force and effect of law" where: (1) they are substantive rules affecting individual rights and obligations, and not merely interpretive rules or general policy statements; (2) Congress has granted "quasi-legislative" power to the agency; and (3) the agency has complied with the applicable procedural requirements imposed by Congress. *Id*. at 301-04, 308, 312-15. There can be no doubt that the DOE regulations at issue here carry the "force and effect of law" in accordance with the *Chrysler* test: Their command that no recipient of federal education aid may "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or origin" could not be more substantive. 34 C.F.R. 100.3(b)(2). In addition, Congress has explicitly granted the DOE "quasi-legislative" powers by directing it to "issu[e] rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. Finally, there has been no allegation that the DOE has failed to comply with any applicable procedures.

regulations promulgated thereunder are enforceable through Section 1983); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 986 (9th Cir. 1984) (Enright, J., concurring in part) ("[T]he Title VI regulations in *Guardians Association* were enforced pursuant to a suit under 42 U.S.C. § 1983.").

The majority of the federal courts of appeal that have addressed the issue have likewise held that administrative regulations promulgated by federal agencies can support a Section 1983 action.[49] *See Powell v. Ridge*, 189 F.3d 387, 402-03 (3d Cir. 1999), *cert. denied*, 528 U.S. 1046 (1999) (enforcing DOE disparate impact regulations under Section 1983); *Buckley v. City of Redding*, 66 F.3d 188, 190 (9th Cir. 1995) (enforcing regulations promulgated pursuant to the Federal Aid in Sport Fish Restoration Act); *Loshavio v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995) ("As federal regulations have the force of law, they likewise may create enforceable rights."); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 725 n.19 (10th Cir. 1988) ("In at least some instances, violations of rights provided under federal regulations proved a basis for § 1983 suits."); *Samuels v. District of Columbia*, 770 F.2d 184, 193-98 (D.C. Cir. 1985) (enforcing regulations promulgated by the Department of Housing and Urban Development under Section 1983); *see also West Virginia Univ. Hosp. Inc. v. Casey*, 885 F.2d 11, 18 (3d Cir. 1989) ("With respect to the existence of the private rights requirement [of Section 1983 analysis], valid federal regulations as well as federal statutes may create rights enforceable under § 1983."). Thus, administrative regulations are enforceable through a Section 1983 action as long as the particular regulations sought to be enforced meet the tests set forth in *Golden State* and *Blessing*.

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[49] The Second Circuit has yet to address this issue. *See King v. Town of Hempstead*, 161 F.3d 112, 115 (2d Cir. 1998).

3. The Department Of Education's Title VI Implementing Regulations Satisfy The *Golden State* And *Blessing* Standards And Create Enforceable Rights

Application of the *Golden State* and *Blessing* factors to the DOE Title VI implementing regulations amply demonstrates that the regulations comprise an enforceable right under Section 1983. Indeed, the court that has squarely addressed the DOE regulations has specifically held that the regulations create rights that are enforceable through Section 1983. *See Powell*, 189 F.3d at 403. In *Powell*, the Third Circuit considered "whether a private plaintiff may state a claim under [the DOE] regulation implementing Title VI . . . and whether a claim may be maintained under 42 U.S.C. § 1983 for violation of that regulation." *Id*. at 391. After examining the DOE regulations in accordance with *Golden State* and *Blessing*, the Third Circuit held that "we see no reason to hold that resort to § 1983 has been foreclosed here." *Id*. at 402.

Under the *Blessing* test, in order to likewise find that the DOE regulations create enforceable rights for purposes of Section 1983, this Court must consider whether the DOE regulations "were intended to benefit the putative plaintiff, whether the right allegedly created is enforceable by the judiciary, and whether the provision allegedly creating the right is couched in mandatory or merely precatory terms." *South Camden*, 145 F. Supp. 2d at 529 (discussing *Blessing*). With respect to the first element of the *Blessing* test, there can be little doubt that Title VI and the DOE's administrative implementing regulations were intended to benefit the plaintiffs in this action. First, Plaintiffs brought this action on behalf of all New York City school children, 84 percent of which are minorities. And, indeed, the specific language of the DOE implementing regulations clearly reveals an intent to benefit individuals such as the Plaintiffs here: "No *person* in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to

discrimination under any program to which this part applies." 34 C.F.R. § 100.3(a) (emphasis added). Second, considering the DOE regulations in the context of the broader legislative and regulatory initiative mandated by Congress through the Civil Rights Act of 1964 and Title VI in particular, it is clear that Congress' purpose in enacting Title VI was to benefit those individuals subjected to discrimination. *See* 110 Cong. Rec. 1540 (Rep. Lindsay) ("This bill is designed for the protection of individuals."). Indeed, the Supreme Court has summarized the intent of Congress in enacting Title VI as follows:

> Title VI [] sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the [] statute[].

Cannon v. University of Chicago, 441 U.S. 677, 704 (1979).

Likewise, the DOE regulations also clearly meet the second *Blessing* requirement that they not be "so vague and amorphous" that their enforcement would strain judicial competence.[50] *Blessing*, 520 U.S. at 340-41. First and foremost, the vast body of existing jurisprudence demonstrating the capacity of the federal judiciary to enforce identical disparate impact regulations completely belies any argument that enforcing the DOE disparate impact regulations

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[50] As discussed above, once a plaintiff has identified a federal right that has allegedly been violated, there arises a "rebuttable presumption that the right is enforceable under § 1983." *Blessing*, 520 U.S. at 341. A defendant may rebut this presumption by demonstrating that Congress "specifically foreclosed a remedy under § 1983," *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1984), either "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341. As the Third Circuit has found, "[n]either Title IV nor the [DOE] regulation promulgated thereunder purports to restrict the availability of relief under § 1983." *Powell*, 189 F.3d at 401. Defendants in this case therefore "must make the difficult showing that allowing a § 1983 action to go forward in these circumstances would be inconsistent with Congress' carefully tailored scheme." *Id*. (citations and internal quotations omitted).

would be beyond judicial competence. *See, e.g.*, *Powell*, 189 F.3d at 403; *Larry P.*, 793 F.2d at 982-83 (enforcing DOE regulations upon a finding of disparate impact); *Linton by Arnold v. Carney by Kimble*, 779 F. Supp. 925, 935 (M.D. Tenn. 1990) (enforcing regulations promulgated by Department of Health and Human Services upon a finding of disparate impact); *see also Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *New York Urban League Inc. v. State of New York*, 71 F.3d 1031 (2d Cir. 1995); *Elston v. Talledega Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988). Second, "[t]he fact that the Title VI disparate impact analysis is modeled on the analysis developed by federal courts to analyze disparate impact in the context of Title VII further supports [the] conclusion that the enforcement of the right to challenge a facially neutral practice, which has an . . . adverse disparate impact on persons based on their race, is well within the competence of the judiciary." *South Camden*, 145 F. Supp. 2d at 540.

Finally, the language of the DOE regulations itself clearly imposes a mandatory obligation on recipients of federal education aid. First, through Section 602 of Title VI, Congress "authorized and *directed*" federal agencies to develop regulations which implement the objectives of Title VI. 42 U.S.C. § 2000d-1 (emphasis added). In accordance with this directive, the DOE incorporated Title VI's mandatory Section 601 language into its general anti-discrimination implementing regulation provision, which provides that "[n]o person *shall* . . . be otherwise subjected to discrimination." 34 C.F.R. § 100.3(a) (emphasis added). Moreover, the disparate impact provision of the DOE regulations appears under the subsection entitled "Specific discriminatory actions prohibited," and provides that recipients of federal education aid "*may not* . . . utilize criteria or methods of administration" that have discriminatory effects. 34 C.F.R. § 100.3(b)(2) (emphasis added). The mandatory nature of the DOE regulations could not

be more self-evident. Indeed, the DOE regulations "'succinctly set forth a congressional command . . . [and are] wholly uncharacteristic of a mere suggestion or nudge.'" *South Camden*, 145 F. Supp. 2d at 542 (*quoting Wilder*, 496 U.S. at 512) (analyzing identical disparate impact language contained in Title VI implementing regulations promulgated by the Environmental Protection Agency).

C. Defendants Cannot Establish That Congress Has Foreclosed A Section 1983 Remedy

Since Plaintiffs, we submit, have met their burden, Defendants must demonstrate that Congress has foreclosed recourse to Section 1983 in this case "by creating a comprehensive enforcement scheme [under Title VI] that is incompatible with individual enforcement under § 1983" *Blessing*, 520 U.S. at 341. Plaintiffs respectfully submit that Defendants cannot meet their burden. Indeed, the Supreme Court itself has recognized that "[o]nly twice have we found a remedial scheme sufficiently comprehensive to supplant § 1983." *Id.*, 520 U.S. at 347 (*citing Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assoc.*, 453 U.S. 1 (1981), and *Smith v. Robinson*, 468 U.S. 992 (1984) (*superceded by statute*, 20 U.S.C. § 1415)). In both instances, the Court emphasized that the statutes at issue specifically provided aggrieved individuals with extensive statutory remedies. *See Sea Clammers*, 453 U.S. at 20 (discussing statute's "quite comprehensive enforcement mechanisms"); *Smith*, 468 U.S. at 1010 (noting the statute's "elaborate procedural mechanism"). By contrast, the enforcement mechanisms available under the DOE's regulations are minimal at best, and are limited to suspension or termination of funding to the offending recipient agency at the discretion of the DOE. 34 C.F.R. §100.8(b). The Supreme Court has, on at least three occasions, found that an agency's authority to cut off federal funding is insufficient to justify the denial of a Section 1983 remedy. *See Blessing*, 520 U.S. at 347-48; *Wilder*, 496 U.S. at 521-22; *Wright*, 479 U.S. at 428. Defendants therefore

cannot establish that Congress has foreclosed recourse to Section 1983 in this case. *See Powell*, 189 F.3d at 403 ("[W]e hold that a § 1983 suit is not incompatible with Title VI and the Title VI [DOE] regulation."). Accordingly, Plaintiffs may enforce the DOE disparate impact regulations under Section 1983, and the trial court's Title VI findings of fact and conclusions of law should be affirmed.

V. THE TRIAL COURT'S REMEDIAL ORDER PROMOTES EFFECTIVE REFORM OF THE STATE FUNDING SYSTEM IN A MANNER FULLY CONSISTENT WITH SEPARATION OF POWERS PRINCIPLES

The evidence in this case establishes that over the course of many years the State has consistently failed to ensure that New York City public school students are provided with a sound basic education.

The State has long been aware of this problem. In *Levittown,* the Court of Appeals, although denying relief to the plaintiffs on their equal protection claims, acknowledged the inequities of the State's education finance system and articulated an expectation that the Legislature would "alleviate the existing disparities of educational opportunity . . . in the discharge of its obligation to provide for the maintenance and support of our State's educational system." 57 N.Y.2d at 49 n.9. In the years following *Levittown,* however, the Legislature totally abdicated its responsibilities in this regard.

In response to the trial court's decision in *Levittown*, Governor Carey appointed a Special Task Force on Equity and Excellence in Education, known as the "Rubin Commission." The Rubin Commission identified a series of weaknesses in the state education finance system, including its failure to fully address student needs and district ability to contribute. Berne 12007:2-11. After the Court of Appeals reversed the lower court decisions in *Levittown*, however, the Rubin commission was disbanded and its recommendations were ignored. Berne 12007:12-17, 12009:21-12010:13.

In 1988, Governor Cuomo and the Legislature established the Temporary Commission on The Distribution of State Aid to Local School Districts, known as the "Salerno Commission." Px 534-A. The membership of that Commission consisted of legislators from both parties, educators and business leaders. Salerno 5690:4-5691:8. The Commission issued a report – unanimously approved by its members – which called for extensive reforms of the state education finance system. Px 534-A at 4-6; Berne 12008:15-21. These recommendations were never put into effect. Salerno 5698:6-19; Berne 12009:21-12010:13. The further recommendations of the Moreland Commission, appointed in the 1990s to examine the effectiveness of the state financing system, were also largely ignored by the Legislature. Berne 12009:12-12010:13.

Justice Roberto of the New York State Supreme Court, Nassau County, after reviewing the history of the Legislature's actions – or inactions – during this time period concluded:

> In *Levittown*, the defendants argued that the litigation had delayed legislative reform. Accepting this, the Court of Appeals deferred to the Legislature . . .. Shortly thereafter, the carefully researched recommendations of the Rubin Commission were discarded, the Salerno Commission was appointed and its recommendations were ignored. Similarly, the annual submissions by [the State Education Commissioner and the Governor] to the Legislature regarding the urgent need for reform fall on deaf ears.

Reform Educ. Financing Inequities Today v. Cuomo, 152 Misc. 2d 714, 721 (Sup. Ct. Nassau County 1991) (citations omitted).

In light of this history of inaction, the trial court's Remedial Order appropriately requires the Legislature to take prompt, effective action to remedy grave constitutional wrongs. At the same time, however, the Remedial Order is carefully constructed to grant the Legislature appropriate discretion to fashion a specific remedy.

A. The Remedial Order Is Limited In Scope And Consistent With Separation Of Powers

Defendants attack the trial court for installing itself as "the monitor of day-to-day decisions about teaching, school administration, and curriculum." Def. Br. at 124. But the trial court's short, restrained Remedial Order does nothing of the kind. The Order has nothing to do with the day-to-day operations of the City system and does not (1) prescribe any specific amount of money that should be allocated to New York City, (2) spell out details of a new funding system, or (3) dictate any particular educational policies that need to be put into place. Instead, the trial court crafted a remedial order which judiciously sets forth a limited number of constitutional "parameters," without directing the Legislature to adopt any particular educational reforms or spending plans. 187 Misc. 2d at 113-16.

1. The Trial Court's Parameters Ensure That The Constitutional Violations Will Be Remedied Effectively

a. Restating The Constitutional Standard

The first parameter set forth in the Order is a restatement of the standard for a sound basic education. Defendants claim that the trial court's direction to the State to provide the educational essentials necessary for a sound basic education is improper because it may require the State to allocate additional funds. Def. Br. at 118-19. Since the Court of Appeals already made clear in *CFE I* that the State "must assure" children certain education essentials, Defendants' argument is blatantly at odds with the law of the case. 86 N.Y.2d at 317.

Moreover, Defendants' notion that a remedial order that requires appropriate spending for mandatory constitutional purposes somehow intrudes on legislative prerogatives has no grounding in logic or law. The Court of Appeals has made clear that the vindication of constitutional rights may "necessarily require the expenditure of funds and a concomitant

allocation of resources." *Klostermann v. Cuomo,* 61 N.Y.2d 525, 536-37 (1984). Just this year, the Court of Appeals ruled that the New York Constitution's "aid to the needy" clause required the expansion of State-funded medicaid coverage to include legal immigrants. *In the Matter of Aliessa v. Novello,* 96 N.Y.2d 418, 2001 WL 605188 (June 5, 2001). This Court, in upholding an order involving the reduction in the size of shelters for the homeless, has itself emphasized the significance of the *Klostermann* doctrine:

> Section 1 of Article XVII of the State Constitution imposes a duty on the State and its subdivisions to aid, care for, and support the needy . . . . Compliance is mandatory despite a purported claim of insufficient funds. The defense of lack of resources is "particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights." The plaintiffs seek to have the municipal defendants comply with their statutory and constitutional obligations. Any inconvenience caused by compliance is outweighed by the harm which would be suffered otherwise.

Doe v. Dinkins, 192 A.D.2d 270, 276 (1st Dep't 1993) (citing *Klostermann,* 61 N.Y.2d at 537).

2. Developing A Reformed School Finance System

The trial court's remaining six parameters address the principles for developing a reformed school finance system.[51] The broad guidelines the trial court articulated in this regard involve the determination of the actual costs of a sound basic education, ensuring the availability

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[51] The trial court also stated that in undertaking these reforms, Defendants should "examine the effects of racial isolation on many of the City's school children." 187 Misc. 2d at 115. Such an examination is likely to reveal that the segregation of African-American and Latino students in New York City into schools where the majority of students are non-white is correlated with concentrations of poverty which have additional negative impacts on student achievement above and beyond the students' individual socio-economic disadvantages. Evans-Tranumn 1365:9-1366:10; *see also, e.g.,* Quality Counts 1998: The Urban Challenge, Educ. Week, Vol. XVII, No. 17, Jan. 1998; Gary Orfield & John T. Yun, *Resegregation in American Schools* (1999). These patterns of racial isolation and concentrated poverty may well require additional or more intensive educational services to provide these students an opportunity for a sound basic education. Sobol 944:23-945:10; *see also, e.g.,* Px 314; Px 1027.

of adequate resources in every district, taking into account variations in local costs, promoting long-term planning, ensuring public understanding and establishing an effective accountability system.

a. Determining The Actual Costs Of A Sound Basic Education

The trial court stated that, as "a threshold task," the Defendants must "ascertain[], to the extent possible, the actual costs of providing a sound basic education in districts around the State." 187 Misc. 2d at 115. Such a costing-out analysis is an essential prerequisite for constructing a constitutionally acceptable funding system since the major shortcoming of the current education finance system has been its failure "to align funding with need." 187 Misc. 2d at 83.

Legislatures and state education departments in more than a dozen states have, in fact, undertaken such costing-out studies in recent years. *See, e.g.*, *Campbell County Sch. Dist v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (directing that "a cost of education study and analysis must be conducted and the results must inform the creation of a new funding system"); *DeRolph v. State*, 712 N.E.2d 125, 251 (Ohio Ct. Com. Pl. Perry Co. Feb. 26, 1999) (directing State Superintendent of Public Instruction to "forthwith" prepare and present to the Legislature proposals for eliminating educational disparities); Supp. App. at RA651-RA717 (*Lake View Sch. Dist. v. Huckabee*, No. 1992-5318 (Ark. Ch. Ct. Pulaski County May 25, 2001) (finding that a constitutionally acceptable funding system must be based on the actual cost of providing an adequate education and that "an adequacy [cost] study is necessary and must be conducted forthwith")).

The methodologies these legislatures and courts have utilized tend to fall into two main categories, the "empirical" and the "professional judgmental." Berne 12556:11-12559:23; *see also* James W. Guthrie and Richard Rothstein, *Enabling "Adequacy" to Achieve Reality:*

Translating Adequacy Into State School Finance Distribution Arrangements, *in* Equity And Adequacy In School Finance: Issues and Perspectives 228-246 (Helen F. Ladd et al., eds., 1999). The trial court's broad costing-out guideline in this case does not, however, mandate that Defendants use any particular methodology. The State retains full discretion to use either of the predominant approaches, or an entirely new methodology, so long as the approach chosen meets the primary constitutional need to inform the Legislature of the actual costs of providing a sound basic education.

b. Ensuring The Availability Of Adequate Resources In Every District

Once the actual costs of providing a sound basic education have been established, Defendants would retain broad discretion to determine the proportions of state and local funding that they deem appropriate and the formula or formulas for distributing the state share of these funds. The trial court has appropriately specified, however, that whatever funding mechanisms the State sees fit to employ, it must ultimately ensure that adequate resources are consistently available in every school to provide the conditions and tools needed for a sound basic education.

The trial courts' constitutional guideline might require, for example, that if the State chooses to maintain the status of New York City and the other four large cities in the state as fiscally dependent school districts, it must, through "maintenance of effort" laws or other means, ensure that the respective municipalities actually appropriate sufficient educational funds so that the essential resources are, in fact, made available to the students in each locality. 187 Misc. 2d at 99.

This guideline guarantees that every district in the state will have sufficient resources to provide the constitutionally mandated opportunity for a sound basic education to its students, contrary to the State's claim that the remedy "may have the effect of shifting funds away from other school districts in the State." Def. Br. at 119. Given the reality that any reforms of the

state education finance system that affect the huge New York City school district will necessarily have a direct impact on the system as a whole, the trial court properly issued an Order which applies statewide and ensures that all districts are properly funded.[52]

Nothing in the trial court's Remedial Order undermines the current system of local funding or precludes school districts from raising additional funds to support additional or enriched services beyond the constitutionally guaranteed adequacy level. Significantly, the New York State School Boards Association, the statewide organization that represents virtually every school district in the state, has submitted a brief *amicus curiae* endorsing the trial court's Remedial Order.

c. Taking Into Account Variations In Local Costs

The trial court specifically found that the failure of the existing finance system to take variations in local costs into account penalizes New York City. 187 Misc. 2d at 85-86. Defendants' own finance expert, James Guthrie, acknowledged that a fair financing system should take local costs into account, particularly for high-cost metropolitan regions. Guthrie 21219:13-21226:8.

In light of these findings, the trial court's guideline specifying that an education finance system must take into account the actual costs of providing services was necessary and

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[52] Application of the remedy on a statewide basis is virtually axiomatic where a state court has invalidated a state education finance system. *See, e.g., DeRolph v. State,* 677 N.E.2d 733 (Ohio 1997) (case brought by five districts; statewide remedial order issued); *Campbell County Sch. Dist.*, 907 P.2d at 1243 (case initially brought by four school districts, later joined by an additional district and the statewide teacher's union; state wide remedial order issued); *Roosevelt v. Bishop*, 877 P.2d 806, 808 (Ariz. 1994) (case brought by four school districts; statewide remedial order issued); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 399 (Tex. 1989) (case brought by nine school districts; statewide remedial order issued); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 78 (Wash. 1978) (case brought by taxpayer-parents and students in one district; statewide remedial order issued); *Horton v. Meskill*, 376 A.2d 359, 361 (Conn. 1977) (suit brought on behalf of three students in a single district; statewide remedial order issued).

appropriate. The Legislature itself has in recent years added regional cost adjustments to some, but not to all, of its complex funding formulas. *See, e.g.* N.Y. Educ. L. § 3206.6 (regional cost factor in building aid formula). There are, of course, a variety of methods for calculating regional cost differences, and a range of opinions on which of the many available cost of living indices should be utilized for various purposes. The trial court's broad guideline does not in any way constrain legislative and executive discretion in making these choices.

d. Promoting Stable Funding For Long-Term Planning

The current state education finance system not only provides insufficient resources to many school districts, but it also impedes effective planning. For example, although Defendants chide the BOE for undue delay each year in hiring new teachers, the Legislature's persistent pattern of delaying the determination of annual educational appropriations well past the statutory April 1 deadline makes efficient teacher hiring, staff assignments and other aspects of sound education planning difficult, if not impossible.

The evidence in this case has also made clear that productive learning is a cumulative process. Students must be provided with qualified teachers, appropriate class sizes, instrumentalities of learning and the other educational essentials, not for a semester or a year, and not only during favorable economic cycles, but for the duration of their academic careers. Darling-Hammond 6477:7-17; Murphy 16628:23-16630:19. Schools and school districts cannot reasonably be held accountable for using funds efficiently and for their students' academic progress if they are not provided with stable funding to permit them to plan and implement effective instructional programs.

e. Providing Transparency For Public Understanding

The trial court found that "the State aid distribution system is unnecessarily complex and opaque." 187 Misc. 2d at 83. It was not unreasonable, therefore, for the court to require the

Legislature to ensure that the public can understand how its elected representatives distribute $12 billion in tax money for education. There can be no justification for perpetuating an unreasonably confusing and misleading set of funding formulas. If the public is to hold school administrators and their elected representatives responsible for effectively utilizing resources and for educational results, surely citizens must be able to understand the basic elements of the State's education funding system.

f. Establishing an Effective Accountability System

Based on the extensive trial record, the trial court found that "increased educational resources, if properly deployed, can have a significant and lasting effect on student performance." 187 Misc. 2d at 75. In order to ensure that any additional funds that result from a reformed school finance system are "properly deployed," the trial court included among the constitutional parameters it specified a requirement for "a system of accountability to measure whether the reforms implemented by the Legislature actually provide the opportunity for a sound basic education." *Id.* at 115.

This parameter would require Defendants to modify existing state accountability systems as necessary to conform to constitutional requirements and to ensure that they are aligned with reforms of the state education finance system and other actions undertaken as part of the remedy in this case. *See, e.g., Tennessee Small School Sys. v. McWherter*, 894 S.W.2d 734, 737 (Tenn. 1995) (describing revised statutory accountability system); *Edgewood Indep. Sch. Dist v. Meno*, 893 S.W.2d 450, 462 (Tex. 1995) (same); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 213 (Ky. 1989) (mandating accountability system to confirm that there is "no waste, no duplication, no mismanagement").

On appeal, the State argues, as it did at trial, that the failings of New York City's schools are due to mismanagement and waste by the BOE, and that any increases in funding might also

simply be wasted. Their objection to a trial court directive that is aimed at precluding the very mismanagement and misuse of funds that they decry, is, therefore, hard to take seriously.

3. Ensuring Prompt Compliance

In order to avoid inordinate delay in effectuating the constitutional rights of millions of school children, the trial court established a deadline for "timely action to address the problems set forth in this opinion." 187 Misc. 2d at 114. The trial court's timeline, if it had not been stayed by the automatic operation of CPLR 5519, would have required the Legislature to develop a new funding scheme during its 2001 session and to implement it shortly thereafter. *Id.* at 116.

In 1990, the SED reported to the Governor and the Legislature that:

> Each year, thousands upon thousands drop out of school. Each year, thousands upon thousands are consigned to a socioeconomic underclass, where they face dismal personal lives and constitute a growing threat to the well-being of the total society.

Px 21 at i. Since that report was issued, almost 250,000 students have left New York City's public schools without a high school diploma, and during that period the Legislature has done nothing to solve the problems identified in 1990 and repeated every year since then. A reasonable timeline that will ensure that Defendants act promptly to meet their constitutional obligations clearly is required given this history of neglect. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 576 (1975) (deprivation of schooling even for ten days or less implicates constitutional "property interest" in educational benefits). This Court can also take judicial notice of the fact that during the 2001 legislative session, in the absence of a mandatory deadline from the Court, the Governor and the Legislature repeated their traditional ritual of making minor adjustments to the education budget, and again failed to address the major constitutional and statutory deficiencies identified in the trial court decision. *See* 2001 N.Y. Laws 149.

B. The Trial Court's Parameters Are Consistent With The Court Of Appeals' Separation Of Powers Principles

The trial court's succinct common sense parameters leave intact the Legislature's prerogatives to devise specific means to repair the constitutional shortcomings. The seven parameters do no more than clarify the nature of the "duty [the Education Article imposes] on the Legislature to ensure the availability of a sound basic education to all the children of the State." *CFE I*, 86 N.Y.2d at 315. They properly emphasize that the constitutional requirement to create an opportunity for a sound basic education for all children is mandatory and not merely "hortatory." *Id*.

The Court of Appeals has itself articulated similar constitutional parameters to guide the remedial process in analogous situations. Thus, in *Matter of Lavette M*., 35 N.Y.2d 136 (1974), a case involving the adequacy and effectiveness of treatment plans for children in need of supervision ("PINS" children), the Court of Appeals defined the proper judicial remedial role as "assur[ing] the presence of a bona fide treatment program." *Id.* at 142. To carry out this judicial role, the Court held that "the perimeters of the right to treatment may be defined," and then went on to articulate the following specific constitutional "perimeters": (1) treatment standards must take account of "present knowledge"; (2) "failure to provide suitable and adequate treatment [may not] be justified by lack of staff or facilities"; and (3) "the right to treatment embraces a requirement of initial diagnosis and of periodic assessment of the PINS child's needs in order that individualized treatment may be revised as the diagnosis develops." *Id*. at 142-43. *See also Heard v. Cuomo*, 80 N.Y.2d 684, 691 (1993) (establishing guidelines for implementing statutory requirement to develop written service plans for the discharge of mentally ill patients who lack housing); *McCain v. Koch*, 70 N.Y.2d 109, 115 (1987) (upholding injunction issued on behalf of

homeless families which included guidelines calling for "a bed for each family member . . . with a clean mattress and pillow"); *Dinkins*, 192 A.D.2d at 273 (upholding specific remedial guidelines, based on testimony of plaintiffs' experts, concerning the suitability of shelters for the homeless).

Defendants' separation of powers argument is based on a string of boilerplate phrases that have no relevance to this case. Def. Br. at 117-19. Most of the precedents they cite involve the basic justiciability question of whether the courts should exercise jurisdiction in the subject area under consideration,[53] an issue the Court of Appeals already definitively determined in *CFE I*. 86 N.Y.2d at 315 ("We recognized in *Levittown* that the Education Article imposes a duty on the Legislature to ensure the availability of a sound basic education to all children of the State. . . We conclude that a duty exists and that we are responsible for adjudicating the nature of that duty."); *see also Levittown*, 57 N.Y.2d at 48. The other cases cited by Defendants concern constitutional or statutory interpretation issues that are also not relevant to the mandatory language of the Education Article and, in any event, do not involve the issue of interference with legislative or administrative prerogatives, the issue Defendants purport to address.[54]

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[53] In *Matter of New York State Inspection v. Cuomo*, 64 N.Y.2d 233 (1984), the Court of Appeals held that a statutory workplace safety claim seeking to stop the state from closing a prison facility was non-justiciable because it would involve the courts directly in "manag[ing] the operations of the divisions of the executive branch, including the Department of Correctional Services." *Id*. at 239. In *Jones v. Beame*, 45 N.Y.2d 402 (1978), the Court held non-justiciable a claim that would have required judicial intervention in the management of New York City's zoos or the influx of mentally ill people into certain communities. *Id*. at 408. In *Matter of Abrams v. New York City Transit Authority*, 39 N.Y.2d 990 (1976), the Court rejected as non-justiciable a claim seeking judicial oversight of the level of noise in the New York City subways. *Id*. at 992-93.

[54] *New York Public Interest Research Group, Inc. v. Steingut*, 40 N.Y.2d 250 (1976) involved legislative compensation issues under Article III of the New York Constitution, and *Bright Homes, Inc. v. Wright*, 8 N.Y.2d 157 (1960) concerned the interpretation of a rent control ordinance.

The seven parameters and reasonable timeline the trial court articulated in this case constitute a commonsense remedial approach that ensures effective constitutional compliance but does not command specific executive or legislative acts. This approach is fully consistent with the Court of Appeals' repeated interpretations of separation of powers as a flexible, practical doctrine, rather than the rigid compartmentalized view of institutional functioning advocated by the Defendants. *See, e.g., Bourquin v. Cuomo*, 85 N.Y.2d 781, 784-85 (1995); *In the Matter of Richardson*, 247 N.Y. 401, 410 (1928).[55]

C. The Trial Court's Remedial Approach Is Consistent With The Successful Practices Of Courts In Other States

Since 1973, courts in more than two dozen states have issued constitutional rulings invalidating their state education finance systems.[56] In recent years, most of these courts have,

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[55] The trial court's approach in also consistent with the recommendations of a task force on educational adequacy of the National Conference of State Legislatures, of which New York is an active member. This task force recommended, *inter alia*, that states build an adequate school finance system by identifying "the conditions and tools necessary to provide all students the opportunity to achieve the [state's] educational objectives" and "ensur[ing] that sufficient funding is made available and used to provide the conditions and tools that have been identified as essential." Px 355 at 10-18.

[56] Extensive state court involvement in this area began shortly after the United States Supreme Court's 1973 holding in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) that education is not a fundamental interest under the federal constitution. *Id*. at 37. The closing of the courthouse gates in the federal system – and the fact that many state constitutions contained specific provisions guaranteeing students substantive educational opportunities – thereafter led plaintiffs to lodge challenges to state educational finance systems in the state courts in more than 40 jurisdictions.

As the trial court noted, commentators have tended to discuss the cases challenging state education finance systems in terms of three "waves", the latest of which began in 1989 and is marked by a de-emphasis on equal protection claims and a greater reliance on education clauses in state constitutions. 187 Misc. 2d at 6-9. The shift from "fiscal equity" to "education adequacy" in recent years has resulted in the issuance of an increasing number of court decisions invalidating state finance systems. *See generally* Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, *in* Equity and Adequacy in Education Finance: Issues and Perspectives 175, 187 (Helen F. Ladd et al., eds., 1999);

like the trial court in the present case, issued broad constitutional guidelines, established specific timelines and retained jurisdiction in order to ensure prompt compliance with the court's orders. Although, especially in the early years, some state courts adopted the approach advocated by Defendants here, and referred the matter to the legislature with no remedial guidelines, that method has led to delays, and protracted compliance proceedings.

A prime example of a successful remedial experience that resulted in prompt legislative response and minimized the court's continuing role is that of Kentucky. There, the state supreme court defined specific goals for an "efficient education" and then set forth basic guidelines that made clear, *inter alia*, that "the maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly" and that the schools should be monitored to "assure that they are operated with no waste." *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d at 212-13. Within ten months of the issuance of the supreme court's final order, the Kentucky legislature enacted the sweeping Kentucky Education Reform Act, one of the most thorough educational reform statutes in the nation. *See* Ky. Rev. Stat.Ann. § 156 *et seq.* (1996); C. Scott Trimble and Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. Mich. J.L. Ref. 599 (Spring 1995) (discussing decision and reform efforts).

Similarly, in Wyoming, the supreme court, based on the trial court's findings of fact, issued substantive instructions to the legislature on the essential resources needed for an adequate education. These were:

1. Small schools, small class size, low student/teacher ratios, textbooks, low student/personal computer ratios.

Deborah A. Verstegen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education*, 24 J. Educ. Fin. 51, 67 (1998); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 Vand. L Rev. 101 (Jan. 1995).

2. Integrated, substantially uniform substantive curriculum.

3. Ample, appropriate provision for at-risk students, special problem students, talented students.

4. Setting of meaningful standards for course content and knowledge attainment intended to achieve the legislative goal of equipping all students for entry to the University of Wyoming and Wyoming Community Colleges or which will achieve the other purposes of education.

5. Timely and meaningful assessment of all students' progress in core curriculum and core skills.

Campbell County Sch. Dist., 907 P.2d at 1279. The Wyoming Supreme Court also specifically directed that "[a] cost of education study and analysis must be conducted and the results must inform the creation of a new funding system." *Id*. The legislature immediately responded by adopting a legislative work plan, delegating various responsibilities to six interim joint committees and retaining professional consultants to conduct an extensive costing-out study to "assure that adequate resources were distributed to provide a proper education for every Wyoming child." *Campbell County Sch. Dist. v. State*, Civil No. 129-59, at 3 (Wyo. Dist. Ct. lst Jud. Dist. Laramie County Dec. 31, 1997). The Wyoming Supreme Court recently declared the costing-out study undertaken by legislative consultants to be constitutionally appropriate, with certain modifications. *Wyoming v. Campbell County Sch. Dist.*, 19 P.3d 518, 537 (Wyo. 2001).

The Ohio Supreme Court also directed the state legislature to "create an entirely new school financing system," in accordance with certain basic guidelines which it expressly articulated. *DeRolph*, 677 N.E.2d at 747. These included a clear declaration that public education must be seen as a single "statewide system," a mandate that the past overemphasis on the local property tax be eliminated, and a specification that the new system include "facilities in good repair and the supplies, materials and funds necessary to maintain these facilities in a safe

manner." *Id.; see also Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997) (clear guidelines issued to legislature regarding new capital funding system led to timely compliance).

Defendants rely on remedial experiences in four states – Alabama, Massachusetts, Texas and New Jersey – to support their position.[57] Massachusetts was miscited and misunderstood, since the court there did, in fact, issue remedial guidelines, based on the Kentucky model, which quickly led to the adoption of a major reform statute by the legislature. *See McDuffy*, 615 N.E.2d at 554 ("As has been done by the courts of some of our sister States, we shall articulate broad guidelines and assume that the Commonwealth will fulfill its duty to remedy the constitutional violations that we have identified."); Massachusetts Education Reform Act of 1993 (Mass. Gen. Laws Ann., Ch. 71 (West. 2001).

The other three states cited by Defendants are, in fact, explicit examples of difficult remedial experiences which Justice DeGrasse wisely chose to avoid in the present situation. The New Jersey Supreme Court's initial decision to defer to the legislature without issuing any remedial guidelines in *Robinson v. Cahill*, 63 N.J. 196, 197-98 (1973) was followed by a history of delays, legislative recalcitrance, extensive compliance proceedings and ongoing rounds of litigation for decades thereafter. Similarly, in Texas, the supreme court's failure in *Edgewood Independent School Distrist v. Kirby*, 777 S.W.2d at 399, to issue remedial guidelines led to confusion over the court's intent, and to political turmoil and three successive major follow-up litigations over a four-year period. Alabama, Defendants' prime remedial model, is hardly an

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[57] The State also cites: a school desegregation case from Connecticut, *Sheff v. O'Neill*, 678 A.2d 1267 (Conn.1996), which has no relevance to the education finance issues in the present case; *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997), which dealt solely with liability issues; and three decisions which dismissed plaintiffs' claims on justiciability or other grounds and have no bearing on a discussion of remedial issues: *Committee for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *Coalition for Adequacy and Fairness*

example of prompt, effective implementation: almost four years after the Alabama Supreme Court had vacated the trial court's original remedy and remanded the matter to the legislature without remedial guidelines, *see Ex parte James*, 713 So. 2d 869, 882 (Ala. 1997), no remedy had been put into place and a further hearing regarding the remedy issues is scheduled for December 5, 2001 before the trial court. *See* Supp. App. at RA550-52 (*Alabama Coalition for Equity v. Siegelman* (CV-90-883-GR) (Scheduling Order of May 15, 2001)).

In short, constitutional guidelines similar to those promulgated by the trial court in this case have been an effective means of promoting successful remedies in cases involving the reform of state education finance systems. Such guidelines promote effective remedies because they encourage:

> a new form of public law litigation: the dialogic as opposed to the managerial model. The state judiciary is taking a track different in two ways from the federal judicial approach. They are less managerial and more advisory . . . what is transpiring is a multi-faceted dialogue between these courts and legislatures, across state judicial systems . . ..

George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on State School Finance Decisions*, 35 B.C.L. Rev. 543, 566-67 (May 1994). *Cf. Cohen v. State of New York*, 94 N.Y.2d 1, 14 (1999) ("The genius of the [separation of powers] system is synergy and not 'separation,' in the common connotation of that latter word.").

The trial court's establishment of a specific timeline for compliance and its retention of jurisdiction are also fully consistent with the precedents in the other states. Almost all of the courts establish specific timelines for compliance, which usually are at or near the end of

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in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996); and *City of Pawtucket v. Sundlun*, 662 A.2d 40, 56 (R.I. 1995).

scheduled legislative sessions and within about a year of the court decree.[58] The overwhelming majority of the courts also retain jurisdiction in order to ensure that compliance is swiftly achieved.[59]

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[58] *See, e.g., Hull*, 960 P.2d at 636 (affirming trial court's June 1998 deadline); *Campbell County Sch. Dist.*, 907 P.2d at 1280 (ordering the legislature to achieve constitutional compliance by "not later than July 1, 1997," a year and a half after the decision date); *Claremont Sch. Dist.*, 703 A.2d at 1360 (staying further proceedings "until the end of the upcoming legislative session"); *DeRolph*, 677 N.E.2d at 747 (staying the effect of its decision for 12 months); *Tennessee Small Sch. Sys.*, 894 S.W.2d at 735 (noting that the trial court had delayed the effective date of its order one year to allow the legislature to correct the constitutional deficiencies); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 688, 693 (Mont. 1989) (tightening the lower court's deadline from Oct. 1, 1989 to July 1, 1989 for the legislature to "present an equitable system of school financing");.

[59] *See, e.g., Opinion of the Justices (School Financing)*, 712 A.2d 1080, 1084, 1088 (N.H. 1998); *Brigham*, 692 A.2d at 398 (remanding to the trial court "so that jurisdiction may be retained until valid legislation is enacted and in effect"); *Ex parte James*, 713 So. 2d 873; *Campbell County Sch. Dist.*, 907 P.2d at 1280; *Roosevelt*, 877 P.2d at 816; *Abbott v. Burke*, 643 A.2d 575, 576 (N.J. 1994); *McDuffy*, 615 N.E.2d at 556; *Helena Elementary Sch. Dist.*, 769 P.2d at 693.

CONCLUSION

For the foregoing reasons, the trial court's January 31, 2001 decision and order should be affirmed.

Dated: New York, New York
September 28, 2001

Respectfully submitted,

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