To be argued by:
Daniel Smirlock
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S T A T E O F N E W Y O R K
C O U R T O F A P P E A L S

CAMPAIGN FOR FISCAL EQUITY, INC., AMINISHA BLACK, INNOCENCIA BERGES-TAVERAS, BEINVENNIDO TAVERAS, TANIA TAVERAS, JOANNE DEJUSUS, ERYCKA DEJESUS, ROBERT JACKSON, SUMAYA JACKSON, ASMANHAN JACKSON, HEATHER LEWIS, ALINA LEWIS, SHAYNA LEWIS, JOSHUA LEWIS, LILLIAN PAIGE, SHERRON PAIGE, COURTNEY PAIGE, VERNICE STEVENS, RICHARD WASHINGTON, MARIA VEGA, JIMMY VEGA, DOROTHY YOUNG AND BLAKE YOUNG,

Plaintiffs-Appellants,

-against-

THE STATE OF NEW YORK, GEORGE E. PATAKI, as Governor of the State of New York, and MICHAEL H. URBACH, as Tax Commissioner of the State of New York,

Defendants-Respondents.

DEFENDANTS-RESPONDENTS' BRIEF

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Preliminary Statement

The outcome of this appeal follows directly from this Court's decision in its first consideration of the case eight years ago ("CFE I"). At issue then was the meaning of the Education Article of the State Constitution, which mandates that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." In CFE I, the Court noted that the Article "requires the State to offer all children the opportunity of a sound basic education," and provided the parties with a

"template" of that requirement: According to the Court, as long as students in the New York City public schools receive an education that is "minimally adequate" to give them "the opportunity to acquire the basic literacy, calculating and verbal skills necessary to enable them to function as civic participants capable of voting and serving as jurors," the State "will have satisfied its constitutional obligation." The Court permitted the case to proceed to trial, giving plaintiffs the opportunity to prove their allegation that New York City students do not get "the opportunity to obtain such fundamental skills as literacy and the ability to add, subtract and divide numbers."

Upon the return of the case to the trial court, plaintiffs disregarded this Court's instructions. Rather than acknowledging that CFE I had established the minimal demands of the Education Article, they contended that the constitutional standard was instead coextensive with the Regents Learning Standards (RLS), a bold policy initiative undertaken by the New York State Board of Regents and designed, according to the State's current Commissioner of Education, not only to provide fundamental skills but also to produce students whose performance is "higher or better than everyone else." On this issue, plaintiffs persuaded the trial court, which found that a minimally adequate education is nothing less than one that gives students an opportunity to

acquire not fundamental skills but the high-level abilities the RLS are designed to produce.

In the decision now on appeal, the Appellate Division, First Department corrected this error. It recognized that the Education Article, as interpreted in CFE I, "requires the State to provide a minimally adequate educational opportunity, but not, as the [trial] court held, to guarantee some higher, largely unspecified level of education, as laudable as that goal might be." Because the trial court had "applied an improper standard," the Appellate Division reversed. It is this reversal plaintiffs now challenge, again contending that the RLS and the constitutional minimum are identical.

The Appellate Division's rejection of plaintiffs' effort to reopen what CFE I resolved was correct for several reasons. First, as this Court has already recognized, the text and history of the Education Article indicate that it imposes only a minimal obligation on the State. Just as importantly, the approach to the Article embraced by plaintiffs would reverse the roles of the courts and the Board of Regents. In plaintiffs' view, the Regents, an administrative agency, are empowered to interpret the State Constitution and define the Education Article's guarantee; indeed, any attempt by this Court to determine the congruence between the RLS and the constitutional requirement would, plaintiffs say, be "judicial activism," putting the Court in

danger of "usurping the Regents' authority." At the same time, plaintiffs ask the Court to exceed the judiciary's often-acknowledged limitations, inherent in the principle of separation of powers, in overseeing the details and funding of public education. They seek to involve the court in micromanagement of education throughout the State--a role more appropriate for the Regents. Finally, an examination of the RLS demonstrates that they are aspirational rather than minimal, and far exceed the basic education required by the Education Article. Indeed, plaintiffs' position that only those citizens who have obtained a high school education pursuant to the RLS are prepared to function as civic participants would exclude from the franchise nearly 40% of the adult population of New York State.

At bottom, then, this is a case about the difference between what sound public policy recommends and what the State Constitution compels. The RLS are laudably rigorous and thorough; as the outcome of State policy decisions, they are unexceptionable. But they provide far more than "basic literacy, calculating, and verbal skills," and demand far more funding than is necessary to produce those skills.

With the determination that plaintiffs' proffered standard exceeds what this Court in CFE I called the "floor" of the Education Article, the constitutional portion of this case should be at an end. Two other potential issues were identified in CFE

I and addressed by both the trial court and the Appellate Division: whether the students in the New York City public schools have the opportunity to receive a sound basic education, and if they do not, whether deficiencies in the State's system of funding public education are the cause of that failure. These issues, however, involve assessments of the weight of the evidence presented at trial, and thus are beyond the scope of this Court's review. The Appellate Division's reasoning on the causation issue, moreover, in no way depends on its opinion about the standard to be applied under the Education Article. It thus provides an independent basis for affirmance of the decision below even if this Court disagrees with the Appellate Division about the standard.

If the Court nonetheless elects to reach these additional issues, it should conclude, as the Appellate Division did, that plaintiffs have failed to prove their case on either score. The only explanation for City students' adequate performance on widely-used standardized tests is that they are getting the opportunity for a sound basic education. An examination, as provided for by CFE I, of the instruction, facilities, and "instrumentalities of learning" provided for these students compels the same conclusion. And any deficiency in the educational opportunities City students receive are attributable not to the level of funding provided by the State, but to

mismanagement, waste, corruption, and pervasive underfunding by the City itself.

Questions Presented

1. Whether, in light of this Court's holding in CFE I that providing the opportunity for a sound basic education within the meaning of the Education Article of the State Constitution requires only "minimally adequate" educational resources that give students the opportunity to acquire "basic literacy, calculating and verbal skills," the Appellate Division was correct in rejecting the "world-class" demands of the Regents Learning Standards as far in excess of the constitutional requirements.

2. Whether the Appellate Division was correct in holding that plaintiffs failed to establish at trial that New York City's public schools do not provide the opportunity to acquire a sound basic education, in light of evidence that the City's educational resources and the performance of its students are more than "minimally adequate."

3. Whether, if New York City's schools are not providing students with a sound basic education, the Appellate Division was correct in holding that plaintiffs failed to prove that the deficiencies in the City's schools are caused by the State's system of funding public education, where the evidence

demonstrated that current funding is more than sufficient to support a sound basic education, the City's Board of Education has mismanaged available resources, and the City has decreased its local contribution to its own public schools.

4. Whether, even if this Court finds that the State has violated the Education Article, it should reject plaintiffs' proposed remedy as overbroad and encroaching on legislative and executive prerogatives, and instead should instruct the Legislature and Executive to rectify any constitutional deficiencies.

5 Whether the Appellate Division correctly held that plaintiffs cannot obtain relief through a private cause of action alleging a violation of the regulations implementing Title VI of the federal Civil Rights Act, by means of either a suit brought directly under the regulations or a suit brought pursuant to 42 U.S.C. § 1983.

The Appellate Division did not address this question.

STATEMENT OF FACTS

A brief discussion of the New York City school system, its governance, funding, and academic standards and assessments is provided below to give context to the arguments that follow. The discussion is by no means comprehensive. Other facts are

provided in greater detail in the Argument section of this brief as they pertain to the issues discussed.[1]

I. Overview Of The New York City School System

The New York City school system is the largest in the United States, comprising approximately 1,189 schools with a student population of 1.1 million (PX3149; PX1167). During the 1999-2000 school year, it employed over 135,000 employees, including approximately 78,000 teachers, 19,000 teacher aides and 13,000 other administrators and pedagogical employees (PX3149). Eighty-seven percent of the system's teachers are certified (PX1222). There is on average one teacher for every 15 pupils –

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[1]Unlike plaintiffs, whose brief repeatedly cites their own Proposed Findings of Fact as support for their factual assertions, we have referred the Court directly to the exhibits and transcript pages on which we rely. Plaintiffs' and defendants' exhibits are denoted as "PX" and "DX", respectively. Citations to the trial transcripts are denoted by the name of the witness, followed by the relevant transcript page number(s).

Defendants-Respondents' Appendix contains select trial exhibits that are reproduced for the Court's convenience. Citations to those exhibits in this brief are denoted by an asterisk following the exhibit number.

In addition, the entire trial transcript and many of the trial exhibits are accessible through Plaintiffs' and Defendants' respective CD-ROMs, submitted as part of the reproduced record on appeal. Also on defendants' CD-ROM is defendants' Trial Evidence Volume, which contains an exhaustive review of the facts of the case and full exhibit and record citations for those facts. Also, for the convenience of the Court, we append to this brief a glossary of education acronyms that are used in this case.

significantly more teachers per pupil than the national average, and better than 90 percent of other large districts across the country (DX19048; Smith 20393-97; Murphy 16242). In addition, the City's pupil-to-certified-teacher ratio is lower than the national pupil-to-all-teacher ratio and considerably lower than the average ratio in all urban districts (DX19190; Murphy 16242-49). Class size in elementary schools has averaged about 26 students, while the middle and high school class size has averaged about 29 students (PX1167*; Smith 20421).

New York City school students are an exceptionally diverse group. Most of the students are immigrants, with fully 80 percent of the 1997 New York City cohort of graduates having been born outside the United States (PX312, p. 28). Approximately 17 percent of the City's students were English Language Learners ("ELSs")[2] in 1995-96; the percentage was up to nearly 20 by the 2000-01 school year (PX1971; Hernandez 9155; Ward 3128). About 37 percent of the City's public school students are Hispanic, 35 percent are African-American, 15.5 percent are Caucasian, and 10.8 percent are Asian (PX1167). Poverty levels, as measured by the federal government's free and reduced lunch program, hover around 80 percent (DX19601; Armor 20465-66). A substantial

[2]The term refers to students who, by reason of foreign birth or ancestry, speak a language other than English and understand and speak little or no English.

number of the City's students are "at risk" of doing poorly in school.[3]

At the time of trial, the overall supervision of the New York City school system was vested in the Board of Education ("BOE"), which was charged with management and control of all aspects of educational affairs in the City. See Educ. L. § 2552. The BOE was comprised of seven members, with one member appointed by the President of each of the five boroughs and the remaining two members appointed by the Mayor (Spence 2044-45; PX1177). The BOE also appointed a Chancellor (currently Joel I. Klein, but at the time of trial Rudy Crew and later Harold O. Levy), who was responsible for the school system's operation. In addition, the BOE had broad powers, including teacher hiring, maintenance of school property and facilities, curriculum, and provision of equipment, books and instrumentalities of learning. See Educ. L. § 2554.

At the time of trial, the New York City school district was subdivided into 32 community school districts ("CSDs"), each of which enrolled between 9,000 and 40,000 students (DX19021). Together, the 32 community school districts operated more than

[3]The term "at-risk" was used extensively at trial to signify students who, by virtue of their background, are less likely to succeed in school, and was variously defined as referring to free-lunch-eligible students (Coppin 577), poor students and ELLs (also referred to as students with limited English proficiency ["LEP"]) (Mills 11152-53), and students who come from single-parent homes or from poor backgrounds (Sobol 943).

900 elementary and middle schools (Tobias 10316; Spence 2041; PX3149). Each CSD had its own elected community school board and superintendent. See Educ. L. §§ 2590-c, 2590-d. Responsibility for the City's approximately 200 high schools was divided among five superintendents, who worked directly under the aegis of the Chancellor and the BOE, as did the superintendent of District 75, which educates 20,000 of the most profoundly handicapped special education students (PX1167*).

Recent amendments to the Education Law, enacted in June 2002, reform the governance structure of the New York City schools, giving the Mayor greater control over the schools and new powers, including the power to appoint the new Chancellor. See 2001 Assembly Bill 11627 (2002). The law also expands the BOE from seven to thirteen members. Id. The Mayor has the power to appoint seven members of the BOE and the five borough presidents will appoint the remaining members, who must be parents of children currently in public schools in the City. Most of the Board's powers have been transferred to the Chancellor, with the Board serving in an advisory capacity. Id. Under the new law, the Mayor has sole control of the City's School Construction Authority ("SCA"), which had been created by the State Legislature in 1988 for the purpose of constructing and renovating educational facilities throughout the City. That work was previously the function of the BOE's school Facilities

division. Id. The law will also eliminate the City's existing 32 community school boards in June 2003. Id. The Mayor has submitted for the Legislature's approval a proposal to replace the CSDs with committees of parents who would be elected by other parents at their children's schools. See Abby Goodnough, Mayor Sets Plan for Tight Control Over City Schools, N.Y. Times, Jan. 16, 2003, at A1. Moreover, under the Mayor's proposed plan, about 1,000 of the 1,200 schools would have to follow a single uniform curriculum. Id.

II. Overview Of State Education Policy And Funding

Pursuant to its constitutional mandate to provide for a system of free common schools, the Legislature has enacted various prescriptions for and provided for oversight of the State's more than 700 school districts. It has established a framework and minimum standards for public education, including compulsory education laws requiring a basic education for the children of the State, see Educ. L., art. 65, part I, prescriptions related to the minimum duration of the school day and year, see id., §§ 1704, 3204, required courses, textbooks, and qualifications of teachers and non-teaching personnel, see id., §§ 801, 804, 806, 808, 3204.

In recent years, the Legislature as a matter of policy has expanded educational opportunities in such areas as pre-

kindergarten and extended day programs (PX2167; DX10951a, p.31; DX19740; Evans-Tranumn 1919-20, 1941-48). See also Educ. L. § 3602-e(10). In accordance with such federal laws as the recently enacted No Child Left Behind Act of 2001, 20 U.S.C. § 6301 - 7014, the Legislature has also authorized state intervention in schools and school districts where students are failing to perform above certain benchmarks on state tests aligned with new learning standards. Under the relevant New York State Education Department ("SED") regulations, schools and districts that fail to achieve sufficient improvement in their students' scores are publicly identified as "low performing" and, in the most extreme cases, are even subject to having their registration revoked, while students attending such schools have the right to transfer to schools that have been classified as satisfactory. See 8 N.Y. Codes, Rules & Regs. ("N.Y.C.R.R.") §§ 100.2(p), 120.3.

The Governor also plays a role in the area of education, particularly the area of education finance. In addition to participating in the law-making process when the Legislature passes laws regarding the State's education policy, the Governor is an essential participant in the budget-making process that determines the level of state education aid and how it is allocated among school districts (King 22121-22). The results of the annual budget process are reflected in legislation passed by

both the Assembly and Senate, and approved by the Governor. The budget process begins each year with the preparation of the Executive Budget proposed by the Governor to the Legislature, and concludes each year with the enactment of the state budget and its signing by the Governor (id.).

State education policy is largely determined by the Board of Regents pursuant to authority delegated by statute. The Board is comprised of 16 individuals (one from each of the State's 12 judicial districts and four from the State at large), each of whom is elected to a five-year term by the Legislature sitting as a unicameral body. See Educ. L. § 202(1). Except when the Legislature has otherwise spoken, the Regents dictate official state education policy, including policy relating to the scope and difficulty of school curricula and high school graduation requirements (Sobol 854). The Regents are also responsible for selecting the State's Commissioner of Education, Educ. L. § 207. As the SED's chief administrative officer, the Commissioner has the power to examine and inspect school facilities and to identify low performing, or SURR ("Schools Under Registration Review"), schools. Id., § 305(2); 8 N.Y.C.R.R. § 100.2(p). The SED itself functions as the Regents' administrative arm, and oversees the BOE and all other school districts throughout the State. Educ. L. § 305(2). The Regents and the SED together make non-binding budgetary recommendations to the Governor and

Legislature, who decide whether to authorize the State funding needed to support the Regents' policy initiatives (King 22127-28). See Educ. L. § 207.

Funding for public schools in New York comes from three basic sources: locally generated revenues, State aid, and federal aid (Wolkoff 18117-18). In New York City, as in other school districts, the school system is primarily dependent on local contributions, in keeping with the State's long tradition of local control. The City school district is one of five "fiscally dependent" districts in the State (Sobol 902-03). It has no independent taxing power and must rely on the City government to determine, as part of the City's budget, the overall level of funding the school system will receive for the support of public education (Rubenstein 11499, 11501-08). Educ. L. § 2576(5). The share of the City school system's overall revenues contributed by the City relative to the State's contribution decreased from 53 percent in 1995-96 to 49 percent in 1999-2000 (DX 19737).

In addition to these locally generated revenues, the City's education system and the other school districts in the State also receive supplemental state contributions, which are determined by the Legislature and Governor with non-binding input from the Regents and SED (King 22127-29). State education aid is allocated among various localities pursuant to a series of funding formulas, which are necessarily complex because they

represent a legislative balancing of multiple and sometimes competing policy values (Guthrie 20171-72; Berne 12674-75). Because local revenues are raised primarily though property taxes and the local tax base varies widely among school districts, the state aid formulas are designed to offset those disparities – that is, they are "wealth equalizing" (PX2027, p.9). An important means of achieving this goal is the Combined Wealth Ratio ("CWR"), on which allocations of state aid are based in part. The CWR measures school district wealth as an average of property value per pupil and income per pupil (Berne 11854-55). Lower wealth districts receive far more state aid per student than higher wealth districts (id.). New York City is in the second wealthiest quartile of districts in the State as measured by CWR (Wolkoff 18041-46).

Generally, there are three categories of formulas used to distribute state aid. Most state aid is termed "operating aid" and is distributed according to two factors: the district's capacity to raise local funds and the number of pupils attending school in the district (Guthrie 20242; DX 19591; PX2027, p. 12). The pupil counts in these formulas reflect the average daily attendance in each district, and are weighted for certain categories of students that may have additional or special educational needs (Wolkoff 17949-50; DX17274, pp. 1-4). The second category of aid is "expense-based aid," which is based on

actual approved spending by a district and incorporates a wealth-equalizing factor (Kadamus 1709-10; PX 2027, p. 12). This category of aid includes funding for buildings and transportation services (PX 2027, p. 12). The third category of aid is a flat grant per pupil, which provides an equal amount of aid per pupil to every district in the State (PX 2027, p. 12).

New York spends more on state aid for education than all but two states in the country (Hanushek 15667; Grissmer 9564-65; PX2272Y). In 2000-01, the State Legislature appropriated $13.6 billion for public education statewide, or 44 percent of the total revenues used for public education in New York in education funding (DX19740). This constituted an overall increase of $4.51 billion since 1993-94 (PX417, p.17). The State's contribution to the New York City school system has markedly increased over the past several years, from $3.1 billion in 1993-94 to $4.5 billion in 1999-2000 (PX2567, p.33; PX417, p.27; DX19693A; King 22158-60). In the current fiscal year, the State contributed more than $5 billion to the City system. See SED's State Aid Web Site at http://stateaid.nysed.gov. From fiscal year 1994-95 to fiscal year 1999-2000, the state's share of the City's combined State and local education funding increased from 47 percent to 51 percent (King 22221-24; DX19737).

Finally, the City school system receives a significant amount of federal assistance. By far the largest source of

federal aid for the City is the approximately $377 million that it has received annually through the Federal Title I program, which seeks to close the achievement gap between poor and middle class children (Walberg 17087-88; Grissmer 9504-05). Approximately 10 percent of the City's education budget consists of federal funds (Wolkoff 18118).

In 1999-2000, the school year during which the trial in this case concluded, the BOE received more than $10.4 billion from all sources to operate the New York City public schools, amounting to $9,500 for each student (Donahue 15455-57; PX3152; Murphy 16234-35). Between 1997, when the BOE budget was $8.1 billion, and 2000, per-pupil spending increased by 20 percent even after adjusting for inflation. See Emanuel Tobier, "New York City's Public Schools: The Facts About Spending and Performance" (May 2001), at http://www.manhattan-institute.org/html/cb_26.htm). The City reports its current school year overall budget to have risen to $12.4 billion. See New York City Dep't of Educ., "Budget Operations and Review" at http://www.nycenet.edu). In addition to its operating budget, the BOE's capital plan at the time of trial provided over $7 billion in funding for new school facilities and repairs to existing facilities (DX1496, p. i-6).

III. State And City Academic Standards And Assessment Systems

For decades and continuing through the time of trial, matters relating to school curricula were largely left to the discretion of the local school districts, provided that children at least received instruction in the courses of study prescribed by the State. Nonetheless, as part of its function in dictating education policy for the State, the Board of Regents has traditionally established curricular standards and requirements for high school diplomas. From the late 1970s through the time of trial, students could receive a local high school diploma by passing the Regents Competency Tests ("RCTs"), which were designed to measure minimum competency in basic literacy, calculating and verbal skills (Sobol 920-22, 1845-48; Kadamus 19270; PX9, pp. 140-41). While students choosing to take more challenging course work could receive a Regents diploma by passing the more rigorous Regents Examinations, approximately 60 percent of all high school students statewide chose to take the RCTs (Rossell 16868; DX19289; PX2064, p. 13).

In 1996, however, as part of the so-called "standards movement" dominating national education policy, the Regents embarked on a bold initiative in order to enhance academic achievement (Mills 1107-1111). The dominant principle of the standards movement is that education programs should embody high standards, expect students to satisfy them, and hold educators

accountable for their students' success (Sobol 978-88). The Regents accordingly sought to adopt a new set of curriculum standards and assessments requiring students to demonstrate "proficiency" (as opposed to mere "competency") in challenging "core academic subjects." See State Education Department Report on Implementation of a System of Accountability for Student Success at 3 (July 2001). This "movement from competency-based to proficiency-based standards" led in 1996 to the new Regents Learning Standards ("RLS"), which will be fully phased in by the year 2005 unless amended. Id. The RLS are detailed goals and standards describing what students should know and be able to do at each grade level and in order to graduate from high school prepared for college or work (DX316-22). Those standards – which have been described as "world class" and "demanding" and as mandating achievement well beyond basic competency standards – require all students to study a "rigorous core of courses in English, history, mathematics, science, technology, arts, health, physical education and foreign language" (PX1587, p.4; PX2064, p. 13; DX19017A, p.704832; Mills 1100, 1108-09; Casey 9976; Chin 4993-4995; Tobias 10545; Hernandez 9210; Kadamus 1715). According to the Regents, "high need" school districts, comprising over half of the State's students, will require additional resources to achieve at the level required by the RLS (Levy 11275-76).

The Regents also developed a set of examinations that are aligned with the Learning Standards and are designed to assess students' progress in satisfying the standards. To ensure that all students are learning the skills that will prepare them for Regents study in high school, and ultimately for a Regents diploma, 4th and 8th grade students in the state's public schools have since 1999 been required to take examinations in English Language Arts ("ELA") and mathematics geared to the RLS in those core subject areas (PX875B, p.6). The Regents' requirements for high school graduation have also changed. Under this new system, the RCTs are being phased out and will no longer be given to high school students, who instead will have to pass five different Regents Examinations to receive a diploma (PX2064, p. 13).

Under the current plan, passage of the full set of Regents exams will be required for graduation by the end of the 2004-05 school year (Tobias 10324-25). Schools whose students do not achieve performance standards established by the SED on the new examinations are subject to classification as Schools Under Registration Review ("SURR"). The SED warns SURR schools that their registrations may be revoked and assists them in improving their educational program (id.). Schools whose students' scores do not then improve may have their registration revoked (id.).

New York City has its own high standards for evaluating student achievement. The City's so-called "New Standards" are

closely aligned with the RLS (Tobias 10461). For the past decade, the BOE has administered citywide tests in reading and math to students in grades three through eight (DX10168; Tobias 10450). These particular reading and math tests (known respectively as the CTB-R and the CAT and collectively as the CTB tests), which were devised by McGraw-Hill, are used in more than one-third of the school districts in the nation (Tobias 10450; Mehrens 18457-61). In selecting the CTB-R and CAT as the relevant measure of student performance in New York City's public schools, the BOE determined that those tests are aligned with the "world class" content and performance standards adopted of the City's New Standards (Tobias 10460; PX1587). See also Performance Standards: English Language Arts, Preface, "Standards for Standards," available at http://www.nycenet.edu/dis/Standards/ELA/index.html. The BOE used these tests as a measure of student performance through the 2001-02 school year. See New York City Dep't of Educ. website at http://www.nycenet.edu/daa/test_results. Through the time of trial, scores on the CTB-R and CAT exams were "norm-referenced:" that is, they were reported in terms of how City students compared to a scientifically-sampled "norm" population of test-takers in the same grade throughout the nation (Mehrens 184665-70). Thereafter, the scores on the city-wide tests were reported in "criterion-referenced" form: that is, in terms of achievement

of levels of performance reflecting how well each test-taker met the criteria for which the exams test (Mehrens 18522). The 4th and 8th grade tests are also criterion-referenced (Mehrens 18525).

IV. The Present Case

A. Levittown

The legal framework of the present case derives initially from this Court's decision in Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27 (1982) ("Levittown"). In Levittown, property-poor school districts contested disparities in education funding that resulted from reliance on local funds to finance education. The Levittown plaintiffs alleged that these funding disparities between wealthier and poorer school districts led to unequal educational opportunities, in violation of both the Education Article and the Federal and State Equal Protection Clauses.

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

> What appears to have been contemplated when the education article was adopted at the 1894 Constitutional Convention was a State-wide system assuring minimal acceptable facilities and services in contrast to the unsystematized delivery of instruction then in existence within the State. Nothing in the contemporaneous documentary evidence compels the conclusion that what was intended was a system assuring that all educational facilities and services would be equal throughout the State. The enactment mandated only that the Legislature provide for maintenance and support of a system of free schools in order that an education might be available to all the State's children. There is, of course, a system of free schools in the State of New York.

Id. at 42 (internal citations omitted).

The Court also explained its understanding of the constitutional obligation imposed on the Legislature by the Education Article. The Court rejected the Appellate Division's finding that the Education Article had been violated because children were denied the opportunity to acquire the skills necessary to prepare them "'for their role as citizens and as potential competitors in today's market.'" Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 83 A.D.2d 217, 249 (2d Dep't 1981) (citations omitted). Instead, "[i]nterpreting the term education . . . to connote a sound basic education," the Court "ha[d] no difficulty in determining

> that the constitutional requirement is being met in this State, in which it is said without contradiction that the average per pupil expenditure exceeds that in all other States but two . . . Because decisions as to

> how public funds will be allocated among the several services for which by constitutional imperative the Legislature is required to make provision are matters peculiarly appropriate for formulation by the legislative body (reflective of and responsive as it is to the public will), we would be reluctant to override those decisions by mandating an even higher priority for education in the absence, possibly, of gross and glaring inadequacy--something not shown to exist in consequence of the present school financing system.

57 N.Y.2d at 49.

B. The CFE litigation

1. Initial proceedings

Plaintiffs Campaign for Fiscal Equity, et al. consist of an advocacy group, various New York City community school boards, and New York City schoolchildren and parents. Plaintiffs commenced this action in May 1993 for a declaratory judgment and injunctive relief on the ground that the State's public school financing system violated the Education Article of the New York State Constitution (art. XI, § 1); the Equal Protection Clauses of the Federal and State Constitutions, U.S. Const. 14th Amend. and N.Y. Const. art. I, § 11; the Anti-Discrimination Clause of the State Constitution, N.Y. Const. art. I, § 11; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d – 2000d-6; and Title VI's implementing regulations, 34 C.F.R. § 100.3(b)(2)(p). The State moved to dismiss the complaint for failure to state a cause

of action. Simultaneously, New York City and the BOE commenced an action against the State and other defendants alleging virtually identical claims. The trial court dismissed the City and BOE's action in its entirety and dismissed from the remaining action certain plaintiffs and all of the claims except those brought under the Education Article, the Anti-Discrimination Clause and Title VI's implementing regulations. Campaign for Fiscal Equity v. State, 162 Misc.2d 493, 500 (Sup. Ct. N.Y. Co. 1994). On appeal, the Appellate Division, First Department dismissed all of plaintiffs' claims for failure to state a cause of action. Campaign for Fiscal Equity, Inc. v. State, 205 A.D.2d 272 (1st Dep't 1994).

2. This Court's decision in CFE I

This Court affirmed the dismissal of all plaintiffs' claims except those brought under the Education Article and Title VI's implementing regulations. See Campaign for Fiscal Equity v. State, 86 N.Y.2d 307 (1995) ("CFE I").

The Court took the view that it had "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. This sound basic education, described by the court as a "constitutional floor," is minimal: It "consist[s] of the basic literacy, calculating, and

verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." Id. at 315, 316. If, moreover, "the physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain those essential skills, the State will have satisfied its constitutional obligation." Id. at 316.

The Court briefly described the State's duty:

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

Id. at 317. It rejected plaintiffs' reliance on "minimum state-wide educational standards established by the Board of Regents and the Commission of Education": "Because," the Court said, "many of the Regents' and Commissioner's standards exceed notions of a minimally adequate or sound basic education – some are aspirational – prudence should govern utilization of the Regents' standards as benchmarks of educational adequacy." Id. Thus, proof of noncompliance with these standards could not, "standing

alone, establish a violation of the Education Article." Id. Nor could plaintiffs rely, in attempting to demonstrate the inadequacy of funding, "on standardized competency examinations established by the Regents and the Commissioners to measure minimum educational skills," for while "[p]erformance levels on such examinations are helpful," they "should also be used cautiously as there are a myriad of factors which have a causal bearing on test results." Id.

The Court declined "to definitively specify what the constitutional concept and mandate of a sound basic education entails." Id. But it provided what it called "a template reflecting our judgment of what the trier of fact must consider in determining whether defendants have met their constitutional obligation":

> The trial court will have to evaluate whether the children in plaintiffs' districts are in fact being provided the opportunity to acquire the basic literacy, calculating and verbal skills necessary to enable them to function as civic participants capable of voting and serving as jurors.

Id. at 317-18. Since the Court deemed it "beyond cavil that the failure to provide the opportunity to obtain such fundamental skills as literacy and the ability to add, subtract and divide numbers would constitute a violation of the Education Article," id. at 319, and plaintiffs had alleged such a failure, the Court reversed the Appellate Division's order dismissing the complaint.

The Court noted, however, that plaintiffs could not prevail simply by establishing the relevant constitutional standard and demonstrating that the City schools had not satisfied it. Plaintiffs were also obliged 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." Id.

The Court in CFE I also permitted plaintiffs to pursue their claim that the State public education financing system violated the implementing regulations of Title VI of the federal Civil Rights Act. Those regulations, the Court said, are violated not only when a challenged practice is motivated by racial discrimination, but also when it has a discriminatory effect. Id. at 322. Since plaintiffs had alleged the requisite "disparate impact," those claims could go forward. Id. at 323.

3. The Trial Court's Decision

The case was tried in Supreme Court, New York County, before Justice Leland DeGrasse. On January 9, 2001, the court issued an opinion finding for plaintiffs on both of their remaining claims. Campaign for Fiscal Equity v. State, 187 Misc.2d 1 (Sup. Ct. N.Y. Co. 2001) ("CFE Trial").

With regard to the Education Article claim, the trial court expanded this Court's template by suggesting that being "capable" of voting and serving on a jury was not just a matter of basic

competence, but rather requires sophisticated knowledge of complex issues such as global warming, DNA evidence, and statistical analyses. CFE Trial, 187 Misc.2d at 13-14. The trial court also grafted onto the template a competitive-employment requirement, concluding that "a sound basic education" must be defined with reference to the projected needs of New York City's local labor market, for which students need to acquire the "high level academic skills" required to "compete successfully for good jobs" in the "high technology sector." Id. at 17.

The court then considered whether the resources, or "inputs," provided to and by the City schools were sufficient to give City students an opportunity to receive a sound basic education as the Constitution defines it in the City's schools. It found that they were not. First, comparing New York City's circumstances with those of other districts in the areas of teacher certification, teacher experience, teacher educational background, and teacher salaries, it found that teaching in the City schools was inadequate. Id. at 24-33.

Next, addressing school facilities and classrooms, the court deemed structural deficiencies identified at particular school facilities sufficient to show system-wide inadequacy, ignoring evidence that 84 percent of the building components were rated "fair" or better and an analysis demonstrating that the conditions of school facilities did not impair student learning.

Id. at 39-45. It also found computer resources inadequate notwithstanding a favorable computer-student ratio, because many computers were obsolete and "an additional number of aged '486s' and Apple Computers were too weak to power recent operating platforms, Internet or CD-ROM applications." Id. at 59-60.

In evaluating the student performance, or "outcomes," in the City's schools, the court examined graduation and dropout rates and test scores, concluding that they were evidence of a constitutional violation. The court rejected the RCTs as a measure of basic competency in reading, writing and mathematics, despite the Regent's use of them as criteria for high school graduation. It concluded that those tests do not measure the skills and knowledge the Court deemed necessary for a sound basic education. Id. at 61. The court also rejected defendants' evidence that City students as a group consistently score at approximately their average "grade level" on the nationally-normed CTB-R and CAT tests. Id. at 66-67.

Having found that the City schools did not provide a sound basic education, the trial court deemed plaintiffs' case proven, despite this Court's directive that plaintiffs also prove that defendants caused the inadequacy. "The short dispositive answer" to this objection, the trial court said, is that even if the City "impede[s] the delivery of a sound basic education, it is the State's responsibility under the Constitution to remove such

impediments." Id. at 80. The trial court also found that the state's funding system violates disparate impact regulations under Title VI of the Civil Rights Act. Id. at 100-13

Finally, the trial court gave the Legislature detailed instructions for reforming the system. Id. at 114-16. It ordered that the Legislature's reforms must produce "sufficient" numbers of qualified teachers, "[a]ppropriate class sizes," "[a]dequate and accessible school buildings to ensure appropriate class size and implementation of a sound curriculum" and "an expanded platform to help at risk students by giving them 'more time on task.'" Id. at 114-15. The court ordered defendants to put these reforms in place by September 15, 2001, and to report on their progress by June 15, 2001. Id. at 116.

4. The Appellate Division's decision

The Appellate Division, First Department reversed the trial court's order and held that plaintiffs had not proven that the State's educational funding mechanism contravenes the Education Article. The Appellate Division also dismissed plaintiffs' disparate impact claim brought under the Title VI implementing regulations and 42 U.S.C. § 1983. Campaign for Fiscal Equity v. State, 295 A.D.2d 1, 3-4 (1st Dep't 2002) ("CFE Appeal").

The Appellate Division first concluded that the trial court had used an improper standard to evaluate whether New York City

provides students with the opportunity for a sound basic education. The court explained that CFE I "requires the state to provide a minimally adequate educational opportunity, but not, as the IAS court held, to guarantee some higher, largely unspecified level of education, as laudable as that goal might be." CFE Appeal, 295 A.D.2d at 3. The court found the trial court's "aspirational standards" to be inconsistent with this Court's declaration that the Constitution requires only the "opportunity" for a "sound basic education" or a "minimally adequate education." Id. at 8 (internal citations omitted).

The Appellate Division also rejected the trial court's interpretation of the phrase "function productively as civic participants" in CFE I as requiring that students be prepared to engage in "competitive employment" somewhere between "low-level service jobs" and the "most lucrative careers." Id. While the phrase does encompass employment, the Appellate Division said, productive functioning should be interpreted simply as "the ability to get a job, and support oneself, and thereby not be a charge on the public fisc." Id.

The Appellate Division rejected use of the Regents Learning Standards as the benchmark of adequacy in education. Id. at 9. It further noted that plaintiffs had failed to specify the level of skills required to demonstrate a sound basic education. In the Appellate Division's view,

> [t]he absence of a clearly articulated level [of skills] helps explain why neither the IAS court nor the dissent is able to determine what programs or what amounts of funding are needed, and why they can only say that more money will lead to a better educational system. However, that is not the constitutional standard, and a statement that the current system is inadequate and that more money is better is nothing more than an invitation for limitless litigation.

Id. The court concluded that there was no evidence that students were "unable to perform basic mathematical calculations, and allowing that some amount of history and civics, and science and technology, are components of a sound basic education, there was no evidence concerning what amount that should be or what amount is actually being provided." Id.

The Appellate Division also disagreed with the trial court's assessment of the evidence concerning whether the State had provided minimally adequate "inputs." It found that while the facilities in New York City schools were not perfect, there was insufficient proof in the record that they were so "pervasive as to constitute a system-wide failure, much less one that was caused by the school financing system, or one that can be cured only by a reformation of that system." Id. at 10.

The court also took issue with the trial court's evaluation of the evidence relating to overcrowding, noting that while there was evidence in BOE records from 1997 of overcrowding in eleven elementary school districts, it was unclear what the overall

utilization rate for school facilities citywide would be if the remaining 21 districts had been considered. Id. at 11. Moreover, the court observed that the City class sizes averaged between 23.8 to 28.72 students per class in kindergarten through eighth grade. The Appellate Division found no evidence in the record that students cannot learn in classes over 20. Id.

The Appellate Division similarly concluded that the instrumentalities of learning provided for New York City students were at least minimally adequate. It pointed to plaintiffs' acknowledgment that recent funding increases have relieved previous alleged inadequacies in textbook and technology funding, and agreed with the trial court's conclusion that there was "little except anecdotal evidence concerning the amount of supplies such as chalk, paper, desks, chairs, and laboratory supplies." Id. Finally, the Appellate Division found, the evidence that library books were inadequate was largely anecdotal. Id. at 12.

The Appellate Division also disagreed with many of the trial court's conclusions regarding teacher quality. "The mere fact . . . that the City's teachers have lower qualifications than those in the rest of the State does not establish that the City's teachers are inadequate," the court stated. Id. at 13. The Appellate Division concluded that the trial court gave insufficient weight to the evidence that, from 1995 through 1998,

fewer than 1 percent of City teachers received "unsatisfactory" ratings on annual performance reviews by their principals. Id. The Appellate Division found that "reviews of teaching ability, completed by principals in daily contact with teachers, are more indicative of a teacher's ability to instruct than is a teacher's curriculum vitae, or a superintendent's suppositions that deficiencies in reporting are due to sloth or fear." Id. at 14. Moreover, the court found that plaintiffs did not explain why $3,000 per teacher spent on professional development was insufficient. Id.

In addition, the Appellate Division disagreed with the trial court's analysis of the evidence concerning academic outcomes, disputing the view that only a high school diploma could signify receipt of a minimally adequate education. Specifically, the court disagreed with the trial court's adoption of the RLS graduation standards as the measure of a sound basic education, finding that the trial court had "disregarded the Court of Appeals' exhortation in CFE I to use performance levels on standardized examinations 'cautiously.'" Id. at 15 (internal citations omitted). The court further concluded that plaintiffs' "position is essentially a form of res ipsa loquitur." Plaintiffs had asserted that the facts that 30 percent of City students drop out and an additional 10 percent obtain only a GED must mean that the City schools fail to offer the opportunity of

a sound basic education. In the Appellate Division's view, however,

> [t]he proper standard is that the State must offer all children the opportunity of a sound basic education, not ensure that they actually receive it. Thus the mere fact that some children do not achieve a sound basic education does not necessarily mean that the State has defaulted on its obligation. Notably, the standard is 'sound basic education,' not graduation from high school; nor can the State be faulted if students do not avail themselves of the opportunities presented.

Id.

The Appellate Division also found that the trial court failed to give sufficient weight to City students' performance on statewide and standardized tests. It noted that 90 percent of the City's eleventh graders achieved graduation competency status in reading, writing and mathematics on either the RCTs or the Regents exams, and that students in grades 3 through 8 consistently scored at the national average on the McGraw-Hill reading and math tests. Id. The court criticized the trial court's willingness to rely on comparisons between City students and students in the rest of the state while refusing to look at comparisons between City students and those nationwide. Id. at 16.

The Appellate Division also rejected the trial court's conclusions about causation. It found that "plaintiffs failed to prove that deficiencies in the City's school system are caused by

the State's funding system." Id. Taking issue with the trial court's formulation of the causation question, the Appellate Division stressed that "the constitutional question is not whether more money can improve schools, but whether the current funding mechanism deprives students of the opportunity to obtain a sound basic education." Id.

The Appellate Division suggests that money spent to alleviate the problems of at-risk students might be spent on non-education social services. These doubts, it added, were shared even by plaintiffs' expert Dr. David Grissmer, who conceded that investing money "in the family" rather than the schools "might pay off even more." Id. And even if more money for education was the answer, said the court, there was ample evidence that "sizeable savings could be reaped through more efficient allocation of resources by BOE, which would then make available large sums of money for programs which are purportedly underfunded, such as 'time on task' programs." Id. By rejecting the evidence of these savings as "wishful thinking," the trial court had erroneously applied a presumption of unconstitutionality to the Legislature's funding laws. Id. at 17. But, the Appellate Division said, it is instead "plaintiff's burden to demonstrate that the current funding scheme is unconstitutional and that the only way to allocate sufficient

resources to the programs they desire is to annul the entire funding mechanism." Id.

The court also rejected defendants' arguments that the City is responsible for any shortfall in funding, noting that the State exerts extensive control over the City. However, it recognized that this control does not "requir[e] the State to write out a check every time the City underfunds education," for there are other areas by which the State can insure an adequate contribution by the City.

Finally, the Appellate Division, taking account of the squarely-applicable decision of the United States Supreme Court in Alexander v. Sandoval, 532 U.S. 275 (2001), ruled that there is no private right of action under the regulations implementing Title VI. CFE Appeal at 20. It further ruled that a claim for violation of the Title VI regulations cannot be brought pursuant to 42 U.S.C. § 1983. CFE Appeal at 20-21. Accordingly, the Court dismissed plaintiffs' Title VI claim as well as its Education-Article claim. Id. at 21-22.

ARGUMENT

STANDARD OF REVIEW

The Court's scope of review in the present case is narrow. C.P.L.R. § 5501(b) empowers the Court "to review questions of law only, except that it shall also review questions of fact when the

appellate division . . . has expressly or impliedly found new facts and a final judgment pursuant thereto is entered." The question on which the court below based its reversal – whether the trial court "applied an improper [constitutional] standard," CFE Appeal at 3 – is subject to this Court's review.[4] But the other two issues the Appellate Division addressed – whether plaintiffs proved that New York City children do not receive an opportunity for a sound basic education, and whether plaintiffs proved that any deficiencies in the City's school system are caused by the State's funding system – are not now reviewable.

In discussing these issues, the Appellate Division made clear that it based its conclusions on its assessment of the weight of the evidence. Thus, on the issue of adequacy, it spoke in terms of whether there was "sufficient proof that [school] facilities are so inadequate as to deprive students of the opportunity to acquire" a sound basic education, id. at 11, observed that plaintiffs had "failed to establish that [certain] instrumentalities of learning are inadequate," id. at 11-12, and commented that the trial court "gave sufficient weight" or "failed to give proper weight" to various pieces of the trial evidence, id. at 13, 15. Similarly, the Appellate Division concluded that "plaintiffs failed to prove" or "failed to

[4]The Appellate Division's conclusion that plaintiffs may not pursue a cause of action under regulations implementing Title VI of the federal Civil Rights Act is likewise reviewable.

demonstrate" causation, repeatedly resorting to assessments of the "evidence" and "significant evidence" in support of its conclusion. Id. at 16-17.

Such assessments of the weight of the evidence are beyond the Court's purview. See, e.g., Sage v. Fairchild-Swearingen Corp., 70 N.Y.2d 579, 588 (1987) ("[t]he Appellate Division's alternate conclusion that the verdict was against the weight of the evidence is a factual determination and, as such, beyond this court's review powers"). Plaintiffs nonetheless contend, without offering any support for the statement (Pl. Br. at 16-17), that the Appellate Division's treatment of the adequacy and causation issues fall within the exception to C.P.L.R. § 5501(b) because the Appellate Division supposedly "reversed or modified nearly all of the [trial] court's findings of fact." But the Appellate Division did nothing of the kind; it merely made a different evaluation of the same evidence relied on by the trial court. Accordingly, the adequacy and causation issues are not before this Court, and the Appellate Division's ruling on causation – an element of any constitutional violation – provides an independent basis for affirmance of the decision below.

POINT I

THE APPELLATE DIVISION CORRECTLY REJECTED PLAINTIFFS' EFFORT TO REDEFINE THE MINIMAL STANDARDS FOR A SOUND BASIC EDUCATION ESTABLISHED BY THE COURT IN CFE I.

As the Appellate Division recognized, plaintiffs have failed at the task this Court set for them in CFE I. This Court's decision made clear that the Education Article requires only that the State provide the opportunity for a "minimally adequate" public education. Provision of anything above this constitutional floor is a matter of public policy, reserved to the sound discretion of the Legislature and localities. Plaintiffs, however, disregard this fundamental limitation, which follows from the text, history, and purpose of the Education Article as well as from important separation of powers concerns. Unable to demonstrate a deprivation of the minimal educational opportunities required by the Constitution and seizing on the fact that, as a matter of policy, the State has chosen to be among the nation's leaders in public education, plaintiffs seek to make the first-rate education that is the goal in New York, and the funding that accompanies it, a matter of constitutional compulsion. Because this approach is incompatible with the meaning of the Education Article established by this Court, it cannot succeed in the present case.

A. As This Court Held in CFE I, the Text, History, and Prior Judicial Construction of the Education Article Leave No Doubt That it Imposes Only a Duty to Provide "Minimally Adequate" Educational Opportunities.

1. The plain language and purpose of the Education Article establish that the Article must be construed to require only the opportunity to obtain a minimally adequate education.

As this Court has already recognized, a narrow definition of the scope of the obligation imposed by the Education Article is compelled by the Article's text and purpose. The Article itself directs the Legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. Const. art. XI, § 1. It contains no express qualitative or quantitative standards.[5] This is unsurprising in light of its "primary aim": simply "to constitutionalize the established system of common schools rather than to alter its substance." R.E.F.I.T. v. Cuomo, 86 N.Y.2d 279, 284 (1995); see also Judd v. Board of

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

Educ., 278 N.Y. 200, 210 (1938) (provisions of Education Article "merely crystalize into fundamental law in mandatory form earlier decisions made by the people and recognized by the Legislature").

By 1894, the Legislature had already enacted a system to provide for the maintenance and financial support of public schools throughout the State. See L. 1894, ch. 556; L. 1874, ch. 421; L. 1812, ch. 242; L. 1795, ch. 75. The members of the Constitutional Convention of 1894 were nonetheless concerned that the common school system "rest[ed] simply on statutory law, easily abrogated by any capricious legislature." 3 Revised Record of Constitutional Convention of 1894 (1900 Fitch rev.), at 695. The Article was also designed to help ensure that public schools were available in localities that had faced difficulties in establishing schools. See id. Thus, this Court said in Levittown, "[w]hat appears to have been contemplated when the education article was adopted at the 1894 Constitutional Convention was a State-wide system assuring minimal acceptable facilities and services in contrast to the unsystematized delivery of instruction then in existence within the State." 57 N.Y.2d at 42. Accordingly, the Education Article must be read to establish only a minimal "floor" above which the Legislature and localities may surely go.

2. This Court, in CFE I and elsewhere, has already held that the Education Article imposes only a minimal obligation upon the State.

Although the text of the Education Article imposes no qualitative or quantitative standards, this Court has found in it a substantive component. Recognizing that the Article's purpose would be thwarted if the resources made available in each local district's schools were so inadequate as to deprive students of any education at all, the Court construed the phrase "may be educated" to mean "may receive a sound basic education." Levittown, 57 N.Y.2d at 48. A violation of the Article, it added, could be demonstrated only by establishing a "gross and glaring inadequacy." Id. at 49. But as long as "what is made available by this system [of educational funding] may properly be said to constitute an education, the constitutional mandate is satisfied." Id. at 48.

As in Levittown, in allowing the present case to go to trial this Court took pains to emphasize the minimal nature of the obligation the Education Article imposes. The State "must assure that some essentials are provided": "minimally adequate" physical facilities, "instrumentalities of learning," and instruction. CFE I, 86 N.Y.2d at 317. As long as these resources are sufficient to give children the opportunity to obtain "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic

participants capable of voting and serving on a jury . . . the State will have satisfied its constitutional obligation." Id.

A return to this well-beaten constitutional path is a necessary corrective to plaintiff's journey deep into the realm of education policy. The Appellate Division pinpointed the problem with plaintiffs' case: The standard they urge as minimally adequate is simply "improper." CFE Appeal, 295 A.D.2d at 3. The Education Article, the Appellate Division recognized, "requires the State to provide a minimally adequate educational opportunity, but not . . . to guarantee some higher, largely unspecified level of education, as laudable as that goal might be." Id.

Ignoring this Court's instructions to the parties in CFE I, plaintiffs again argue for their expansive interpretation of the Constitution. Such an approach is foreclosed by this Court's decision in CFE I, where it reaffirmed the minimal nature of the constitutional requirement. Moreover, as demonstrated in the next section, plaintiffs' insistence on a constitutional standard defined by what the Board of Regents considers optimal would make the Regents the final arbiters of the meaning of the Constitution, while assigning this Court the task of micromanaging the State's education system.

B. Plaintiffs' Insistence on a Constitutional Standard Defined by the High Standards of the Board of Regents Rather Than the Minimal Level of Adequacy Established by CFE I Would Reverse the Roles of the Courts and the Regents, With Courts Micromanaging Schools While the Regents Interpret Constitutional Provisions.

1. The standard of minimal adequacy established by CFE I comports with the limited role of the judiciary in overseeing public education.

Plaintiffs argue that changes in social circumstances since the Education Article was adopted require a more expansive approach than the framers of the Article intended. But the minimal nature of the obligation imposed on the State by the Education Article derives not only from the history and text of the Education Article but also from a recognition of the proper role of the judiciary in the State's system of government. This Court recognized in Levittown that

> [t]he determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous political complexity, and resolution appropriately is largely left to the interplay of the interests and forces directly involved and indirectly affected, in the arenas of legislative and executive activity. This is at the very essence of our governmental and political polity.

Levittown, 57 N.Y.2d at 38-39; see also Hoffman v. Board of Educ. of the City of N. Y., 49 N.Y.2d 121, 125-26 (1979) ("We had thought it well settled that the courts of this State may not substitute their judgment, or the judgment of a jury, for the

professional judgment of educators and government officials actually engaged in the complex and often delicate process of educating the many thousands of children in our schools.”). Because “[i]t would normally be inappropriate . . . for the courts to intrude upon such decision-making,” Levittown, 57 N.Y.2d at 40, only a gross and glaring failure to provide the opportunity for a minimally adequate education required by the Article can prompt judicial intervention in the political process of determining what an education should consist of and how much should be spent on it. In all other cases, public officials and educators – not judges and lawyers – will continue to make these policy-based judgments.

The Appellate Division recognized, as the trial court did not, the importance of this fundamental principle of the separation of powers in fashioning a proper approach to this case. The trial court failed to follow this Court’s mandate in CFE I to inquire only into whether school resources were grossly and glaringly inadequate to provide the opportunity to obtain a minimally adequate education. Unfettered by either the mandate of CFE I or the sense of the limitations of the judicial role that has informed this Court’s Education Article jurisprudence, the trial court instead asked what level of resources would be optimal to provide the opportunity for a world-class education and eradicate any barriers to student achievement, without regard

to resource or financial limitations. This inquiry took it into discussions of ideal class size, desirable teacher credentials, preferable computers, and dozens of other dimensions of day-to-day school micromanagement. As the Appellate Division noted, however, "that is not the constitutional standard, and a statement that the current system is inadequate and that more money is better is nothing more than an invitation for limitless litigation." CFE Appeal, 295 A.D.2d at 9.[6] Disregard for the "minimally adequate" standard impermissibly converts judges into arbiters of education policy and shifts control of our schools away from elected representatives and educators. This is precisely the role that this Court has said the judiciary should avoid, for it "require[s] the courts not merely to make judgments as to the validity of broad educational policies – a course we have unalteringly eschewed in the past – but, more importantly, to sit in review of the day-to-day implementation of these policies." Donohue v. Copiague Union Free Sch. Dist., 47 N.Y.2d 440, 445 (1979).

[6]The long, arduous, and largely unhappy experiences of the courts of Ohio and New Jersey with education micromangement are detailed in Point IV, infra.

2. Definition of the "minimally adequate" standard required by the Constitution is not the province of the Board of Regents.

Plaintiffs ask this Court and the courts of the State to assume a role for which they are institutionally unsuited and micromanage the City's school system. At the same time, plaintiffs would seize from the courts the ability to say what the State's Constitution means. Apparently aware that the substantial amount of money the State provides to the New York City school system is more than ample to provide City students the opportunity to acquire the modest skills that CFE I establishes as a sound basic education, see infra Point II, plaintiffs attempt instead to redefine the constitutional standard. They treat as "minimally adequate" and thus constitutionally compelled a level of resources and student achievement far beyond what this Court contemplated in CFE I. They raise every aspect of the Court's bare-bones standard. And they justify this by reference to the policies of the State Board of Regents, arguing that the Constitution's standard of minimal adequacy should be measured by achievement of the Regents Learning Standards, the world-class standards adopted by the Regents in 1996.

Even before considering how far beyond minimal the Regents standards in question stretch, see infra Point I.C, it is easy to see why the definition of the constitutional standards is not a

task for the Board of Regents. The Regents are an administrative body. They are not popularly elected. Their job is solely to "determine [the State's] educational policies" within the limitations of the State's statutory law. They do not determine the amount to be spent on education. Educ. L. § 207. They have no incentive or mandate whatever to define the education to be provided in the State in terms of bare minima.

Nor, despite their limited policymaking function, are the Regents similarly situated even to the Legislature, on which the Education Article directly imposes a responsibility.[7] Unlike the Legislature, the Regents are under no obligation to consider either the costs of fulfilling government responsibilities other than education, the relative merits of non-education social programs in improving the lives of the citizens of the State, or even the cost-effectiveness of their own educational policies. They are not concerned, for example, with the competing claims on the public fisc of health care, social service, public security, environmental, and other programs, or with the amount of revenue that the State can raise to pay for education and other services. The Regents' narrow-focus policy considerations have nothing to do with either the constitutional minimum

[7] This is not to suggest that the Legislature is the final arbiter of the meaning of the Education Article. See Levittown, 57 N.Y.2d at 39.

It is, by contrast, very much this Court's job to interpret the Constitution. See, e.g., Anderson v. Regan, 53 N.Y.2d 356, 372 (1981) (interpretation of State Constitution is the role of the courts). Indeed, the Court in this case has not only already recognized that duty, see CFE I at 315 (under Education Article, "a duty exists and . . . we are responsible for adjudicating the nature of that duty"), but also discharged it, offering in CFE I an interpretation of the Education Article that plaintiffs now seek to undo.

Undeterred either by this Court's recognition in 1995 that many of the Regents' Standards – even those in place before adoption of the world-class Regents Learning Standards in 1996 – "exceed notions of a minimally adequate or sound basic education," or by the Court's observation that "adjudicating the nature of the duty" imposed by the Education Article is its own responsibility, plaintiffs try to transplant the Regents' policy preferences to the Constitution. Indeed, they warn the Court that anything but obeisance to the Regents' preferences would be "judicial activism" that "usurp[s] the Regents' authority." Pl. Br. at 47. Thus, the foundation of plaintiffs' entire argument remains what it has been throughout: their assertion that "the Regents' current statewide minimum standards of educational quality and quantity . . . necessarily serve as a benchmark" in determining the contents of a minimally adequate education. Id.

at 44. As they put it, "if the State ensures that school systems provide the opportunity for students to meet the graduation requirements set by the Regents, then the constitutional obligation will be satisfied." Id.

The fact that the standards that plaintiffs would transplant to the Constitution are now the State's achievement criteria for high school graduation does not make them any less a matter of policy choice rather than constitutional compulsion.[8] As this Court has recognized, the Regents' authority "to establish criteria for high school graduation" is a dimension of their delegated "power to determine educational policy in this State."

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[8]It should also be noted that at the time the Article was ratified, "common schools" were widely understood to consist of only the 1st through 8th grades, while high schools consisted of grades nine through twelve. The framers of the Constitution certainly recognized this distinction. See Report of the Committee on Education, 1894 Constitutional Convention, Document No. 62, pp. 3-9 (discussing "common schools" in connection with the first section of the proposed provision – the one now at issue – while discussing the subject of "Secondary and Higher Education" in connection with the proposed second section, which unified the State's entire education system under the governance of the University of the State of New York). Subsequent constitutional history preserved this distinction, see Temporary State Commission on the 1967 Constitutional Convention: Education at 15 (discussing proposal to change phrase "common schools" to "public schools," "on the ground that the terms 'common schools' and 'common school districts' in current usage refer to only one small category of public schools and school districts"), and it continues today, see Educ. L. § 3204(3) (mandating that "[t]he course of study for the first eight years" of public school provide for instruction in the "common school branches" of education). This is not to suggest that a system that failed to provide a traditional K-through-12 school system would be adequate or acceptable. That question is not at issue in this case.

Board of Educ. v. Ambach, 90 A.D.2d 227, 231 (3d Dep't 1982), aff'd mem., 60 N.Y.2d 758 (1983). When the Regents establish high school diploma requirements, they do so as policymakers only, while determining how much funding is available to assist in the fulfillment of those requirements remains a prerogative of the Legislature and the Governor.

Plaintiff's insistence on rooting a constitutional standard in the Regents' preferences imprisons their argument in a circularity it cannot escape. If, as plaintiffs say, a minimally adequate education consists not of a particular set of skills and body of knowledge that may well be imparted before high school graduation, but rather of skills and knowledge whose acquisition is congruent with attainment of a high school diploma, then anything the Regents deem desirable in a high school education is immediately elevated to a component of a sound basic education for which the State must ensure funding, whatever the cost and regardless of other barriers to attaining such skills.

Indeed, the Regents' adoption of the indisputably "world class" Regents Learning Standards, see infra Point I.C,, appears to have been motivated in part by a desire to achieve precisely this outcome. According to former Commissioner of Education Thomas Sobol, this Court's conclusion in Levittown that the Education Article entitles the State's students to "a sound basic education," 57 N.Y.2d at 48, led the Regents "to operationalize

the conditions that would lead to a sound basic education" (Sobol 963). They did this "[b]y creating the learning standards, and then by urging the legislature to provide the resources necessary for their attainment" (Sobol 963). If these rigorous world-class standards could be equated with minimal adequacy, the State would have to finance them, regardless of economic exigency or competing policy choices.

It is from this perspective that this case can be seen as no more than an effort to have the judiciary substitute its judgment for the decisions of the elected branches of state government as to how the State's limited financial resources can best be allocated. Witness after witness for plaintiffs attested to an urgent need for additional funding simply in order to meet the Learning Standards. This was true for virtually every category of educational resources: teacher training ("Coaching," in which master teacher co-teaches with novice, is "most expensive model" of professional development, but becomes "essential" with implementation of RLS [DeStefano 5437-39]); better-qualified teachers (with respect to teacher qualifications, "the state's obligation is to give the conditions . . . to meet the standards" [Darling-Hammond 6448]); special programs and extra instruction for students, the purpose of which is to enable them to meet the standards (Casey 9975); programs for students with limited English proficiency (intensified programs and professional

development necessary because "the new standards have been rolled in very, very quickly" [Hernandez 9188]); "particular facilities that the Regents believe are necessary to provide an opportunity for children to meet the new learning standards" (Levy 7113-14); and books, materials and supplies that "are matched to the new standards" (DeStefano 5499). All these can be seen as dimensions of the Regents' overall attempt to "align school funding with the statewide effort to assist all students in meeting state standards" (PX2064 p.13).

If not for the constitutional dimension of this case, such an effort would be entirely unexceptionable, indeed laudable. An administrative agency charged with advocacy for a particular program area has reached certain conclusions about what constitutes sound policy, and now seeks the money to put that policy in effect. What makes this effort objectionable in its current incarnation is its displacement from the political to the judicial arena. That plaintiffs and the Regents have chosen, in pursuing their policy preferences, to proclaim that the Regents Learning Standards are no more than "minimally adequate" and thus constitutionally compelled does not make them so.

C. The Regents Learning Standards are Aspirational and Cannot Be Equated With "Minimally Adequate" Education Required by the Education Article.

In addition to the reversal of judicial and administrative roles that would result if plaintiffs' position were adopted, the Regents Learning Standards claimed by plaintiffs to be synonymous with the sound basic education mandated by the Constitution far exceed the minimally adequate education that is mandated by the Constitution. Indeed, plaintiffs' attempt to equate of the Regents Learning Standards with the constitutional standard has already been rejected by this Court. This Court established in CFE I that standards promulgated by the Board of Regents do not and cannot reflect what makes for a minimally adequate education as a matter of constitutional law. In their complaint, the Court noted, plaintiffs "rel[ied] on the minimum State-wide educational standards established by the Board of Regents and the Commissioner of Education." CFE I, 86 N.Y.2d at 317. The Court said that such reliance was misplaced:

> [B]ecause 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.

Id. at 351. Significantly, the Regents' and Commissioner's standards before the Court in CFE I were far less rigorous than

the Regents Learning Standards plaintiffs now proffer as no more than minimally adequate, but even these less rigorous standards were said to "exceed notions of a sound basic education."

There can be no serious doubt that the Regents Learning Standards, in their scope and content, greatly exceed what the Education Article requires. The witnesses at trial attested almost unanimously to the high levels of achievement embodied by the RLS. Indeed, this was the primary allure of the Standards. For example, Richard Mills, the State's current Commissioner of Education, bases his views on what constitutes an adequate education on his belief that "[it] is not enough for New York to have just a pretty good system in comparison with other states, because New York is in a different position in terms of the economy and of the world" (Mills 1226). Similarly, Mills's predecessor Thomas Sobol's definition of a "sound basic education" omits "minimally adequate" educational facilities in favor of an embracing social vision in which education "reflects the dynamics of the American small town" and "everybody is working toward the same goal and . . . sharing the same values" (Sobol 1786). SED Deputy Commissioner James Kadamus likewise described the RLS as "significantly beyond basic competency standards," which the Regents had "reject[ed] as a matter of Regents policy" (Kadamus 1713). The testimony of witnesses who work in the New York City schools was in accord with these views.

See Chin 4915 (RLS are "world class standards"); Fink 1739 (new standards are "pushy" and "hard"); Casey 9975-76 (programs designed to enable children to meet new standards "represent high expectations" and are not "basic or minimal").

The RLS are aspirational not just in their particulars but as an overall educational endeavor. Although plaintiffs would embed the RLS in the State Constitution, the Standards are in fact policy determinations of recent vintage and uncertain result. Testimony at trial indicated that the RLS are a product of the so-called "standards movement," the roots of which lie in A Nation at Risk: The Imperative for Educational Reform, a 1983 report by the National Commission of Excellence in Education (Sobol 914-18). The premise of A Nation at Risk was that America's "once unchallenged preeminence in commerce, industry, science, and technological innovation is being overtaken by competitors throughout the world." National Commission on Excellence in Education, A Nation at Risk: The Imperative for Educational Reform (1983). The report concluded that there are "disturbing inadequacies in the way the educational process itself is often conducted," id. at 8, and recommended, among other things, that schools "adopt more rigorous and measurable standards, and higher expectations, for academic performance," id. at 27.

A Nation at Risk galvanized the American education community, particularly the New York State Board of Regents. It led eventually to issuance in 1991 of the Regents New Compact for Learning (Sobol 969-70). As Sobol said at trial, the New Compact, like A Nation at Risk, expressed concern that the nation was on the verge of "slid[ing] into a darker and less prosperous time" (see Sobol 1827), and prescribed as a remedy the establishment of statewide goals that would eschew "minimum competence," which was said to be "not enough," in favor of a curriculum, "instructional methods," and "adult expectations which challenge [children] to perform at their best, and help them to become truly proficient in knowledge and skill" (PX519, p. 3). The New Compact's promise of specific high standards led, five years later, to the RLS (Sobol 962-63).

What the Regents produced in the RLS was a bold policy initiative aimed at establishing world-class standards and a world-class educational system, not producing basic literacy or calculating skills. The testimony of plaintiffs' own witnesses confirms this. Kadamus testified that in adopting the RLS (which he characterized as "rigorous" and "demanding"), the Regents "rejected" the minimum competency standard articulated in Levittown in favor of a standard of "high outcomes for all students" (Kadamus 1713-14). Commissioner Mills testified that, in developing the RLS, the SED took the view that it was not

enough for New York to have just a "pretty good system in comparison with other states, because New York is in a different position in terms of the economy and the world" (Mills 1226). The Regents were not satisfied by student performance at the national average if that performance did not meet the RLS (Mills 1225, 1245-96). In fact, they do not advocate or even talk in terms of minimal adequacy (Mills 1221). They are of the view that New York must be a national leader in setting high educational standards (Mills 1247).

Although the Regents and SED have confidence in the RLS, it remains unclear that the Standards will succeed in the manner they hope for. Plaintiffs' own expert noted that the standards movement is "still relatively young," and that there are "extremely limited" empirical data "on the efficacy of performance based curricula" (Schwartz 2644, 2655). Another expert presented by plaintiffs has written that there is no evidence that raising standards improves student performance (Jaeger 13496); see also Sobol 2644 ("there isn't a substantial amount of research" about standards). The Regents are still attempting to develop a scoring system for the Regents examinations that will provide a suitable transition from the State's longstanding reliance on the RCTs and ensure that a satisfactory percentage of students are able to obtain a diploma in the face of increasingly challenging curricular and testing

requirements. At the time of trial, the Regents had set the passing grade on the ELA Regents exam at 55 rather than 65 in order to avoid having a disastrously low passing rate (Coppin 720; Kadamus 1595). And the effect of the demanding nature of the RLS on student morale and on the availability of other services has caused concern in both the general education and special education communities. See Diane Ravitch, Higher, but Hollow, Academic Standards, N.Y. Times, Feb. 6, 1999, at A15; Kim Kruger, Individuals Guarantee Own Success, Times Union, May 18, 1998, at C1. Thus, the novelty, uncertainty, and rigor of the Regents Learning Standards establish that they are not synonymous with a minimally adequate education. The very attributes that make them admirable as policy make them inappropriate as a constitutional standard.

D. Students Need not Satisfy the Regents Learning Standards to Attain "the Basic Literacy, Calculating, and Verbal Skills Necessary to Enable Children to Eventually Function Productively as Civic Participants Capable of Voting and Serving on a Jury."

1. A sound basic education need not prepare children for high-level "competitive employment."

Plaintiffs mistakenly argue that only those students who satisfy the Regents Learning Standards receive a sound basic education. They contend that attainment of those Standards is necessary to obtain high-level "competitive employment." That

argument rests on a faulty premise, because preparation for such employment is not a part of the template this Court established in CFE I. Plaintiffs stray far from this Court's pronouncement in CFE I that students who are able to "function productively as voters and jurors" have received a sound basic education. Even had this Court not already rejected a "competitive employment" addition to the requirements of a sound basic education, such an addition would be untenable.

Prior opinions of this Court foreclose this portion of plaintiffs' argument. In Levittown, the Appellate Division had found that the Education Article was violated because children were denied the opportunity to acquire the skills necessary to prepare them for roles "as potential competitors in today's market." 82 A.D.2d at 217 (citation omitted). This Court rejected the approach, instead concluding that those children had not been denied the opportunity for a "sound basic education," Levittown, 57 N.Y.2d at 47-50; see also CFE I, 86 N.Y.2d at 328-29 (Levine, J. concurring) (concluding that Levittown decision rejected any notion that sound basic education must provide children with skills needed to be "potential competitors in today's market place").

Sobol nonetheless introduced the concept of "competitive employment" to the "sound basic education" requirement because it "seemed to [him] an omission from the Court's version" and is

"something that most parents want for their children" (Sobol 1056). Of course, former Commissioner Sobol cannot so easily vary the meaning of the State Constitution. And in any event, preparation for "competitive employment" as plaintiffs use the term cannot possibly be a component of a minimally adequate education, however desirable such a proposition might be as a matter of policy. By "competitive employment," plaintiffs do not mean merely the ability to obtain a job. Rather, they mean a set of "higher level" skills that are to be contrasted with the "basic skills" that, plaintiffs contend, are no longer useful in the American workplace. Pl. Br. at 28. Plaintiffs repeatedly characterize any jobs that do not require these higher-level skills as "menial labor." Id. at 31.

This policy-fraught judgment dismisses as "menial" the work that is done by 70 percent of the American population and that will represent nearly 60 percent of the jobs available over the course of the present decade. According to the federal Bureau of Labor Statistics, 71 percent of all jobs in 2000, and 58 percent of the job growth over the 2000-2010 period, will consist of occupations "generally requiring only work-related training," with 37 percent of all jobs in 2000 and 35 percent of job growth in occupations requiring only "short-term on-the-job training." Daniel E. Hecker, "Occupational Employment Projections to 2010," Monthly Labor Review, Nov. 2001 at 81 (available at

www.bls.gov/opub/mlr/2001/11/art4full.pdf). Plaintiff's own expert largely concurred in these predictions, testifying that new technologies are unlikely to have a profound effect in upgrading the education and skill requirements of jobs and that most new jobs and job openings will be in occupations that require relatively limited levels of skill and education (Levine 12205-07).[9]

The point is not, as plaintiffs will doubtless mischaracterize it, that people should be consigned to such jobs if they do not want them. Rather, it is that the decision to prepare students for higher-level jobs, as the RLS do, is an aspect of policy choice rather than constitutional mandate. This Court emphasized in CFE I the fact that the Education Article mandates only the bare essentials of education. If in fact the requirement in that decision that education prepare children to "function productively" is a reference to employment at all, it should, as the Appellate Division said, "be interpreted as the ability to get a job, and support oneself, and thereby not be a charge on the public fisc," CFE I Appeal, 295 A.D.2d at 8. An

[9] One of plaintiffs' experts made the entirely unsupported assertion that "[a]bout 90 percent of the jobs that are in the economy today . . . are jobs that require at least a high school education" (Darling-Hammond 6460). It is difficult to see how such a figure could be ascertained. The witness presumably meant to say that about 90 percent of the jobs in Amercia are in fact occupied by high school graduates – an entirely different proposition.

education that provides the basic skills mandated by the CFE I template imparts that ability, and that is all the Constitution requires.

2. The Regents Learning Standards provide skills far beyond those necessary to prepare children to be responsible voters and jurors.

Plaintiffs' definition of who is sufficiently educated to be "capable of voting and serving on a jury," like their definition of which jobholders "function productively," is notable chiefly for how many people it excludes. For plaintiffs, those who have not obtained a high school diploma are not capable of voting or acting as jurors. Nor are the many New Yorkers who have received a high school education by passing the RCTs, but have not gotten the world-class high school education that the Regents now deem desirable. According to plaintiffs, only a high school education pursuant to the RLS is acceptable preparation for civic participation.

By plaintiffs' reckoning, nearly 40 percent of the adult population of New York State is thus unfit to exercise its basic civic responsibilities. 20.9 percent of the State's 25-and-over population has no high school diploma. U.S. Census Bureau, Table DP-2, "Profile of Selected Social Characteristics: 2000, New York" at www.nylovesbiz.com/nysdc/census2000/demoprofiles234/nystate.pdf. Another 27.8 percent has only a

high school degree, including a GED. Id. On the assumption, extremely generous to plaintiffs, that the recent 40 percent Regents diploma rate for high school graduates applies to this population, an additional 16.7 percent – i.e. 60 percent of 27.8 percent – of the City's adults, bringing the total to 37.6 percent, are in plaintiffs' opinion not competent to vote.[10]

These data alone are proof that plaintiffs' proposed standard cannot be correct. According to plaintiffs, an education consisting of less than a high school diploma is not "meaningful;" even a local diploma or a GED cannot make for "productive citizenship" (Pl. Br. at 34). But although this

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[10]The United States Supreme Court has made clear that only a minimal education is necessary for citizens to participate in the political system, however desirable further education may be from a policy standpoint. In Wisconsin v. Yoder, 406 U.S. 205 (1972), it recognized that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system," and described the product of a compulsory education -- which, in Wisconsin as in New York, did not require school attendance after the age of 16 – as the ability "to be self-supporting and to discharge the duties and responsibilities of citizenship." Id. at 221, 234. Debates during the 1894 Constitutional Convention suggest that the framers of the Education Article likewise equated the education to be provided under the Article with the instruction that parents had a duty to provide for their children, and that the Legislature required all children to receive under its Compulsory Education Law of 1894 (L. 1894, ch. 671). See 3 Revised Record of the Constitutional Convention of 1894, at 690-91 (observing that the Article "direct[ed] the Legislature to use the power of the State" to "foster" and "enforce adhesion to" the "principle and universal education," by ensuring that children whose parents had otherwise failed to discharge their legal duty to educate could be sent to the public schools to receive their required basic education).

Court in CFE I declined "to definitively specify" what a sound basic education consists of, it made two things clear: The minimal nature of the State's obligation under the Education Article, and the fact the State "will have satisfied its constitutional obligation" as long as students learn the "essential skills" that make them "capable of voting and serving on a jury." CFE I, 86 N.Y.2d at 316. If plaintiffs are right, nearly 40 percent of the State's adult population have never received such an education.

Although plaintiffs insist (Br. at 35-37) that responsible voters and jurors must possess extraordinarily sophisticated skills, in fact the requirements to serve as a voter or juror in this State are few. The Legislature presumably understands that setting too high a threshold for civic participation is fundamentally antidemocratic. Thus, New York imposes no literacy or other educational requirement on voters, and merely requires that otherwise qualified jurors "[b]e able to understand and communicate in the English language." Jud. L. § 510. Cf. 28 U.S.C. § 1865(b) (requiring jurors to be able "to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form," and able "to speak the English language"). These requirements are similar to federal laws specifically defining educational or literacy requirements for voters. See 42 U.S.C.

§ 1971(c) (in proceeding in which literacy is a relevant fact, "there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade . . . possesses sufficient literacy, comprehension, and intelligence to vote in any election") (emphasis added); 42 U.S.C. § 1973b(e)(2) (providing that "[n]o person who demonstrates that he has successfully completed the sixth primary grade . . . shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education").

In light of this Court's directive that the measure of a sound basic education is the acquisition of skills necessary for participation as a voter and juror, the State presented empirical evidence at trial regarding the aptitudes essential for these tasks. Defendants' expert Herbert Walberg used a widely-recognized, objective "readability analysis" program to determine the difficulty of certain texts, based primarily on vocabulary and sentence length (Walberg 17182-83). He analyzed the texts of television news broadcasts and newspapers discussing election and City Charter issues and determined their level of difficulty. He

also looked at the opening statement and jury instructions in the Stahl case, on which plaintiffs' witness had based her views of the demands made on jurors, and determined their level of difficulty as well (DX19319). To prove that students had the opportunity to obtain the skills necessary to comprehend these texts, the State relied upon what was then the measure of whether students could graduate from high school – passage of the Regents Competency Tests (RCTs), which test reading, writing, and mathematical skills (Ward 3330; Kadamus 1579; Walberg 17220-21, 17355-56; PX2, pp. xi, 11). A review of the RCTs demonstrated that the difficulty level of their contents was similar to the difficulty level of the texts analyzed by Walberg. This indicated that students who pass the RCTs achieve sufficient competence to read and understand these texts, comprehension of which betokens possession of a sound basic education.

Plaintiffs never confront this evidence on its merits. They instead mischaracterize the State's position as one that would entitle students only to an education through the 8th grade (Pl. Br. at 3, 16, 34). This is profoundly deceptive. Children in New York are entitled to receive a free public-school education from kindergarten through the 12th grade, see Educ. L. § 3202(1), and there is no question that they are receiving the opportunity for such an education. Suggesting that some students acquire basic literacy, calculating, and verbal skills by a particular

grade level in no way means that children are entitled only to an "eighth grade education." What this Court identified as a sound basic education – and what the State's evidence related to – is the set of skills necessary for meaningful civic participation, not the grade level at which those skills are on average attained. These minimally adequate skills bear no relation to the sophisticated mastery that the Regents Learning Standards are designed to produce.

With plaintiffs' failure to show that their version of a minimally adequate education corresponds even remotely to the constitutional command, this case should reach an end. First, as noted above, supra at 39-42, the issues of adequacy and causation are questions of fact that are beyond this Court's review. Moreover, any further exploration of the facts or of the sufficiency of plaintiffs' legal arguments would amount to an advisory opinion. This Court resolves litigation and adjudicates controversies between parties. It does not sit as a roving commission of constitutional inquiry. Yet that would be its status if it proceeded beyond a reiteration of CFE I and rejection of plaintiffs' proposed standard to a more detailed consideration of what the standard should be and whether it has been met. Plaintiffs' cause of action, as this Court characterized it in CFE I, "essentially alleges that the State's educational financing scheme fails to provide public school

students in the City of New York . . . an opportunity to obtain a sound basic education as required by the State Constitution." 86 N.Y.2d at 314. Success on that cause of action requires accurate understanding of the constitutional requirement itself. Plaintiffs, ignoring the clear instructions of CFE I, argue instead that the Education Article requires nothing less than "a high school level education" as the Regents have defined it. The Court has rejected their proffered standard once and should do so again. And once that rejection occurs, plaintiffs' case can go no further.

POINT II

THE STUDENTS IN THE NEW YORK CITY SCHOOL SYSTEM HAVE THE OPPORTUNITY TO OBTAIN AND IN FACT RECEIVE A SOUND BASIC EDUCATION

In terms of both the educational resources provided to City students and the results those students achieve, City students have the opportunity to receive a sound basic education. In CFE I, this Court made clear the relevance of both resource "inputs" and student outcomes to the constitutional analysis: "If the physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain those essential skills (i.e., 'the basic literacy, calculating and verbal skills' discussed in the preceding section), the State will have

satisfied its constitutional obligation." 86 N.Y.2d at 316; see also id. at 317 (test results on examinations designed to measure minimum educational skills "helpful" in ascertaining whether constitutional mandate is satisfied). The performance of City students on both widely-used standardized tests and Regents-sponsored statewide examinations specifically designed to test for competency in these essential skills shows that the great majority of City students actually obtain a sound basic education. And a review of the "inputs" that enable students to produce those results demonstrates that the City school system offers all of its students the opportunity for such an education.

It is necessary as a preliminary matter to emphasize that it is opportunity that is the constitutional benchmark. The success of City students on statewide and national tests demonstrates that most of them do obtain a sound basic education. And if they do so, it must be because the opportunity is offered them by the City schools. In view of the prevalence in the City's student population of factors that put them "at risk," their success can mean only that the City schools are fulfilling the constitutional mandate.

The evidence of City students' competent performance thus obviates any inquiry into the adequacy of the resources that produce the performance. But this is not to say that only test results can serve as proof of the availability of a sound basic

education. The standard mandates opportunity, not necessarily achievement. And, as this Court indicated in CFE I, "a myriad of factors . . . have a causal bearing" on student achievement. Id. at 317. That is why an examination of the "inputs" to City students' education is pertinent. Any unresolved questions about whether City students have an opportunity to be educated can be answered by means of a review of the resources the City schools make available. These adequate resources usually produce the desired adequacy of outcome, as demonstrated by student performance. But even if they do not, it is not for lack of an opportunity for a sound basic education.

A. The performance of New York City elementary and middle-school students on nationally-normed standardized tests demonstrates that they receive a sound basic education.

The performance of New York City students on widely-used, nationally-normed standardized tests aligned with the BOE's standards shows that they receive a sound basic education in the City's public schools. Although the City's student population contains far more at-risk students than the sample population on whose scores the test results are based, the City students consistently score at the national average on those tests. The only explanation for these results is that the City's schools provide an education that is adequate as this Court defined the term in CFE I.

As a preliminary matter, it should be noted that the Court's injunction to plaintiffs in CFE I about their attempted use of assertedly low test scores to prove the inadequacy of the education the City offers does not apply to defendants' reliance on them to demonstrate adequacy. As the Court said of plaintiffs' "rel[iance] on standardized competency examinations established by the Regents and the Commissioner to measure minimum educational skills," "[p]erformance levels on such examinations are helpful but should also be used cautiously as there are a myriad of factors which have a causal bearing on test results." CFE I, 86 N.Y.2d at 317. The Court thus recognized that assertedly low test scores are not necessarily caused by an inadequate education. But it is impossible to explain the adequate scores of New York's heavily "at-risk" student population as the result of anything but an adequate education (Mehrens 18481-82; Murphy 16193).

The essential facts about the City students' test results can be easily set forth. In the academic years 1996-97, 1997-98 and 1998-99, New York City students in grades 3 through 8 (excluding grades 4 and 8 in 1999, when those students took the new statewide tests) took "citywide" tests in reading and mathematics. Each student's results were reported in terms of how the student compared to a scientifically-sampled nationwide group of test-takers in the student's grade (Tobias 10243). A

score at the 50th percentile on a given test is a score precisely at the nationwide median, a score above the 50th percentile is better than the nationwide median score, and below that percentile is worse (Tobias (10260). For the three years in question, the percentages of City students who scored at or above the national average in reading scores were 47.3 percent, 49.6 percent, and 48.5 percent respectively (Tobias 10491, 10505, 10556; Def. Exh. 10103, 12774). In math, the percentages were 60.4 percent, 63.1 percent and 50 percent.[11]

A full examination of the background, contents and results of those tests establishes that they bear directly on the

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[11] The same citywide tests were offered in 2000, 2001 and 2002, but the scores were reported in terms of levels of achievement rather than relative to a norm--that is, the results were criterion-referenced rather than norm-referenced. Thus, no direct comparison with the 1997-1999 scores is possible. Moreover, the City reports that the scores in the past three years have been comparable to or better than the earlier scores. See New York City Board of Education, Report on the 2002 Results of the State Elementary and Intermediate English Language Arts Tests and the City Reading and Math Assessments, available at www.nycenet.edu/daa/reports/2002_Results_Math&RDG.pdf; Report on the 2002 Results of the State Elementary and Intermediate Math Assessments and the Combined City and State Assessments, available at www.nycenet.edu.daa/2002math/2002_Test_Results.pdf; Report on the Results of the CTB-Reading Test (CTB-R) Administration in New York City, June 2000, available at www.nycenet.edu.daa.reports/ctbr2000_report.pdf; Report on the Results of the CTB-Mathematics Tests (CTB-M) Administration in New York City, June 2000, available at www.nycenet.edu/daa/reports/ctb_math_2000_report.pdf. It thus appears that the same inference of competence can continue to be drawn from City students' performance. The City will use a different reading test as the citywide test in the current school year. See Abby Goodnough, After Disputes on Scoring, School System Switches Provider of Reading Tests, N.Y. Times, Sept. 28, 2002 at 3.

question of whether City students receive a sound basic education. The CTB-R (CTB-Reading) and CAT (California Achievement Test) are standardized tests developed by McGraw-Hill (Jaeger 13246-49, 13398-400; Mehrens 18458-60). The purpose of such tests is to provide measurement tools referenced against national norms, and thus avoid the effect of local, idiosyncratic judgments of student achievement (Mehrens 18455). There are four major nationally-marketed test sets; approximately one-third of the school districts in the United States use the McGraw-Hill tests (Mehrens 18450).

McGraw-Hill designs the CTB-R and CAT precisely in order to reflect the prevalent national norms (Mehrens 18459-60). It undertakes an extensive survey of curricular materials throughout the country in order to ascertain what educators "want people to be able to know and do" (Mehrens 18459). Its aim is to ascertain the "common essence of the curriculum in the nation" and produce a test whose content is aligned with the prevailing curricula (Mehrens 18458).

Once McGraw-Hill develops its test questions, the tests are administered to a scientifically-selected "norm group," designed to be a representative sample of the nationwide test-taking population (Mehrens 18465-66; see also Tobias 10160 [comparison to state norms]). The range of scores of this group becomes the "norm" against which subsequent test-takers are measured, and in

terms of which "norm-referenced" scores are reported (Mehrens 18465-66).

The CTB-R and CAT are, in the view of witnesses for both plaintiffs and defendants, high-quality and vigorous tests (Mehrens 18473; Tobias 10504). McGraw-Hill, moreover, takes pains to keep its tests at a challenging level. Thus, for example, plaintiffs' testing expert Richard Jaeger mentioned the "Lake Woebegone effect," in which the longer a test is in use, the easier it is for schools to "teach to" the test and produce better scores, which in turn creates the illusion that students, who are still measured against the original and possibly outdated norms, have improved (Jaeger 13398-300). To avoid the Lake Woebegone effect and other "artifacts" – i.e. circumstances that reduce the accuracy and validity of normed test scores – McGraw-Hill made the versions of the CTB-R and the CAT it offered in 1999 more difficult, and used a more recent administration of the test as the source of the norm population against which test-takers were measured (Jaeger 13300-01).[12]

As the City itself has long recognized, the CTB-R and the CAT are well aligned with the New York City "New Standards," and thus with the Regents Learning Standards on which the New

[12] The re-norming of the test may account for the drop in Math scores between 1998 and 1999 (Jaeger 13300-01). The fact that New York City students performed at the 50th percentile on these newly-normed tests indicates that they are performing at the national average.

Standards are based (Tobias 10461). The City began using the McGraw-Hill tests because they tested "higher-order skills" (Tobias 10160). The CTB-R was chosen because it "aligned well with the content standards of the recently issued New York State learning outcomes [i.e. the RLS], and others emerging from various national professional organizations" (Tobias 10487). The CAT was selected because it is the "test that has the best set of national norms," and "stresses higher-order math skills" that are "benchmarked to world-class levels" (Tobias 10509, 10545).

The rigorous nature of the McGraw-Hill tests, coupled with City students' demographic makeup, makes the students' performance on those tests impressive. In order to guarantee a nationally representative sample of significant demographic characteristics in the McGraw-Hill norm group, the testing company included in that group a far smaller proportion of at-risk test-takers than the New York City student population contains. Thus for example, the norm group for the 1998 CTB-R contained 26 percent free-lunch eligible students and 8 percent LEP students, compared to figures of 67 percent and 11 percent in the City schools (Tobias 10505). The only possible explanation for the City students' national-average performance is the adequacy of the educational opportunities they are receiving. As one witness put it, in light of New York City's higher at-risk population, "[i]t is reasonable to believe that this level of

achievement is more likely due to the quality of education in New York City," such that the City schools are doing "a quality job" (Mehrens 18481-82); see also Murphy 16193 (City's higher at-risk population means test results suggest City is "doing a pretty good job").

The City students' performance on the McGraw-Hill tests is also better than the performance of students in other large urban school districts on nationally-normed tests. These comparisons are relevant because of the similarities between New York City and other large American cities in the demographic makeup of their student populations (Mehrens 18469). Tobias knew of no other urban school district in the United States whose children performed as well on such tests (Tobias 10524). Former Chancellor Crew, relying on City students' performance on the citywide tests, declared that "New York City leads the way among almost all urban school districts in virtually every performance indicator" (DX1153).

City students' performance on the McGraw-Hill tests is worth so much attention now because it frees this case from the indeterminacy and circularity in which plaintiffs' arguments would otherwise trap it. The fact that City (and for that matter State) students have not been notably successful in achieving at the levels required by the new, "world-class" RLS lead plaintiffs to conclude not that the RLS may be problematic but rather that

the programs already in place work, but "have never been implemented on a sufficient scale" (Pl. Br. at 59). As the Appellate Division noted, however, "a statement that the current system is inadequate and that more money is better is nothing more than an invitation for limitless litigation." CFE Appeal, 295 A.D.2d at 9. A focus on the favorable objective outcomes embodied in the CTB-R and CAT results permits – indeed demands – an inference that the education City students receive is adequate without requiring the impossible determination of the precise level and cost of resources that will produce adequacy.

Requiring the judiciary to make judgments about the optimal class size, set of teacher credentials, material resources and curricula that make for an adequate education is forbiddingly difficult, and will invite endless litigation in and by every school district in the State. Reliance on objective outcomes makes this inquiry unnecessary. If, as plaintiffs insist, the State's system of education is wholly responsible for at-risk students' poor performance, then it must be entitled to credit when those students perform acceptably. Simply put, a performance at the national average, especially given the relative disadvantages of the New York City student population, must be the product of an adequate education. The only way plaintiffs might have proven otherwise would have been with a demonstration that the level of education nationwide is so

inadequate that a performance at the nationwide median does not betoken possession of minimum competency sufficient for civic participation. They did not make or even attempt any such showing. Nor, in all likelihood, could they have succeeded, for at least 45 of the 50 states have embraced the standards movement and incorporated standards in their own education requirements (Schwartz 2589).

Most of plaintiffs' objections to reliance on the results of the McGraw-Hill tests rest in large part on mischaracterizations and misunderstandings of the record. They suggest (Br. at 101) that the scores are not probative because they represent "averages across the entire City school system" and thus mask a bimodal distribution of scores, with the "poor results" of some students "mask[ed]" by the high scores of others. But the results recounted above are not "averages" in the sense plaintiffs mean the term. Rather, they reflect the percentage of City students scoring at or above the nationwide midpoint for a given school grade (Def. Exh. 10104, 10108, 10189, 10103, 10109, 10112, 10113, 10137, 12774). Approximately half of students in New York City score above this midpoint – exactly what one would predict for a demographically representative test-taking population, and a good deal better than a population with a high percentage of at-risk students might be expected to perform. Moreover, the distribution of the New York City test-taking

population around the nationwide midpoint approximately reflected the norm group's distribution (Mehrens 18512).

The McGraw-Hill test scores in fact act as a corrective to the self-referentiality of plaintiffs' evidence and arguments. As discussed above, supra Point I.A.2, variations on the same fundamental testimony occurred repeatedly at trial. A witness would attest that a particular resource was inadequate simply because it was not sufficient to satisfy the Regents Learning Standards. The testimony on cross-examination of plaintiffs' testing expert Richard Jaeger is emblematic of this problem, and indeed of this entire litigation. During a lengthy cross-examination, Jaeger's concerns about the validity of the McGraw-Hill tests were largely obviated. Nevertheless, Jaeger said, the results on the McGraw-Hill tests did not mean that City students receive a sound basic education, because the tests are "not a valid measure of the New York State Standards [i.e. the RLS] used by the State to define what students should know and be able to do in order to demonstrate that they received a sound basic education" (Jaeger 13411, 13589).

Plaintiffs' further objections to reliance on the McGraw-Hill test results largely reflect and rest on concerns of this sort, and are specious for the same reasons. They complain (Br. at 101) that norm-referenced tests show only "how students stacked up against another set of students," whereas results in

the same tests, reported with criterion-referenced scores, suggest "that the 50th percentile test scores reflected skills and knowledge that were significantly below what educators believed students in those grades should know."[13]

There, in miniature, is the fatal flaw in plaintiffs' case. As demonstrated in Point I, supra, "what educators believe . . . students should know," while a potent determinant of policy, is not and cannot be the same thing as a minimally adequate education. The two standards diverge drastically in New York State, where educators believe that "minimum competence" is not "the appropriate level of achievement" (Mills 1222). While laudable as a policy goal, this standard exceeds what the Constitution, according to this Court, demands.

This is why plaintiffs' resort to criterion-referenced tests such as the statewide 4th and 8th grade English Language Arts and Mathematics tests first offered in 1999 is unavailing. These new tests are aligned with and based on the RLS (Tobias 10172). Scores on those tests thus may reflect City students' progress in satisfying the Regents Learning Standards. But neither they nor

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[13] Plaintiffs also object (Br. at 102), quite misleadingly, to reliance on the McGraw-Hill norm-referenced test scores because it is supposedly improper to compare the scores of City students to scores elsewhere in the nation. While there is some evidence that intercity or interstate comparison of scores on different norm-referenced tests may be problematic, there is no such problem with comparing scores of students in different cities or states on the identical test.

tests based on them have anything to do with what the Constitution requires. That is only a minimally adequate education, which the scores of City students on the McGraw-Hill tests indicate that they receive.

B. The Performance of New York City High School Students on the Regents Competency Tests Demonstrates That They Receive a Sound Basic Education.

The performance of New York City high school students on the Regents Competency Tests likewise demonstrates that they receive a sound basic education. Until 1999 – in other words, long after the standards movement had galvanized the education community – the Regents deemed passing grades on the RCTs sufficient demonstration of competence to entitle students to a high school diploma. It is not to cede power to the Regents to define the "constitutional floor" of the Education Article to suggest that success on a set of tests that they continue to regardas acceptable criteria for a high school diploma, signifies the possession of the basic literacy, calculating and verbal skills the Court mentioned in CFE I.[14] The success of City students on the RCTs thus demonstrates that they receive a minimally adequate education.

[14]The phase-in of the RLS is not yet complete, and until it is, passing grades on the RCTs enable students to graduate from high school.

The overwhelming majority of New York city students could and did pass the RCTs. In 1997-98, 90 percent of the eleventh graders in the City's public schools demonstrated competency in reading by passing either the RCTs or the Regents examination (PX2, p. 11). Eighty-three percent of the City's eleventh grade students demonstrated competency in reading, and 90 percent demonstrated competency in mathematics (id.). These figures approach the statewide averages of 91 percent for reading, 89 percent for writing, and 94 percent for mathematics, and exceed the averages of 86 percent for reading, 85 percent for writing, and 86 percent for mathematics in the State's other large urban school districts (id.). This rebuts any argument that the cumulative educational program provided by the City school system deprives students of the opportunity to acquire a sound basic education.

As might be expected of tests that the Regents only a few years ago deemed suitable criteria for high school graduation, passage of the RCTs in fact requires a demonstration of competence. Although plaintiffs (Br. at 42) invoke Sobol's statement that the RCTs "were never intended to be a measure of what a sound basic education ought to be" (Sobol 1000), this is no more than another instance of the circularity that infects plaintiffs' entire argument: the RCTs are said not to be minimally adequate because they are not aligned with the newer

Regents Learning Standards that plaintiffs and the Regents equate with a minimally adequate education.

Thus, Sobol elsewhere conceded that the RCTs were designed "to supply basic floor [sic] for competence . . . for a high school diploma" (Sobol 922). As recently as 1996, an SED publication called "Guide to Comprehensive Assessment Report" indicated that "[t]he Regents Competency tests establish minimum standards of achievement in the basic skills for pupils receiving high school diplomas" (PX781*, p. 16; Tobias 10436). And in 1998, an SED manual for administrators and teachers indicated that the RCT in Mathematics was designed "to assure that students have acquired adequate competency in [mathematics] skills before receiving a high school diploma" (Kadamus 19272).

Other testimony revealed that the chief problem with retaining the RCTs was their incompatibility with the new Regents Learning Standards. For Mills, the RCTs were "not consistent with the [new] standard," and were "insufficient given the standards the Regents have defined" (Mills 1139, 1222). As Kadamus put it even more clearly, the RCTs "were eliminated because they didn't measure the learning standards" (Kadamus 1579). This may make excellent sense as policy: If State policy establishes the RLS as the relevant educational standards, then no doubt graduating students should be able to pass examinations that are based on them. But as Regents Chancellor Carl Hayden

pointed out, the RLS "extends beyond providing minimum competencies. It goes directly to providing our young people with the skills and knowledge that we think they need" (Hayden 1327).

Nor does the City high school dropout rate demonstrate the constitutional inadequacy of the City school system or render the evidence of the RCTs less compelling. Plaintiffs (Br. at 103-104) invoke a "Cohort Report" showing that roughly 30 percent of students who enter the ninth grade in the City's schools do not obtain a diploma. But plaintiffs' "cohort analysis" does not identify where City high school students have received their elementary and middle school education. Eighty percent of the 1997 New York City cohort of graduates were born outside the United States (Pl. Exh. 312, p. 28), and a large proportion enter the City school system for the first time in ninth grade. The ninth grade is the second largest grade of entry (after kindergarten) for students entering the City school system, with many of those ninth-graders coming from other countries (Kadamus 1612, 19290-91). The quality of the instruction provided in the City schools cannot be judged by the high school performance of students who attended elementary and middle school elsewhere. And in any event, students who fail to complete high school are still "educated," as the Constitution defines it, as long as they have acquired basic skills by the time they choose to leave high

school. As noted above, City students' performance on the McGraw-Hill tests suggests that they have. Their performance on the RCTs confirms that fact.

C. The inputs available to the New York City school system are sufficient to provide a sound basic education.

The Court need not examine the inputs available to the New York City school system to conclude that City students receive the opportunity for a sound basic education. As noted above, the performance of City students on nationally-normed standardized tests and the Regents Competence Tests itself establishes that they in fact receive an adequate education. Nevertheless, a review of these resources demonstrates that plaintiffs failed to prove that there are gross and glaring inadequacies to them, as there must be for plaintiffs to prevail.

Indeed, plaintiffs' suggestion that they have not met their burden of demonstrating input inadequacy (Pl. Br. at 78) amounts to a piece of special pleading. Because, they say "education is a cumulative and collective experience, . . . it is very difficult, if not impossible, to make such direct links" between educational inputs and student performance. But plaintiffs cannot avoid their burden of proof by contending that a point is unprovable.[15]

[15]Moreover, the presence or absence of such "direct links" is provable. Experts on both sides testified to the efficacy of

In any event, as the Appellate Division found, the evidence adduced at trial showed that the teachers, curricula, facilities, and instrumentalities of learning available in the City school system give students the opportunity to obtain a sound basic education. This is unsurprising in view of the substantial sums spent on the New York City school system. If it were counted as a state, New York City would rank fifth in per-pupil expenditure; it would still rank ninth if spending were adjusted for cost-of-living differences (Hanushek 15851-53; Guthrie 20168-69). The City's average per-pupil expenditure of approximately $9500 in Fiscal Year 2000 far exceeds the expenditure of some of the most effective City public and Catholic schools educating similar populations of at-risk students. For instance, the evidence showed that Community School District ("CSD") 2 in Manhattan, a national model for successful public school education, is one of the highest-performing but lowest-spending school districts in the City. In 1998, CSD 2 was the second-highest scoring district on citywide tests. In reading, 73 percent of students were at or above grade level, compared to the national average of 50

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by regression analyses that isolate a given input and quantify its impact on performance. Plaintiffs never sought to relate deficient student achievement to a particular resource inadequacy, whereas defendants' experts established that the alleged resource inadequacies did not adversely affect student performance.

percent, and in math, 82 percent attained this level (Fink 7888-90; DX10103; DX10109).

Likewise, while plaintiffs dispute the point, there is little doubt that the City's Catholic schools have performed successfully even though those schools spend only half of what the City's public schools spend per pupil (regardless of how much money plaintiffs contend that these Catholic schools receive from donations or otherwise, see Pl. Br. at 80-82) and have a higher pupil-teacher ratio, larger class sizes, lower-paid teachers, older facilities, and fewer science labs and other educational amenities than public schools (DX19564*; Puglisi 19340-44, 19353-55; Murphy 16404, 16416). See also Stephen D. Sugarman, School Choice and Public Funding, School Choice and Social Controversy 111, 126 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (noting that religious schools tend to spend less per student than public schools, employing lower-paid teachers and smaller administrative staffs, and supporting larger class sizes).

As the following analysis demonstrates, in every category of basic resources specified by this Court in CFE I, the City's public schools meet or exceed constitutional minimums.

1. <u>The teachers in the City schools are adequate.</u>

Plaintiffs cannot substantiate their claim of "gross inadequacies" in the City's hardworking, dedicated teaching force (Pl. Br. at 67). They disregard the BOE's own evaluations, which indicate that the City's teachers are far more than minimally adequate. Instead, they rely upon disparities between the credentials of City teachers and those of teachers in the rest of the state, but such comparative evidence cannot support an Education Article claim. And while plaintiffs claim (Pl. Br. at 68) that "the qualifications of the City teachers are objectively so low" that they betoken gross and glaring inadequacy, the contention is false.

As the Appellate Division recognized, the only direct evidence of the actual quality of teaching in the City schools adduced at trial suggests that City teachers are adequate. This evidence consists chiefly of the system-wide teacher observations conducted for the BOE by principals in the ordinary course of business ("U/S ratings"). Teachers are evaluated on such matters as whether they are "adapting instruction to individual [student] needs and capacities," making "effective use of appropriate methods and techniques," and demonstrating "evidence of pupil growth in knowledge" (DX10398; Tames 3086-88). After review, which includes observation of their classroom teaching, they receive ratings of either "satisfactory" or "unsatisfactory"

(Tames 3088). Between 1995 and 1997, about 99 percent of the teaching force was rated "satisfactory" (DX115; DX12739; DX19182; PX1167*; PX1222; Tames 3089-93).

There is little merit to plaintiff's objections (Br. at 69-72) to the Appellate Division's reliance on the BOE's own evaluations. They claim that honest evaluations would give administrators the unpalatable choice between an inadequate teacher and no teacher at all, and that the administrative process for giving an "unsatisfactory" rating is too "arduous." But government officials should be presumed to carry out their responsibilities in good faith. If the system-wide teacher evaluations are meaningless, millions of dollars are being wasted. And the only suggestion that the system is a sham is anecdotal, in the form of the testimony of district superintendents, who, as the Appellate Division noted, are not even the people charged with making the evaluations. Cf. NAACP v. Yonkers, 197 F.3d 41, 53 (2d Cir. 1999) (rejecting "scattered anecdotes" and "subjective, intuitive impressions" of school superintendents in light of their interest in obtaining additional funding for education). The U/S ratings represent the only systemic evaluations of teacher performance in the City schools, and they support the conclusion that these teachers perform adequately. It was up to plaintiffs to present systemic

evidence suggesting otherwise, and they have failed to meet that burden.

The adequate teaching reported in the teacher performance reviews was confirmed by the PASS review process – BOE's only comprehensive system of assessing school quality (Rossell 16742). As part of that process, trained educations are required to give impartial evaluations of the quality of a school's teaching (Casey 10038-40,; Tobias 10625-29; DX10285, p. 9; DX10318, p. 3). Those observations showed that, on average, schools were performing between an "exemplary" and "approaching exemplary" level in the area of instruction (Rossell 16738-42; DX15140, pp. 6-9; DX19267). Although the Appellate Division rejected the PASS reviews because "they are generally used as self-assessment reports by schools having a national interest in rating themselves highly," CFE Appeal at 16, in fact the PASS system is not used for purposes of accountability, which enables it to be employed for honest self-evaluation (see Tobias 10644-45; PX2379, pp. 12-14).

The evidence that plaintiffs did adduce in lieu of focusing on actual teaching does not demonstrate that New York City's teachers are inadequate. They mention (Pl. Br. at 67-68) that 13 percent of City teachers are uncertified, "compared to just three percent in the rest of the State." But this, as the Appellate Division noted, demonstrates only disparity, not inadequacy, and

is thus irrelevant to the present case. See Levittown at 41-42. Eighty-seven percent are certified (Darling-Hammond 6686) – a number that, if the BOE had chosen to employ only that portion of its staff who are certified, would have permitted it to every classroom with a certified teacher, raise teacher salaries and still have a pupil-teacher ratio better than the national average (Podgursky 17889-90; Smith 20383). In Sobol's view, State certification demonstrates a teacher's competence (Sobol 1860), and it is impossible to argue that a teaching force from which every classroom could be staffed with a certified teacher is grossly inadequate. And the absence of certification, standing alone, is not proof that a teacher is inadequate. Moreover, the argument is in essence moot, for the City has begun filling all vacancies with certified teachers. See Alison Gendar, Certified Teacher Ranks Soar to 97%, Daily News, Aug. 23, 2002, at p. 9.

In any event, nothing about the credentials of the City's teachers is low in absolute terms. These teachers have a median of 13 years of experience (Podgursky 17868; Smith 20375-76). Seventy-four percent have at least a Masters degree, as compared with 47 percent of teachers nationwide (Podgursky 17868). About half have either a Master's degree plus at least 30 credits or a doctoral degree – a percentage that exceeds that in the rest of the State (Podgursky 17868). And the City spends about $3000 per teacher per year on further professional development for its

teachers, more than other large urban school districts (DX19053; Murphy 16324-25).

As the BOE and former Chancellor Levy have elsewhere concluded, "[t]he vast majority of teachers in the New York City public schools provide high-quality educational experiences for the students" and "are gifted professionals" (DX19053 p. 2; DX19469*). The systemic and statistical evidence provided at trial suggests as much. There is certainly nothing in the record demonstrating that the quality of teachers and instructors in New York City is so grossly inadequate that the City's students are being deprived of the opportunity to acquire a sound basic education.

2. New York City's school facilities are not inadequate.

a. The facilities are in sufficiently good repair to permit students to get a sound basic education.

Plaintiffs failed to show that the City's schools lack the "minimally adequate" facilities necessary for children to learn. Although in certain cases schools may be more crowded or in greater need of repair than is desirable, the claim that the physical conditions and capacity of the City's school facilities as a whole are so deficient that students are prevented from obtaining an education was contradicted by the evidence at trial. As the Appellate Division found, while plaintiffs offered "anecdotal evidence concerning the condition of certain schools,"

there was "no proof that these conditions are so pervasive as to constitute a system-wide failure." CFE Appeal, 295 A.D.2d at 10.

Indeed, an exhaustive survey of City schools completed for the BOE in the ordinary course of business refutes plaintiffs' contention. The Building Condition Assessment Survey ("BCAS") was a complete inventory of City school buildings undertaken by independent consulting engineers in 1998 (Zedalis 4400). BOE officials said at trial that it provides the best information currently available about the conditions of the City's school facilities (Zedalis 4867). The BCAS data indicate that these facilities are largely in reasonable condition, with only a small percentage of "building components" displaying serious problems. The consulting engineers rated approximately 84 percent of those components to be in better than "fair" condition, with "fair" defined as not in need of immediate repair (O'Toole 18,801-02; Zedalis 4828). Facilities expert Robert O'Toole, in analyzing the BCAS data on the basis of the engineers' estimates of repair costs per square foot, found that these estimates confirmed the "by and large better than fair" picture presented by the component ratings (O'Toole 18814).

In addition, there was no evidence that even in those buildings most in need of repair, building conditions interfered with student performance. If poor physical conditions were depriving children of an opportunity to learn basic literacy,

calculating, and verbal skills, scores on standardized tests that measure those skills would be lower for schools with high repair needs. The record reflects just the opposite. Trial evidence showed that a school facility's relatively high repair needs are not associated with lower student performance (DX19083*; DX19084; DX19085; DX19088*; DX19089*; DX19090; Hanushek 15872-92). And multiple regression analysis showed that there is no statistically significant relationship at all between student performance and building repair needs in New York City (DX19084; DX19085; DX19089; DX19090; Hanushek 15872-92).

Plaintiffs neither successfully rebutted this evidence nor met their burden of proof on this issue. Although they allude generally to "voluminous statistical reports documenting the conditions of all the City's schools" (Pl. Br. at 73), they ignore the BCAS survey, which is such a report. They point instead to anecdotal evidence about unfilled work orders and incomplete repairs (Pl. Br. at 74). But even if there are specific problems at particular schools that should be remedied, this evidence cannot satisfy plaintiffs' burden of demonstrating system-wide deficiencies serious enough to interfere with learning. Although, as this Court's CFE I template suggests and plaintiffs insist (Br. at 77-78), it is possible to imagine a school system with facilities in such grave and widespread

disrepair that students' opportunity to learn is affected, the New York City schools are not such a system.

b. City school facilities are not so crowded that they prevent delivery of a sound basic education.

Plaintiffs have not shown that the City schools are so overcrowded that students do not have the opportunity for a sound basic education. The evidence indicates that some Community School Districts and some City high schools have "utilization rates" that exceed their rated capacity. Capacity, however, is calculated on the basis of enrollment: Average daily attendance in the City's high schools was 81.29 percent of enrollment (PX1166). When viewed in terms of number of children actually in classrooms on a typical day, City high schools operate at about 93 percent of full capacity. Moreover, regression analysis performed by defendants' expert Dr. Eric Hanushek established that there is no correlation in New York City schools between utilization rates and student performance (Hanushek 15827-28, 15860-61, 15872-93; DX19083*; DX19084; DX19085; DX19088*; DX19089; DX19090).

In any event, a decline in enrollment may alleviate any overcrowding that exists. Plaintiffs dispute (Br. pp. 76-77) the accuracy of figures developed on behalf of the BOE and relied on by the Appellate Division that suggest total enrollment will have declined by 66,000 students by 2008. But there is some evidence

that the projected decline may indeed be underestimated. Although, as plaintiffs note, the BOE projections suggest that "it will be 2005 before the number of pupils enrolled falls below the number in 1998" (Defendants' Exh. 17124 p. 2), in fact it has already done so in both of the past two years, with enrollment now lower than it was at the time of trial. See "Mayor's Management Report: Preliminary Fiscal 2003" at 24 (Enrollment on 10/31/00 was 1,105,000 and on 10/31/01 was 1,098,800), reported at www.nyc.gov/html/ops/pdf/2003_mmr/0203_mmr.pdf; New York City Department of Education Statistical Summaries, reported at www.nycenet.edu/stats (enrollment on 12/31/02 was 1,087,255).

c. Classes in the City Schools are not too large to permit delivery of an adequate education.

Classes in the City schools are not too large to permit delivery of an adequate education to City students. Indeed, class size is not part of this Court's definition of a sound basic education in CFE I. Rather, the Court required that there be "sufficient personnel." CFE I at 317. The City's schools satisfy this standard, for New York has one teacher for every 14.1 students, placing it in the top 10 percent of large districts across the nation (DX19048; Murphy 16242). By comparison, Los Angeles, the second largest school system, in the nation, has one teacher for every 20.8 students (Smith 20393-96).

The "sufficient personnel" standard establishes that plaintiffs' reliance on class size is irrelevant. Class size is a function of how the BOE deploys its teachers, not a measure of whether the City employs enough teachers (Mills 1269-73; Garner 3565). Before their recently-negotiated collective bargaining agreement, the City's teachers had a shorter contractual teaching day than other school districts in the state and other large urban districts across the nation (DX19154A*; DX19156*; Podgursky 16535-48). The BOE also has thousands of teachers who are not assigned classroom teaching duties (PX3159; PX31608; Donohue 15409-11). Thus, though the City employs roughly the same number of teachers per student as the rest of the State, its class sizes are much larger (DX19189; PX1167*).

Nor can plaintiffs' claims that smaller classes may yield certain educational "benefits" or that New York City classes are "larger than those in other districts in New York State" (Br. at 78-80) give rise to a constitutional violation. The purported advantages of smaller classes are not relevant to this case without gross and glaring evidence that classes in the City schools are too large to permit students to learn. The fact that classes may be larger in New York City than in some other districts in the State is an impermissible "equity" argument that is foreclosed by this Court's decision in Levittown.

In any event, the City's average class size of 26.1 in the elementary schools, 28.7 in the middle schools and 29.3 in the high schools is adequate for the provision of a sound basic education and is consistent with the class size in many large school systems across the nation (PX 1167; Smith 20421). In addition, the City's average class size is smaller than the average class size in the City's Catholic schools, which, as previously noted, serve a similar student population and achieve superior results on state tests (DX19009*; DX19564*; Puglisi 19320, 19339-40, 19374-75).

The evidence on the benefits of smaller class size is in any case too ambiguous to make significantly smaller classes an element of "the constitutional concept and mandate of a sound basic education." The parties presented extensive evidence concerning the effect of class size on student performance (Finn 8008-14, 8034-47; Hanushek 15892-925). Plaintiffs' experts testified that class sizes of 17 or fewer students, particularly in the early grades, would improve performance for all students, especially for poor, at-risk students (Finn 8008-14, 8034-47). The primary class-size study upon which plaintiffs' experts relied, the Tennessee STAR study, examined the achievement of students in class sizes of 22-26 students compared to the achievement of students in class sizes of 12-17 students (Finn 7975-76). Plaintiffs' class size expert, Dr. Finn, testified,

however, that the STAR study showed that the effects of these substantially smaller classes on student achievement were "small" or "modest" (Finn 8012-14). Furthermore, the study examined only the effects of reducing class size to an average of 15--a level that is not found in any urban school district in the nation (Finn 8224).

There is, moreover, considerable evidence suggesting that even such drastic reductions may not be especially effective. For example, in a recent $3 billion class size reduction program in California – the most extensive such program ever undertaken – drastic class-size reduction produced little or no effect on student achievement (Finn 8305-07, 8314-16; Hanushek 15727-31). And a "meta-study" of many studies on this subject by Glass and Smith, also relied on by Dr. Finn, showed that class size reductions from 40 to 20 students have only a minor influence on student test scores (Finn 8227-28). The results of class size reductions are at most mixed – some researchers have found small to modest effects on student achievement while others have found inconsistent or no effects (Finn 8012-14, 8226-28; Hanushek 15725-31, 15892-925; Walberg 17342-43). The record does not permit the conclusion that City classes are too large now, or that reduction in class size will produce significant results.

3. The "instrumentalities of learning" provided to City students are not inadequate.

Plaintiffs have not demonstrated that the City schools fail to provide an adequate supply of this Court in CFE I called "instrumentalities of learning." Whatever may have been the case at one time, in the four years before trial, the BOE had enough money not only to provide students with current textbooks, but also to buy an additional set of four textbooks per student (PX1169, pp. 51-52, 75; PX2567, p. 9; PX3114, pp. 9-10; PX3204). Plaintiffs, by contrast (Br. at 80-82), rely largely on anecdotal evidence of past shortages of textbooks and supplies. Even plaintiffs, however, grudgingly concede that "recent funding increases have provided partial, short-term relief" for textbook shortages, but suggest that a judicial remedy is somehow still required because shortages may arise again. Such an argument would enable any plaintiff to prevail in any action against a governmental entity simply by asserting that a constitutional violation may arise in the future. It cannot be the basis for judicial intervention here.

Nor are the City school libraries pervasively inadequate. Plaintiffs offer anecdotal evidence of outdated library books, but fail to show that the City's school system suffers from system-wide deficiencies. Indeed, the trial court's view that the books in the City's public school libraries "are inadequate in number and quality" was based largely on comparative evidence

that New York City "lag[s] behind the rest of the State in the number of library books per student." CFE Trial, 187 Misc.2d at 57. But such comparative evidence cannot demonstrate gross and glaring inadequacy. And as the Appellate Division noted, the trial court appears to have based its finding that the City's library books are inadequate "in quality" on "certain Superintendents' opinions that most of the books were 'antiquated' in that they were 'not correct in terms of . . . the multicultural themes our children should be exposed to.'" CFE Appeal, 295 A.D.2d at 12; see Cashin 249, 304, 393-94. This criticism is irrelevant to the question of whether the quality of these books denies children a meaningful opportunity to develop basic literacy, verbal and calculating skills.

Nor, finally, does the City suffer from what plaintiffs (Br. at 86-87) label "inadequate instructional technology." Even assuming such equipment is essential for the teaching and learning of the skills constituting a sound basic education, the BOE has purchased enough specialized equipment to bring the ratio of students to computers to a level that equals or exceeds the national ratio (PX1592, p. 8a; PX1856; Taylor 6205, 6238). The BOE's system-wide documents, moreover, show that the vast majority of these computers are current models (PX1592, p. 8a; DX10556). Indeed, former Chancellor Crew described the City's "Project Smart" computer initiative as having "the potential of

helping to make the NYC public school system "one of the most technologically advanced in the nation" (PX1856).

4. The special programs provided by the city schools are not constitutionally inadequate.

Plaintiffs complain that the City's at-risk students are being denied a variety of extra resources needed to improve their performance in school. See Pl. Br. at 87-88. However, the statistics they cite reveal the baselessness of their complaint. For example, plaintiffs assert that at the time of trial, "only" 40 percent of students in grades one to three were able to participate in the Project Read program (Casey 10015); hundreds of thousands of students participated in summer school, after school, weekend and other "extended time" programs (Spence 2298-99; Tames 3002-07; PX1191, PX1270); and one-third of the estimated four-year-old population attended free pre-kindergarten classes (PX1 at 1), while there is no evidence that any child was turned away from that program. While plaintiffs seek to use these figures to establish the City school system 's failure to provide extra help to more than "a fraction" of its at-risk student population, even they acknowledge that at least by the time of trial, that system had made such programs available to "a significant number of students" (Pl. Br. at 88).

In any event, plaintiffs' argument (Br. at p. 88) that the City's failure to provide "extra resources" to its students demonstrates a violation of the Constitution by the State in fact reveals the flaw in plaintiffs' case. In plaintiffs' view, if a special program might help – even when it has not been shown to do so, or when its provision is not cost-effective – it must be provided, and a failure to provide it in the fullest conceivable measure makes for a constitutional violation. This cannot be what the Education Article requires. The gulf between arguably desirable inputs that might bring City education closer to the Regents' "world-class" standards and inputs the State must supply in order to discharge its obligation to provide basic literacy, calculating and verbal skills swallows plaintiffs' argument. The performance of City students on nationally-normed tests and the RCTs, discussed above, provides a complete corrective to plaintiffs' wish-list approach. Despite the disadvantages they start with, City students perform acceptably on nationally-normed standardized tests designed to measure precisely the skills this Court has identified as the components of a sound basic education, and then do well on Regents-sponsored tests intended to measure competence. The only possible explanation for this performance is the adequacy of the instruction they receive and the environment and circumstances they receive it in.

POINT III

THE APPELLATE DIVISION CORRECTLY FOUND THAT PLAINTIFFS FAILED TO PROVE A CAUSAL LINK BETWEEN THE STATE'S FUNDING SYSTEM AND ANY PROVEN FAILURE TO PROVIDE A SOUND BASIC EDUCATION TO THE CITY'S CHILDREN

Even assuming that the New York City public schools failed to provide their students with the opportunity to acquire a sound basic education, plaintiffs' constitutional claim fails. As the Appellate Division correctly determined, plaintiffs have not proven that the deficiencies of the City's schools are caused by the State's education financing system. As noted above, supra pp. 39-42, the Appellate Division's holding on this issue is not subject to this Court's review, and provides an independent ground for affirmance of the decision below, regardless of the Court's view on the other questions addressed by the Appellate Division. Again ignoring this Court's directives in CFE I, plaintiffs contend that they need not prove causation because the Education Article imposes on the State the sole responsibility of educating the children of the State. Plaintiffs' attempt to avoid their burden of proof and eliminate a key element of the cause of action that the Court allowed to go forward in CFE I must be rejected.

In CFE I, the Court held that plaintiffs, in order to prevail, must "establish a causal link between the present funding system and any proven failure to provide a sound basic

education to the New York City school children." 86 N.Y.2d at 318. Notwithstanding plaintiffs' attempt in Point II of their brief to portray this case more broadly as one about the State's overall constitutional obligation for the delivery of public education, the case instead challenges only the sufficiency of the State's education funding system.[16] As this Court said in CFE I, "there can be no question that the pertinent pivotal claim made here is that the present financing system is not providing City school children with an opportunity to obtain a sound basic education." Id. at 317. Plaintiffs thus bear the burden of proving that inadequate funding, and more specifically inadequate State funding, has caused any proven constitutional deficiencies in the City's school system.

In order to meet their burden of establishing causation, plaintiffs must first prove that the overall funds available to the BOE are insufficient to provide a sound basic education. Without such proof, plaintiffs cannot establish that the State's finance system caused any constitutional deficiency in education. This is especially necessary given defendants' evidence of local mismanagement, fraud, and inefficient deployment of funds and resources. Plaintiffs' contention that the State bears

[16] Plaintiffs also improperly attempt to bring the issue of state responsibility for inefficient local school district management into this case in the accountability prong of their proposed remedy. Pl. Br. at 139-41.

responsibility for any local mismanagement and is required to increase funding to make up for such mismanagement ignores the constitutional and statutory responsibility that local governments have to provide a local public school system. Moreover, even if overall funding were proven to be the cause of any demonstratable constitutional deficiencies, plaintiffs must prove that additional funding would cure the identified deficiencies. Finally, plaintiffs must prove that insufficient state funding, not local funding, was the cause of any such inadequacy.

Plaintiffs have not met this burden. New York City is one of the highest spending urban school districts in the nation. Spending approximately $9,500 per child at the time of trial, and almost $11,300 per child today, the New York City school system has had more than ample funding to ensure that its students have an opportunity to receive a sound basic education. Any deficiencies are caused by the BOE's misallocation and inefficient use of available funds. Even if overall funding were found to be insufficient to provide minimally adequate educational opportunities, any such funding insufficiency is the result of New York City's failure to provide its fair share of funding its public schools. Plaintiffs in any event have not shown that additional funding would have a significant impact on school performance.

A. The Funds Available to the BOE Are Adequate to Support a Sound Basic Education in the City's Schools.

1. Any claim of "gross and glaring inadequacy" in education funding is belied by the fact that the City is one of the nation's leaders in education spending.

The record demonstrates that the total funds available to the BOE are sufficient to offer the City's students the opportunity for a sound basic education.[17] The City's school

[17] Plaintiffs have devoted substantial energy to criticizing the complexity of the State aid formulas and the inner workings of the budgetary process – all to show that the State's education aid allegedly is not aligned with actual need. See Pl. Br. at 113-119. Plaintiffs' discussion is irrelevant to the question of causation. If the State provides an amount of money that, together with a reasonable contribution from the locality, is sufficient to support a sound basic education, then the State has discharged its constitutional responsibility. The relevant question is whether the amount of funding provided by the system was sufficient, not whether the methods by which that amount was derived are desirable.

Plaintiffs' suggestion that the education budget is first determined by political leaders in secrecy and the secret agreement then camouflaged by complex and opaque State aid formulas puts a cloak-and-dagger spin on the common reality of the democratic process. The coming together of elected political leaders to negotiate and reach final agreements on appropriations that will meet the approval of a majority of duly-elected legislators is neither deviant nor unconstitutional. See City of New York v. State of New York, 94 N.Y.2d 577, 591 (2000) (if the resulting legislation is itself constitutional, the court may not inquire into the Legislature's motives in enacting it); People v. Devlin, 33 N.Y.2d 269, 279-80 (1965) (same). Nor are simplicity and transparency in the budgetary process constitutional requirements. It can hardly be expected that a process that determines the distribution of this much state money, and attempts to accommodate an extraordinary array of competing policy considerations, will be simple. See Levittown, 57 N.Y.2d at 38 ("The determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous

system ranks, and historically has ranked, at or near the top in spending when compared to other large urban school districts, with its per-pupil expenditure far exceeding the national average. During the 1999-2000 school year, federal, state, local, and other revenues provided the significant sum of $10.4 billion (not inclusive of capital spending) to operate the New York City public schools, which amounted to approximately $9,500 per enrolled student (Donohue 15455-57; Murphy 16233-35). In 2002-03, the BOE's budget is $12.4 billion, or $11,300 per enrolled student.[18] When the City was spending $8,578 per student in 1998-99 (totaling $9.8 billion), it ranked second nationally among the 44 districts of over 50,000 students reporting to the Education Research Service ("ERS"), spending about 46 percent more per student than the average of those districts (DX19039*; Murphy 16229-30, 16233). Of the 18 districts with enrollment larger than 100,000 students reporting to ERS – which included Los Angeles, San Francisco, Honolulu, Houston, and Chicago – New York City also ranked second, spending $2,273 more per student than the average of those 18 districts (Murphy 16227-29; DX19038*). Similarly, at the time of CFE I,

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practical and political complexity.").

[18] The City reports that its education budget for fiscal year 2003 has risen to $12.4 billion. See Brief of City of New York Amici Curiae at 5. It reports enrollment at 1.1 million students. Id. at 2.

i.e. the 1995-96 school year, New York City had the highest per-pupil expenditure of the 10 largest school districts in the country (DX19118*), spending $7,428 per enrolled student comparing to an average of $6,991 among the ten largest school districts (Murphy 16202-05; DX19036*). Its average per-pupil expenditure was 25th out of the 463 largest school districts (DX19114; Hanushek 15639-40).

In light of these national comparisons, as well as the absolute sums of money available to the BOE, plaintiffs cannot fairly argue that there was "gross and glaring inadequacy" in the City schools' funding. Indeed, the BOE's substantial budget surpluses over the recent years, ranging from $212 to $259 million a year (Donohue 15482-83), are hardly indicative of a school system starved for resources.

Defendants' expert Dr. James Smith confirmed that New York City has had adequate resources to provide a sound basic education meeting the standards set forth in CFE I (Smith 20366-68). For example, he estimated that an expenditure of $8,596 per pupil on a typical elementary school of 800 students would have been enough to pay for the schools' operation, including all teacher salaries and benefits, and have $5 million left over (Smith 20368-70). Dr. Smith also conducted a "professional judgment study" in which impartial educators assessed whether they could provide educational programs meeting the sound basic

education standard set forth in CFE I, given the level of resources actually available to the BOE, and which showed that sufficient resources were present to provide a sound basic education (Testani Proffer 20415-16). Although this methodology is generally accepted as a valid means of measuring the adequacy of school resources, the trial court erroneously excluded the study on the ground of hearsay.[19]

[19] New York courts have repeatedly recognized that experts may testify about the contents of documents that are not in evidence so long as the material is of a type generally relied upon by experts in the field. See, e.g., Freitag v. New York Times, 260 A.D.2d 748, 748-49 (3d Dep't 1999); Greene v. Xerox Corp., 244 A.D.2d 877 (4th Dep't 1997). Here, the study was of a type accepted by the social science community. Even plaintiffs' expert, Dr. Berne, acknowledged the reliability of this type of "professional judgment" study (Berne 12558 [noting that there are three main methods of estimating the cost of providing an adequate education, including the "professional judgment" method, which assembles educators to measure what educational programs and resources are required to achieve state standards]). Moreover, Dr. Smith's findings were admissible as the results of a survey. See, e.g., Greene, 244 A.D.2d at 877 (upholding trial court's decision to allow defendant's vocational expert to give opinion testimony based on a labor market survey he conducted by phone with prospective employers). Dr. Smith designed the specifications for the study, coordinated the study's implementation, oversaw the deliberations, and analyzed the results of the study (Smith 18384-92).

a. National rather than regional comparisons of education spending are relevant to the issue of the sufficiency of the BOE's funding level.

Plaintiffs do not dispute that BOE's per-pupil expenditures are above the national average. See Pl. Br. at 125. Instead, they contend that national comparisons are meaningless because such comparisons do not account for cost of living differences. Id. at 126. According to plaintiffs, it is more relevant to consider the fact that the City spends $1,500 less per pupil than the state average, and "even more telling is the fact that New York City spends at least $4,000 less per pupil than the average spent in the surrounding suburban counties, who face a similar cost of living but serve far fewer at-risk students and against whom New York City must compete for qualified personnel." Id. at 126-27.

But national funding comparisons plainly are relevant to ascertaining the cause of any constitutional deficiencies in the quality of education because they show that a "minimally adequate" education can be had in New York City. Indeed, this Court has indicated that such comparisons are not only relevant but persuasive. In Levittown, it had "no difficulty in determining that the constitutional requirement [of the Education Article] is being met in this State, in which it is said without contradiction that the average per-pupil expenditure exceeds that

in all other States but two." 57 N.Y.2d at 48. As in Levittown, the favorable national comparisons in this case preclude a finding of "gross and glaring inadequacy" in the funding of the City's schools. Id.

On the other hand, intra-state or regional comparisons on education spending are inappropriate because, as the Appellate Division recognized, such comparisons essentially amount to an impermissible inequality claim. See 295 A.D.2d at 17-18. It is by now settled that the Education Article does not "reveal an intent to preclude disparities in the funding for education or in relative educational opportunities among the State's school districts." R.E.F.I.T., 86 N.Y.2d at 284. Even "great and disabling and handicapping disparities in educational opportunities across our State, center[ing] particularly in our metropolitan areas" would not offend the Education Article. Levittown, 57 N.Y.2d at 50 n.9. More to the point, the simple fact that the BOE spends less per pupil than the state average says nothing about whether its funding level is inadequate to provide a sound basic education.

Comparisons with the spending levels of the suburban school districts in the counties surrounding New York City are particularly inappropriate because, as demonstrated at trial, these school districts are "off the scale" in education spending by virtue of local decisions to spend on education. For example,

for the 1996-97 school year, the Rye district in Westchester County collected and spent about $14,700 per pupil in local funds (which was supplemented by only $938 of State contribution per pupil), while New York City collected and spent only about $4,000 per pupil from local resources, with the State contributing $3,595 per pupil (PX2 at 2, 55; Wolkoff 180108 [estimating that the City collected about $4,000]). The school districts in the five counties surrounding New York City are among the very highest spending school districts in both New York and in the nation, with 95 percent of those school districts falling in the top 20 percent of 15,000 U.S. school districts in per-pupil spending (DX19123; DX19253; Hanushek 15669-76; DX19072; DX19130). Rather than evidencing the level of spending necessary to support a minimally adequate education, these property-rich school districts' education spending reflects no more than the localities' choice to provide their children with much more than a minimally adequate education, a choice that is entirely permissible under Levittown, even if the result is significant disparities in spending between neighboring school districts.

b. The cost of living in New York City does not enable plaintiffs to establish that the BOE's funding level falls below the constitutional minimum.

Plaintiffs deny that they are using regional cost comparisons to show inadequacy in education funding, claiming that these comparisons instead merely highlight the City's higher cost of living and thus its need for more funding. Allegedly, it costs more to educate children in New York City "than almost any other place in the country." See Pl. Br. at 126.

There are at least two major flaws in plaintiffs' argument. First, the City spends a great deal on education even when its expenditures are adjusted for cost of living differences. While plaintiffs contend that even $10 billion a year (FY2000), not including capital spending, is insufficient to buy minimally adequate educational opportunities in New York City when adjusted for the cost of living, they make no attempt to establish that such higher costs adversely affect the BOE's ability to deliver educational services to the City's students – a burden that is plaintiffs' to meet. Plaintiffs do not dispute that comparisons with other large school districts in American cities where there are similarly high costs of living, such as San Francisco, Honolulu and Los Angeles, place New York at or near the top of these districts in per-pupil spending. And in any event, even when adjusting the City's spending for cost of living differences by much as 20 percent, based on estimates of the American Federation of Teachers, the City still ranks in the top 10

percent of per-pupil spending among the nation's 463 largest cites for the 1995-96 school year (Hanushek 15639-42; DX19115*).

The other flaw in plaintiffs' argument is that, despite their bold assertion that "it simply costs more to educate children in New York than it does in almost any other place in the country," Pl. Br. at 126, they provide no support for the claim. Presumably, plaintiffs are referring to a regional cost of living index that appeared in a 1999 SED Study analyzing the differences in education costs across the state. See PX469A,* p. 10. Plaintiffs had relied on this index at trial, but the Appellate Division rejected it as irrelevant to assessing the cost of educating a student in New York City because one of the most significant elements of costs of providing an education, i.e. the cost of educators, had been excluded in constructing that index. 295 A.D.2d at 18.

This rejection was clearly appropriate. As the SED study explained, the index excluded teachers' salaries because "[t]he field of education is clearly not a competitive market" due to factors such as teachers' unions and publicly elected school boards (PX469A,* p. 15; emphasis original). The SED study was an attempt not to measure the actual market but to "imagine what the cost of education in a community would be if the education market were fully competitive." Id. The cost of living index in the SED study was merely hypothetical; it does not accurately assess

differences in the real costs of education across the State. As such, the Appellate Division properly rejected the study as not probative.

In any event, as defense experts explained at trial, reliable cross-City cost of living adjustments are difficult to construct because the "bundle of goods" that consumers purchase depends largely on personal lifestyle preferences, which vary widely across communities (Podgursky 16518-20; Hanushek 16086-88). For this reason, defense experts addressing the issue of cost of living in terms of the purchase of educational goods agreed that the available cross-City cost of living indices, including the 1999 SED study, are not accurate or reliable (Podgursky 17908-12, 17793; Hanushek 16087-88).

c. The success of Catholic schools and of some lower-spending public schools in the City shows that the BOE has sufficient resources to provide a sound basic education.

The success of the City's Catholic school system – which serves more students and operates more schools than does any public school system in the State except for New York City (DX19160; Podgursky 16572), demonstrates that the BOE's current level of funding is sufficient to give the City's students an opportunity for a sound basic education. The City's Catholic schools have a substantially lower drop-out rate, a higher

percentage of students graduating high school in four years, and substantially more students attending four-year colleges upon graduation than do its public schools (DX19009,* pp. 12-13, 15; Puglisi 19351; PX1251, pp. 6-7). They have consistently outperformed the City public schools (DX19564*; Puglisi 19340-44, 19353-55; DX10223*; DX19009*, p. 2), despite spending substantially less per pupil and having a higher pupil-teacher ratio, larger class sizes, lower-paid teachers,[20] older facilities, and fewer science labs and other educational amenities (Puglisi 19310-20, 19366-80; Walberg 17120-27, 17136-45; Zedalis 4348; DX19563*; DX10094A; DX19254-56; PX1155 p. 160; PX1167*; Murphy 16404, 16416; DX19021, p. 11; DX19304-08*).[21]

Plaintiffs argue that no meaningful comparison between the City's public schools and Catholic schools can be made. See Pl. Br. at 80-81. The record shows, however, that comparisons between the two school systems are relevant in assessing whether the BOE is adequately funded. The students in the Catholic

[20] In 1999-2000 Catholic school teachers in the City were paid between $22,250 to $38,250, compared to the BOE's salary range of $31,910 to $70,000 (DX19563*; PX1155, p. 160).

[21] Contrary to plaintiffs' argument (Pl. Br. at 80-81), the record contains undisputed evidence of Catholic schools' larger class sizes (see, e.g., Puglisi 19318-20 [noting that class size in the Brooklyn Diocese, which used to be "huge," is now covered by a policy permitting 25 students in K-4th grade classes and 35 students in 5th-8th grade classes]; Murphy 16406 [observing, based on visits to seven Catholic schools serving predominantly poor and minority students, that classes were for the most part larger than he observed in the public schools]).

schools and public schools have similar socioeconomic characteristics and live in the same neighborhoods (Puglisi 19330-34, 19339-40; DX19565; DX19009*, p. 9). The two school systems have similar percentages of students who come from households with income below $15,000 or single-parent families; whose parents did not complete high school; whose siblings had dropped out of school; and who face the same multiple risk factors (DX19009*, p. 9).

A study by defense expert Dr. Walberg confirmed that the City's Catholic schools provide a sound education with less money. He took into account the socioeconomic characteristics of the students when comparing the performance level of the two school systems. For example, he compared Catholic school students in the Archdiocesan schools in Manhattan, Staten Island and the Bronx with their counterparts with similar level of poverty in the public schools of those boroughs, and found that the Catholic school students outperformed their counterparts[22] (Walberg 17157-63; DX19304-08*). Yet data from the Archdiocese

[22] A recent study also concluded that Catholic school in New York City are able to bring their students to higher levels of achievement than are the City's public schools, and that they come much closer to breaking the link between at-risk factors and student achievement than do public schools. Raymond Domanico, "Catholic Schools in New York City", at iii (March 2001) www.nyu.edu/wagner/education/pecs/CathSchools-Report.rtf. According to the study, by some indicators, the performance of the Catholic schools with at-risk students equals or surpasses that of public schools with populations that have far fewer at-risk students. Id.

and BOE indicated that per-pupil spending in the Catholic schools is approximately one half the spending in the public schools, even after adjusting for services such as special education, central administration, food services, transportation and school safety, that the Catholic schools do not provide or incur to the same extent as the public schools (DX19304-08*; Walberg 17136-45).

Plaintiffs' challenge to the validity of Dr. Walberg's analysis is not well-taken. They suggest that while Dr. Walberg claimed to have based his opinion on financial data provided by the Archdiocese, "he failed to actually offer any of this data into evidence" and admitted his unfamiliarity with how the Archdiocese "allocates costs among its schools." Pl. Br. at 81.[23] There is no requirement that an expert's underlying data be entered into evidence at trial. Plaintiffs certainly offered no evidence of their own regarding the operational costs of New York City's Catholic schools. Moreover, Dr. Walberg's

[23] The portion of the transcript plaintiffs cite as support for this alleged failure and admission actually dealt with a question of whether Dr. Walberg obtained any bookkeeping information from the Archdiocese regarding "any policies, manuals or records about how they keep their books," to which Dr. Walberg responded, "[n]ot aside from the description that's in the materials that I put in the file" (Walberg 17228:6-20). This line of questioning thus has nothing to do with the validity of Dr. Walberg's estimate of the per-pupil spending of the Catholic schools based on the total expenditure of the Catholic school system and excluding certain costs of programs not available in the Catholic schools.

conclusions are corroborated by the SED's Blue Ribbon Panel on Catholic Schools, which also found that the City's Catholic School students have a significantly higher passing percentage on all statewide Pupil Evaluation Program ("PEP") tests than the public school students on these exams, despite having substantially lower average per-pupil costs than the public schools (DX19009*, p. 2).

There are similar differences among the City's public schools, where high-achieving schools spend less and produce better performance. Many of the superintendents whom plaintiffs called to testify actually acknowledged that the lower spending schools in their districts tended to perform at higher levels than the higher funded schools, and vice versa (Coppin 803-10; Fink 7892-93, 7917-23, 8796; Ward 3321-33; Zardoya 7291-301). In fact, the testimony of plaintiffs' witnesses is entirely consistent with defendants' example of CSD 2, which, despite being one of the lowest spending City districts (spending less than 24 of the 32 community school districts), is one of the highest performing districts (e.g., ranking second-highest among districts on citywide tests in 1998) (Fink 7888-90, 7892-93; DX10026-33; DX10202; PX875B; PX1811; DX10103; DX10109). Even CSD 2's four most disadvantaged schools – with over 90 percent of the students eligible for free or reduced priced lunch and two of the four having high LEP populations – performed "far above average"

compared to similarly situated schools elsewhere in the City (Fink 8791-97; DX10132).

Thus, the City's Catholic schools and some of its public schools are able to achieve superior results at lower costs despite the similarity of their student populations to those of less successful, higher-spending schools. This fact leads to only one conclusion: The BOE's funding level is sufficient to allow it to provide a sound basic education to the City's public school students.

2. Any lack of a sound basic education is attributable to local mismanagement, waste, or corruption.

Since the existing resources properly deployed can provide a sound basic education, the responsibility for any constitutional deficiency must lie with the BOE's mismanagement of the City's public education system. As the Appellate Division correctly found, the various alleged educational inadequacies plaintiffs cite as manifestations of insufficient funding actually "implicate[] the system of education, not the system of funding." 295 A.D.2d at 18. The Appellate Division determined that there was "significant evidence that sizeable savings could be reaped through more efficient allocation of resources by BOE." Id. at 16. These savings could then be used to support other purportedly underfunded programs, such as the "time on task" programs allegedly much needed by the City's at-risk students.

Id. at 16. Under these circumstances, plaintiffs have not established a "causal link" between the present overall funding system and any proven failure to provide sound basic education. See CFE I, 86 N.Y.2d at 318.

The Court's explicit ruling in CFE I is firmly supported by the concept of local control embraced by the Education Article. As this Court has noted, the Education Article "constitutionalized the established system of common schools" already in existence in 1894. R.E.F.I.T., 86 N.Y.2d at 284; see also 3 C. Lincoln, The Constitutional History of New York, at 554 (1906). The laws in place at the time of the Education Article's enactment authorized localities to divide themselves into school districts, raise additional monies for the establishment and operation of common schools, determine their own course of study in those schools in addition to the State required subjects, elect school commissioners to supervise and manage schools in each district, and elect school inspectors to examine and certify district teachers. See L. 1894, ch. 556. In this dual system of State and local control, the State cannot be held liable for funding inadequacies when the failure to provide pedagogical services or instrumentalities results from poor local decision-making about the management of otherwise adequate resources.

The City has recently undertaken sweeping reforms in its public school system to eliminate, or at least minimize, the

inefficiencies and waste that have been so prevalent in that school system for years. These reforms corroborate defendants' evidence that such mismanagement and corruption lay at the heart of the perceived educational inadequacies in the City's schools. They also underscore the absurdity of plaintiffs' argument that the solution to any such perceived inadequacies is increased funding, and only increased funding. The appropriate response to mismanagement is not increased funding; rather, it is to pursue reforms like those that the City school system has recently undertaken.

a. The BOE mismanaged its resources by substantially overspending on special education programs.

The Appellate Division cited the City schools' special education program – an area that accounted for more than 25 percent of the BOE's annual budget, or $2.5 billion in 1998-99[24] – as a prominent example of the BOE's inefficiency and waste. See 295 A.D.2d at 17. As the Appellate Division noted and the trial court found, "tens of thousands" of the 135,000 students in special education have been improperly placed there. Indeed, more than 80 percent of the students classified as learning disabled do not meet the standard (see PX2177*, p. 17 [citing

[24] In 1995-96, the last year for which complete data were available, special education accounted for 28.20 percent of all BOE instructional expenditures (Reschly 18989-94; DX19220A).

report by plaintiffs' expert Dr. Mark Alter estimating that approximately 85 percent of the sample city students identified as learning disabled did not meet State criteria]; DX11170*, p. 5; DX19212; Reschly 18925). Id. The BOE also makes excessive use of full-time, segregated special education classes, with 48.9 percent of all special education students placed in such setting compared to the State's average of 27.3 percent and the national average of 21.3 percent (Reschly 18953-56; DX19199*).

This massive over-referral and overuse of full-time segregated settings produced both a significant waste of money and harm to those improperly classified students. As defendants demonstrated, simply moving a student from a full-time setting (budgeted cost at $24,313 per student for 1998-99) to a part-time setting (budgeted cost at $14,405 per student) yields significant savings (Reschly 18934-38; DX19206*). And even greater savings can be realized by returning a student misclassified as learning-disabled to general education, which had a budgeted cost of only $7,225 per student (id.). Reviewing this evidence, the Appellate Division found that by placing the students in the least restrictive environment possible and returning improperly referred students to the general school population the BOE could save "hundreds of millions of dollars – if not one billion dollars – even after accounting for the cost of redirecting students to the general population." 295 A.D.2d at 17.

Although plaintiffs argue that these estimates have "absolutely no evidentiary basis" (Pl. Br. at 129-30), it is clear how the Appellate Division arrived at its estimate. It assumed that 80 percent of the City's 135,000 special education students have been improperly placed there and that all of them are in fully-segregated settings. Moving all of those students to part-time settings would yield $1.07 billion – (80 percent x 135,000) x ($24,313-$14,404) – of potential savings in special education. While the $1 billion figure represents the upper boundary of potential savings, the Appellate Division was simply illustrating the point that significant potential savings can be realized by appropriately referring special education students. Thus, even if there are costs associated with reabsorbing improperly classified students into general education, hundreds of millions of dollars can still be saved through proper referrals.

Though plaintiffs agree that some City students are misidentified as persons having a disability and that "an inappropriately high percentage of students with disabilities were educated in segregated classrooms" (Pl. Br. at 128), they argue that the chronic resource deficiency in general education bears the blame for this problem.[25] But this argument is both

[25] Plaintiffs also argue that the State's funding formula and the regulatory schemes underlying special education will prevent any savings from being realized. This is highly speculative and

illogical and without merit. Even if resources were insufficient in general education, it does not mean that the BOE may place students in costly special education programs where they do not belong, or in segregated settings that experts in the field agree should be used as seldom as possible, while spending much more money to support those inappropriate services (Reschy 18870-71, 18959-65).

Appropriate referrals would benefit students as well as reduce costs. Even plaintiffs' special education expert Dr. Mark Alter has concluded that separate special education classes harm academic achievement, particularly for students of average or near average intellectual capacity – which includes virtually the entire group of students classified as learning-disabled in New York City (Reschly 18963; DX15479*, p. 106; Alter 10771 ["I think the literature certainly shows that we have had a difficult time justifying the placement of students in self-contained classrooms."]). In fact, as the BOE has acknowledged, it can, and under federal and state laws must, move toward broader use of less restrictive and part-time special education placements

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in any event illogical. If state aid to the special education programs may be reduced, more resources will be available for distribution by the State. Also, while there may be transition costs in properly placing the misclassified students due to regulatory requirements, it does not mean that there would be no net savings. In the long run, efficiently-run special education programs can only be beneficial to the students involved and the entire school system.

(Reschly 18934-38; PX2097). The undeniable fact is that the City is sustaining, at great cost, a separate system of education for students with disabilities that does not produce adequate academic growth for most of those students, and that segregates them in predominantly restrictive placements in contravention of federal and state mandates.[26]

b. The BOE's ineffective management of administrative and teaching staff contributed to any perceived educational deficiencies in the City.

The BOE's ineffective personnel management also adversely affects the quality of education in New York City. For years, the important positions of the school system's principals were filled through patronage hiring and other corrupt practices, resulting in the hiring of unqualified and ineffective principals and poorer education being produced in those schools they serve (DX12492*, p. ix; DX10025-28*, pp. 7, 16, 20, 30, 91-92, 112;

[26] The City's special education program is not the only one that suffers from such inefficiency and ineffectiveness. The City's LEP programs are another example. Through over-referral of children to LEP programs, particularly the less effective and more expensive bilingual programs, the BOE expended significant amounts of resources that could be directed toward other more effective and yet less costly programs, such as the English as a Second Language program (DX12215, pp. ii, ix; DX19281-2; Hernandez 9260-62; Rossell 16847-48, 16818-22, 16826-29). Thus, as the BOE itself concluded, increased funding is not necessary for effective LEP programs. Indeed, its study showed that schools with the most effective LEP programs spent the same amount as or less than other schools in New York City (Rossell 16851-54, 16865; DX12196).

Stancik 20034, 20056-57). Principals generally also were not held accountable for student performance or the general conditions of their school (see DX10544), when such accountability is vital to their schools' success (Murphy 16334-46, 16358-59).

The BOE's management of the City's teaching force was no better. According to plaintiffs' own expert and the BOE's report, as a result of the BOE's "cumbersome and dysfunctional" hiring procedures, including late recruiting and job offers, "well-prepared teachers are discouraged from applying for jobs" and new teaching graduates are prompted to accept jobs elsewhere (PX1870 p. 19; PX1874 at 37; Tames 3035). Of those that joined the City's teaching force, thousands were not assigned to classroom teaching duties (Donohue 15398-412 [16,000 of the City's 78,000 teachers were not teaching in the classroom]). As to those that did teach, the union contract negotiated by the City allowed them to limit their classroom instruction to 3 hours and 45 minutes a day (PX1175; PX1155; DX11042*, p. 7; Spence 4139-44; Donohue 15396-98). The City's teachers had the shortest contractual workday among a representative sample of New York State school districts and urban school districts across the nation (DX19154A*; DX19156*). The Citizens' Budget Commission estimated that requiring teachers to have a longer instructional day or overall workday among other measures would increase

productivity and result in savings of $246 million annually (DX11042*, pp. 7, 11). Indeed, although the City employs roughly the same number of teachers per student as the rest of the State, its class sizes are far larger (DX19189; PX1167*; Murphy 16270-72).

Moreover, the City permitted its more experienced teachers to transfer out of schools that were low-performing and difficult to staff (PX 1155, p. 116). The trial court had found that inexperienced teachers "are disproportionately assigned to the schools with the greatest number of at-risk students," which "makes it more difficult for New York City public schools to meet the needs of its students." 187 Misc.2d at 29. The Appellate Division correctly recognized that this problem is the result of the City's collective bargaining agreements, "not the manner in which the State funds the City's schools." 296 A.D.2d at 18. In fact, the City's contract with the teachers' union also does not let teachers be paid more to work in schools that are difficult to staff. All teachers – regardless of where they teach or how competent they are – are paid pursuant to a single salary schedule (PX1155, pp. 155-60; Fruchter 14742-43; Lankford 4576-77). One well-publicized example of inefficiency was the teacher disciplinary procedures, in which teachers spend an average of one-and-a-half years awaiting completion of their disciplinary proceedings, "oftentimes doing no more than reading the

newspaper" and still being paid (DX19469*, p. 1) (Feb. 2000 memo from Chancellor Levy noting that 301 teachers were awaiting completion of their disciplinary proceedings with the longest pending case being almost seven years old).

The data for teacher aides and other paraprofessionals also raise questions about the BOE's deployment of resources. In the 1998-99 school year, the BOE employed paraprofessionals and teacher aides at ratios of approximately 32 to 1, compared to a median of 82 to 1 for large school districts reporting to ERS (DX19059). New York City schools tjis have a higher paraprofessional/teacher aide ratio than most large school districts (DX19059; Murphy 16249-52).

c. The BOE's policies related to facilities have generated significant waste.

The BOE's policies related to facilities were particularly inefficient and wasteful. The BOE's failure to allocate sufficient funds for preventive and corrective maintenance caused existing conditions of disrepair in the New York City public school system. Facilities that would have required a relatively small investment to remain in a state of good repair instead required capital expenditures in far greater amounts (Spence 4220-22; O'Toole 18749-50; DX19511; see also PX128, p. 9 [estimating that for each dollar not invested in timely school

building maintenance and repair, the system falls another $620 behind]).

Instead of spending the $7.8 billion capital fund available to it between 1990 to 1999 to keep its facilities in a state of good repair – an undertaking that would have cost only $5.8 billion – the BOE upgraded its staff offices and undertook unnecessarily expensive construction projects (PX190; DX19700-05; DX19515A; O'Toole 18697-732, 18738-39). With a documented ambition to build schools that are "beautiful public works," the BOE built schools that are "monuments" instead of more cost-effective structures (O'Toole 19695, 19705-10; PX108A, pp. I 15-16). Indeed, one of plaintiffs' witnesses, Patricia Zedalis, who was the Director of the BOE's Division of School Facilities, was removed from her post in 2001 after estimates of a shortfall in the construction budget ballooned to $2.8 billion. See Edward Wyatt, Chancellor Seeks to Shift Control in School-Building, N.Y. Times, Aug. 8, 2001 at A1. Over the years, the Inspector General of the School Construction Authority – an independent agency created in 1988 in response to the abysmal performance of the BOE's Division of School Facilities – uncovered extensive corruption in connection with the construction and repair of the City's school facilities (DX15062; DX17065; DX19007; DX19005).

d. Fraud and corruption in the City's public school system have led to the squandering of significant resources.

In addition to management failures, fraud and corruption have long been rampant in virtually every area of the City's public school system, with vast resources squandered in the process. These problems, uncovered by numerous public commissions, included wasteful perquisites, bribery, kickbacks, bid rigging, phony invoicing, no-show positions, phantom classes to raise funding level, patronage hiring, and even blatant theft. One commission report found "serious corruption or impropriety almost wherever we looked," including "millions [] squandered on unneeded patronage positions" and "thousands of dollars wasted through gross fiscal mismanagement," with some "spent on vital equipment that just disappears" and additional money "wasted on unnecessary frills for public servants" (Stancik 19985, 19887-88; DX12492*, p. vi).

Another commission report found the local school board elections to be a "patronage mill," where school principals acted as "foot soldiers in their bosses' campaigns" and educational priorities took "a backseat to political imperatives" (DX10025-28*, p. 116; Stancik 20034). In the fiefdoms that developed, principals became beholden to the individual board members who hired them, pedagogical jobs were peddled out, and the budget for non-pedagogical jobs was used to return political favors or

distributed by corrupt board members to their friends and relatives (Stancik 20050, 20081-86; DX10025-38*, pp. 7, 52, 54-55, 91-92. Yet another commission report, entitled Paper, Pencils and Planes to the Caribbean, documented a system of credit pools and slush funds in which suppliers bribed school officials to get the lucrative business that schools' large purchasing power could provide (Stancik 21465-66; DX10025-39*).

Such fraud and corruption inevitably reduce the quantity or quality of resources for the actual work of education, particularly in districts with low performing schools (Fruchter 14736; DX10025-34*, p. NYS00628; Stancik 21442-43). Indeed, the SURR schools tend to be located in school districts that have been noted for corruption and poor management (Fruchter 14736). A 1996 commission report, for example, noted that in District 9, where the board had been suspended twice in eight years and ongoing corruption had led to the indictment of board members on charges of larceny-related kickbacks, the students ranked "at the absolute bottom of citywide reading and math scores" (DX10025-34*, p. NYS000628).

This well-documented history of fraud and waste is relevant to the causation analysis, particularly when its undisputed impact on the City's schools is an overall lowering of educational quality – an effect plaintiffs claim has instead been produced by insufficient funding. Since it was plaintiffs'

burden to prove that the State's funding level was unconstitutionally low, they were required to show that the funds available to the BOE were actually used efficiently and not wasted through fraud, corruption or otherwise. They did not do so.

e. The City's recent sweeping education reforms corroborate defendants' evidence of mismanagement and corruption and shows that increased funding is not the solution.

At the City's request, the State has approved sweeping education reforms in the New York City public school system to eliminate inefficiencies and corruption in the management of its resources. These sweeping reforms corroborate defendants' evidence of extensive mismanagement and corruption. They also illustrate how misguided are plaintiffs' attempts to obtain a one-dimensional solution – more money. They instead represent an appropriate political response to serious problems in the governance of New York City's school system, a response that the judicial system would have been ill-equipped to devise or oversee.

These recent amendments to the Education Law, dramatically changing the governance structure of the City's public school system and granting the Mayor substantial control over the system, see L. 2002, ch. 91; Educ. L. § 2590, are sweeping reforms that target many of the City school system's inefficient

and corrupt practices. These changes will likely generate significant efficiencies and savings that will improve the quality of education in the City's schools. As the Mayor observed, the new school system is designed to "end[] the bureaucratic sclerosis that prevents resources and attention from going where they are needed: the classrooms." The reforms are meant to "clear[] out the Byzantine administrative fiefdoms that multiplied under the Board of Education." Remarks by Mayor Michael R. Bloomberg, Major Address on Education at New York Urban League's Dr. Martin Luther King Jr. Symposium, delivered on January 15, 2003 ["Mayor Bloomberg's 1/15/03 Remarks"].[27]

The Mayor's education reform seeks to replace the City's 32 community school boards – eliminated by the new law – with committees of parents selected from the different schools within their district. See Chancellor Klein's Testimony Before the State School Board Task Force, delivered on Jan. 16, 2003. Not only are there plans to streamline the chain of command in the school system, but the Mayor also plans to centralize the operational services and reduce thousands of non-pedagogical staff, with the "savings [] accrued in this process" going to the students. Mayor Bloomberg's 1/15/03 Remarks. By moving operations employees out of classrooms currently used as offices

[27] All press releases and statements cited in this section are available at http://www.nycenet.edu/press.

and conference facilities, the system "will free up at least 8,000 classroom seats," which is "the equivalent of a dozen new schools." Id.

The City's new Department of Education is also implementing a multi-year reform program designed to promote principal leadership, accountability, and increased autonomy. See Press Release 283-02, Dec. 11, 2002, Mayor Michael R. Bloomberg and School Chancellor Joel I. Klein Announces Sweeping Initiatives to Promote Principal Leadership and Accountability in Schools. In addition to plans to fire a significant number of principals who have persistently failed at their work, the initiatives include a leadership academy to recruit, train and develop quality principals, and monetary incentives for outstanding principals who move to selected low-performing schools. Id.

Teaching in the City schools will also change. Agreements between the new Department of Education and the teachers' union extend the teachers' workweek by one hour and forty minutes, which will provide the students with more instruction time and the teachers with more professional development. See Press Release N.31 2002-2003, Sept. 30, 2002, Department of Education and UFT Announce Proposed Modification of Contract. Similarly, in the area of facilities, the Mayor recently announced that his new team has "made a makeover of the scandalously expensive and time-consuming process of school construction and repair," and

estimated that planned merging of the Division of School Facilities and the School Construction Authority "alone will save hundreds of millions dollars and years of planning." Press Release 283-02, Dec. 11, 2002, Mayor Michael R. Bloomberg and School Chancellor Joel I. Klein Announces Sweeping Initiatives to Promote Principal Leadership and Accountability in Schools.

Furthermore, in the area of special education, the Mayor announced that the "largely segregated and largely failing [special education] system that unmercifully ravages the lives and future of our children" will "no longer be tolerated." See Press Release N. 88, April 3, 2003, Mayor Michael R. Bloomberg and Chancellor Joel I. Klein Announce Reforms of Instruction and Services for All Special Education Students in New York City. The Mayor seeks to implement comprehensive reforms to improve special education programs in New York City's public schools, including holding schools and principals accountable for improvements in special education; streamlining the special education evaluation process; and providing services and incentives for better school performance. See id. As the Mayor recognized, "[t]he need for comprehensive reform of the special education system in [the City's public schools] is manifest – for too long, the system has failed shamefully to help our children learn and raise their levels of expectation and achievement both in the classroom and in life." Id.

These reforms demonstrate that the evidence of waste, inefficiencies, and corruption presented by defendants at trial in this case is, after all, well-founded. They also support defendants' suggestion that local mismanagement, not overall underfunding, caused any perceived inadequacies.

B. Even if the BOE's Total Funding is Deemed Insufficient, the State is Still Not Liable Because the City Has Substantially Underfunded Its Schools.

Even assuming that the total funds available to the BOE were insufficient to provide the City's children with a sound basic education, the shortfall must be attributed to the City's failure to contribute a reasonable amount of funds to education. See CFE I, 86 N.Y.2d at 341 (Simons, J., dissenting in part) ("a court could justifiably conclude as a matter of law that the shortcomings in the City schools are caused by the City's failure to adequately fund City schools"). Trial evidence showed that the City substantially underfunded its public schools during the relevant period, both in relation to local contributions made by other districts across the State and in light of its relative wealth.

1. The City has substantially underfunded its schools.

The City's education allocation is deficient both in terms of the actual dollars appropriated and as a percentage of its municipal budget. In 1996-97, the latest year for which comparative data were presented at trial, the City raised only about $4,000 per student from local resources – that is, $2,200 less than the state average of $6,200 per student. DX19399*; Wolkoff 18108. If the City had merely matched this average local effort, its 1.1 million students would have had $2.4 billion more for education. In addition, while the City spent only 21 to 23 percent of its annual budget on education during the period between 1986 and 1996, the average for the rest of the State during that same period was around 47 percent (DX19405*; Wolkoff 18124). See also CFE I at 342 (Simons, J., dissenting) (noting that other districts contributed twice as much to education as a percentage of local revenues as did New York City). If the City devoted the same percentage of the full value of its property tax base to educational purposes as the rest of the State does on average, education funding would increase by about $1.4 billion (Wolkoff 18128-29; DX19407*). And if the City made a local effort equal to the average local effort in the rest of the State as a percentage of income, its total contribution in 1996 would have increased by about $2 billion (Wolkoff 18131-32; DX19409*).

The inadequacy of the City's contribution to education funding is even more apparent in light of its capacity to raise local funds. As measured by combined wealth ratio ("CWR") – which calculates a school district's capacity to raise local funds for education relative to other districts in the State by considering both the value of its taxable real property and its adjusted gross income – the City is in the second wealthiest quartile of districts in the State (Wolkoff 18041-46 [noting that in 1995-96, the City had a CWR higher than 446 of the State's 683 districts]). Yet the City's local education contribution per student is exceeded by virtually every school district in its own quartile, by many districts in the second poorest quartile, and even by one district in the very poorest quartile (Wolkoff 18111-13; DX19400).

Plaintiffs complain that the CWR fails to take into account New York City's regional costs, again relying on the 1999 SED regional cost index discussed above. See Pl. Br. at 118. Even if true, this actually highlights the paltriness of the City's contribution of $4,000 per student. But the CWR actually understates the City's relative capacity to fund education because the City has a disproportionate share of the State's financial wealth which is not captured in the CWR (Wolkoff 18088-91; DX19396*). The City has approximately 42 percent of the State's dividend income, about 43 percent of the State's interest

income, and almost 45 percent of the State's income from capital gains, and none of it is reflected in the CWR (DX19396*).

Plaintiffs argue that the City's low contribution is due to the economic swings it inevitably experiences. It is true that the City depends primarily on a variety of income, sales, business and other taxes for education funding, rather than on property taxes and that the revenues these taxes produce fluctuate with the business cycle. See Pl. Br. at 119-20. But this is a matter of policy choice: The City could dedicate its property tax receipts to schools and avoid such fluctuations. This is, of course, what independent school districts do. Moreover, the City's dependence on non-property taxes does not establish that the City is incapable of providing reasonable support to education. In each of the 17 years from 1982 to 1999, through several business cycles, the City had a budget surplus, sometimes in excess of $2 billion (Rubenstein 11729, 11731, 11744; DX11174 at NYC00443, NYC00458; PX758 at NYC00107, NYC000117; see also PX3816 at 4). The City plainly had choices about how to allocate its resources (Sweeting 13863-65), and evidently chose not to devote more to education.

2. The State should not be held responsible for the City's choice to fund its schools at such relatively low levels.

Integral to New York's system of local control of education is its reliance on localities to pay their appropriate share of public education costs. Local control over education in New York has always been accompanied by local responsibility for funding.[28] Thus, the Legislature has imposed upon the City's BOE and the City of New York the duty to maintain and support a public school system. See Educ. L. §§ 2554, 2576(5), 2590-i(b), 2590-g (2001). A failure by the City to raise enough money to fulfill this duty cannot give rise to liability on the part of the State. See, e.g., Witwyck School for Boys v. Hill, 11 N.Y.2d 182, 191 (1962) ("The legislature has imposed this duty [i.e. to

[28] The reliance on local funding for education in New York dates back two centuries. Beginning as early as 1795, the common school law made State aid to counties and cities for their local schools contingent upon their matching funds. See CFE I, 87 N.Y. 2d at 326 (Levine, J., concurring) (citing 3 C. Lincoln, The Constitutional History of New York, at 526-27); L. 1795, ch. 75 (requiring each county in State to raise tax totaling half of county's education funding, with the balance to be provided by State); L. 1812, ch. 242 (towns eligible to receive state funds only if equivalent amount raised by local tax). The common school law in place at the time of the Education Article's enactment similarly made State aid contingent upon local contribution. See L. 1894, ch. 556, § 3 (payment of any moneys to which any county may be entitled could be withheld until satisfactory evidence "that all moneys required by law to be raised by taxation upon such county, for the support of schools . . . have been collected"). In fact, the State raised only about 20 percent of all monies spent for education at that time. See 40th Annual Report of the State Superintendent of Public Instruction, 6 N.Y. Assembly Documents of 1894, Doc. No. 42, pp. 114, 118.

fulfill the mandate of the Education Article] in cities upon local boards of education"); Hermes v. Board of Educ., 234 N.Y. 196, 202 (1922) ("The board of education is the agency to which the state delegates the power and duty of controlling the schools in the district").

In Levittown, this Court recognized the historical foundation and soundness of local control and, concomitantly, local funding responsibility. As it said, "the preservation and promotion of local control of education . . . is both a legitimate state interest and one to which the present financing system is reasonably related." 57 N.Y.2d at 36; see Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public school and to [the] quality of the educational process").

In CFE I, this Court again recognized the City's obligation to contribute meaningfully to education funding. Although considering it "premature," in light of the procedural posture of the case, CFE I, 86 N.Y.2d at 318, a majority of this Court took no issue with Judge Simons' observation – made when recounting New York City's declining and below-average contribution to local education – that "a court could justifiably conclude as a matter

of law that the shortcomings in the City schools are caused by the City's failure to adequately fund City schools, not from any default by the State of its constitutional duty." Id. at 341 (Simons, J., dissenting in part).

Moreover, the Stavisky-Goodman provision contained in section 2576(5) imposes a maintenance-of-effort responsibility on the City. That provision requires the City to approve the BOE's proposed annual itemized estimate, if the estimate is equal to or less than "an amount equal to the average proportion of the total expense budget of such city . . . appropriated for [education]" in the three preceding years. Educ. L. § 576(5) (2001). That is, the BOE could request, and the City must appropriate, an amount equal to the average of the amounts appropriated for education by the City from its own budget in the three preceding years, not, as plaintiffs argue (Pl. Br. at 121), the average of amounts available to the BOE for education from all local, state and federal sources for those years. This is so because Federal and state education contributions are already accounted for in the BOE's estimates. See Educ. L. § 2576(1).

As this Court recognized in Board of Educ. v. City of N.Y., 41 N.Y.2d 535 (1977), the Stavisky-Goodman Law was enacted to respond to the fact that "the city's school system needed guaranteed support in the municipal budgetary process." Id., 41 N.Y.2d at 536-37 (emphasis added). The purpose of the law was

thus to "requir[e] a minimum appropriation for the system within the city's budget." Id. at 536-37 (emphasis added); see also Memorandum of Leonard Stavisky, Chairman of Committee on Education, New York State Assembly, Bill Jacket, L. 1976, ch. 132 (bill "calls for a reshaping of priorities, within the city, to guarantee the continuation of [the] vital function" of education, and ensures that "education will receive an equitable share of the city's available financial resources – at the same percentage as in recent years") (emphasis added).[29]

The City thus has an obligation to provide a level of funding that it did not provide. If plaintiffs believed that the budget approved by the City was inadequate to enable the BOE to provide the services, facilities and programs required by the Education Law, they could have sought legal redress against the City. Thus, if the City is not meeting its funding obligations, the solution, as the Appellate Division noted, "is to seek compliance with the statute rather than to annul the entire State funding system." 295 A.D.2d at 40.

[29]The Legislature recently clarified this maintenance-of-effort provision to remove any possible ambiguity. By its own terms, the statute applies only to the City's own budget and not to "funds derived from any federal, state or private sources over which the city has no discretion." L. 2002, ch. 91, § 5; Educ. L. § 2567(5-a).

C. In Any Event, Plaintiffs Have Failed to Prove a Significant Correlation Between Increased Funding and Student Performance.

Plaintiffs failed to prove an even more fundamental aspect of causation: that additional funds for education, if supplied, will affect City students' achievement. See CFE I at 318 ("plaintiffs must demonstrate a correlation between funding and educational opportunity"). Plaintiffs present no such proof, declaring only that additional resources, "if properly deployed," or "used well," can have such an impact. Pl. Br. at 122. This is so, according to plaintiffs, because all children can learn, and because plaintiffs' experts have "identified specific programs that would improve the education of students," such as "time on task" programs. Id. at 123, 125. Plaintiffs' assertion begs the question of whether increasing the overall funding level of New York City's schools would improve student performance. Their failure of proof on this issue precludes any claim that inadequate funding is the cause of any proven inadequacy in education.

1. Plaintiffs failed to prove any correlation between increased funding and enhanced achievement.

Plaintiffs failed to prove any significant correlation between higher education funding in New York City and improved student performance. In fact, they presented no analyses of data

pertaining to New York City at all, but relied instead on anecdotal evidence from superintendents and other witnesses who testified to their belief that City students cannot meet stringent Regents Learning Standards without more money for education (see, e.g., PX2332A ¶ 149; PX2026A ¶ 28; Spence 2005). Such anecdotal testimony and unsubstantiated opinion evidence is not enough. Cf. NAACP v. Yonkers, 197 F.3d 41, 53 (2d Cir. 1999) (rejecting "scattered anecdotes" and "subjective, intuitive impressions" as evidence of causal link between low expectations of students and prior de jure segregation by school system).

The only statistical evidence tendered by plaintiffs on the effect of school resources on achievement was presented by Dr. Grissmer, who sought to demonstrate that extra resources in three limited areas – (1) reduced class sizes in lower grades only, (2) "reported adequacy of resources by teachers," and (3) pre-kindergarten – could improve student outcomes (Grissmer 9428, 9481). But the actual results of Dr. Grissmer's analyses were not nearly so clear-cut. They varied according to which of several statistical models he used and the socioeconomic status of the students measured (PX2272VV; Grissmer 9567, 9589-91). The effects that Dr. Grissmer found were small, and many were not scientifically reliable at the 5 percent confidence level, which he acknowledged is typically used by social scientists in the field (id.; Grissmer 9580-81, 9584-90; PX2272XX; PX2272WW).

The other principal piece of evidence relied upon by plaintiffs for the proposition that additional school resources are likely to improve student achievement is the so-called STAR study (hereinafter "STAR"), conducted in Tennessee public schools to measure the effects of reduced class size on performance in the earlier grades. That study concluded that children in classes reduced from about 24 to 15 students improved their performance, with the degree of the improvement dependent on the race and socioeconomic status of the students (Finn 7975-77, 8034-35; PX2116A). The STAR study concluded that the effect of small class sizes on student achievement was statistically "small" or "modest" (Finn 8012-14), when the classes were as unusually small as 12 to 17 children.

Defendants' experts confirmed that there is no correlation between increased educational spending in the City's public school system and improved student performance. Most of the analyses isolated a measure of spending (e.g., per-pupil spending) or of a particular resource or advantage (e.g., teacher certification) to ascertain whether variations in the level of that particular "input" had an impact on student performance. The results indicate that more money does not necessarily translate into higher performance. Instead, educational quality and performance are functions of something more than resource differences. For example, Dr. Hanushek conducted a study to

determine the relationship, if any, between the level of resources in the City's elementary and middle schools and their students' performance on the citywide math and reading tests. Overall, he found no systematic pattern of correlation between the quantum of resources/spending and the performance of students; a high-spending school may or may not be a high-performing school (Hanushek 15810-11).

Dr. Hanushek examined high poverty (over 90 percent free lunch rate) and moderate poverty (over 75 percent free lunch rate) schools to determine whether there were any differences in resources between the high and low achieving schools in each free lunch category. The resource measures used in the study included per-pupil spending, pupil-to-teacher ratio, computer-to-pupil ratios, capacity utilization and facility conditions. Dr. Hanushek found that to the extent there were differences in the levels of school resources among high versus low achieving schools, the resource differences actually favored the low performing schools (see Hanushek 15822-29, 15849-62; DX19077-83*; DX19086A*; DX19087A*; DX19132-33*; DX19143-44*; DX19088*). Dr. Hanushek also performed multiple regression analyses on all of the City's elementary and middle schools and found no statistically significant, positive effect on student achievement for four different resource measures (per-pupil spending, computer-to-pupil ratios, capacity utilization and facility

conditions) (DX19084-85, DX19089-90; Hanushek 15872-80, 15890-92).

Similarly, Dr. Armor examined the effect of five school resource measures – teacher experience, teacher education, teacher certification, pupil-teacher ratio, and per-pupil spending for general education students – on the City students' performance on State and citywide math and reading tests. Using four different cohorts, Dr. Armor concluded that the five resources measures had virtually no statistically significant effect across the four cohorts studied (Armor 20559-64; DX19579*; DX19541-45A*; DX19556-60*; DX19546-55*). Dr. Armor also found no statistically significant simple correlations between per-pupil spending and the levels of teacher certification, teacher education, or teacher experience in City schools (DX19561; Armor 20568-71).

Studies based on statewide data and nationwide samples also confirmed that there is no positive relationship between resources and student performance. For example, Dr. Hanushek performed two regression analyses (one controlling for socioeconomic backgrounds of students) on all State districts (except New York City) and found, in both analyses, no correlations between per-pupil spending and the percentage of a district's students that obtained a Regents diploma (DX19073-75*; DX19113; Hanushek 15786-807). In fact, when plaintiffs' rebuttal

expert, Dr. Grissmer, attempted to replicate Dr. Hanushek's Regents Diploma analysis and to correct certain purported flaws in Dr. Hanushek's analysis, his results actually confirmed Dr. Hanushek's findings (Grissmer 22434-35, 22438-41). In another study, using data from some 377 separate studies on the effects of school resources, Dr. Hanushek also found no consistent relationship between higher school resources and student performance (Hanushek 15708-34)

Thus, these expert witnesses performed a range of analyses, relying on an array of available data and considering the education system from a variety of angles. Their consistent conclusion was that more money is not what drives improvement in student performance.

2. There is no correlation between funding and student performance because factors extrinsic to the education system account in large part for performance in schools.

No one disputes that socioeconomic factors in a student's background, such as family income or the education level of his or her parents correlate strongly with a student's academic performance (Grissmer 9358, 9487; Armor 20448-51, 20469; PX2373*, p. BOE76954-6). The BOE itself has recognized the importance of socioeconomic factors in assessing the impact of education resources on student performance. "A fair and accurate analysis

of the relative performance of our schools must 'level the playing field,' and take into account demographic factors that significantly affect student achievement" (PX2373*, p. BOE769546; see also id. at p. BOE769548). In particular, the BOE noted that students' economic status and limited English proficiency are "factors that have repeatedly been shown in national studies to have a significant impact on student achievement" (PX2373*, p. BOE769546).

The SED also has recognized that the quality of instructional programs may not be accurately assessed by relying on test scores because

> [t]here are many other factors that influence test results, such as the general intellectual level of the students, the extent to which they are motivated to learn and to obtain high test scores, the availability of community resources such as museums and libraries, etc. Motivation is particularly important. School achievement suffers in communities and neighborhoods where unemployment, hunger, violence, drugs, and broken homes prevail.

(PX781*, p. 2.) Plaintiffs' expert Dr. Grissmer similarly admitted that socioeconomic factors such as parental education level and family income play the "predominant" role in how students perform on academic tests (Grissmer 9487, 9515-16).

Heeding this Court's observation in CFE I that "there are a myriad of factors which have a causal bearing" on achievement outcomes, 87 N.Y.2d at 570, the Appellate Division properly found

that the City students' perceived poor performance is partly attributable to factors that are outside the control of the schools. For example, plaintiffs cite City students' relatively low high school graduation rate as evidence of the cumulative effect of the City school system's breakdown. But as noted above, supra Point II.B, a large number of those students actually entered the City's public school system for the first time in ninth grade and are limited in their English proficiency. Indeed, the ninth grade is the second largest grade of entry (after kindergarten) for students entering the City's public school system, with a large number of them coming from other countries (Kadamus 1612, 19290-91). In addition, fully 80 percent of the 1997 New York City cohort of graduates were born outside the United States (see PX312, p. 28), and as plaintiffs have asserted, over 90 percent of the State's immigrants reside in New York City. Given the greater number of English Language Learners, coupled with the high incidence of poverty in the City, it should be no surprise that a number of children in the City need extra time in which to complete high school (see PX3777, pp. 7, 10; 19290-91). Therefore that delay cannot be attributed to any lack of resources, or even considered an educational failure in the first place.

At an even more basic level, school attendance, or more precisely absenteeism, helps explain the lack of correlation

between funding and academic performance. The City's high school attendance rate is only slightly over 80 percent (PX1167*), a circumstance largely beyond the control of school authorities.[30] If the students do not attend school regularly, no amount of funding will increase performance.

The significance of socioeconomic factors for student performance precludes a finding of the causal link required by CFE I between the State's funding of City schools and any of the City's educational shortcomings. Just as the Education Article does not impose strict liability on the Legislature for a sound basic education when localities fail to meet their constitutional obligations, it similarly does not require the Legislature to eliminate all factors external to the education system that may hamper the students' performance, no matter the comparative wisdom or cost. As discussed above, this Court, in construing the Education Article, cautioned that "there are a myriad of factors which have a causal link bearing on test results," CFE I, 86 N.Y. 2d at 317, many of which are outside the control of the classroom. See Donohue v. Copiague Union Free Sch. Dist., 47 N.Y.2d at 446 (Wachtler, J., concurring) (agreeing with majority that students claiming to be functionally illiterate

[30]Both by statute, see Educ. L. § 3212, and as BOE policy, it is a parent's responsibility to "send his or her child to school ready to learn and to ensure that his or her child attend[s] regularly" (DX15467).

could not bring claim against school district because "[f]actors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning"). In Levittown, this Court similarly observed that the "inequalities existing in cities are the product of demographic, economic, and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction." 57 N.Y.2d at 41. The education system is not a substitute for social services, nor is it unconstitutional for the Legislature, in its wisdom, to determine that the State's limited resources may be more efficiently spent in other areas also benefitting the City's children. Even plaintiffs' expert, Dr. David Grissmer, conceded that "investing money 'in the family' rather than the school 'might pay off even more.'" CFE Appeal, 295 A.D.2d at 16. And former United States Secretary of Education, Terrel H. Bell, who established the National Commission on Education that in 1983 issued A Nation at Risk and ushered in the standards movement on which the RLS and plaintiffs' case are based, took a similar perspective. In retrospect, he concluded that

> [g]ains in student achievement, declines in high school dropout rates, and other desired outcomes cannot be attained simply by changing standards and mandating procedures and practices. A much more massive systemwide effort is required that engages parents, neighborhoods, and communities. We ha[ve] placed too much confidence in school

> reforms, that affected only six hours of a child's life and ignored the other 18 each workday plus the hours on weekends and holidays.

Terrel H. Bell, Reflections One Decade After A Nation at Risk, Phi Delta Kappan 593, 594 (April 1993).

Thus, although schools and other community resources may help remedy some of the socioeconomic disadvantages faced by the City's students, it is clear that the education system is not constitutionally required – and may well lack the capacity – to fully compensate for them. The education system does not "cause" low performance by the City's students, and thus the amount of funding the State provides does not cause that performance.

POINT IV

IF THIS COURT WERE TO HOLD THAT THE STATE HAS VIOLATED THE EDUCATION ARTICLE, IT SHOULD REJECT PLAINTIFFS' PROPOSED REMEDY AND INSTEAD INSTRUCT THE LEGISLATURE AND EXECUTIVE TO RECTIFY ANY CONSTITUTIONAL DEFICIENCIES IT FINDS.

If this Court were to reverse the Appellate Division's decision and hold that the State has violated the Education Article, the Court should order the defendants, through established legislative processes, to determine and implement measures that will provide New York City's public school students with the opportunity for a constitutionally sufficient education. As this Court made clear in CFE I, the Legislature's obligation

under the Education Article is specific and limited. A sound basic education

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

86 N.Y.2d at 316. If this Court were to find that the State is not satisfying its constitutional obligations with respect to the public education of New York City students, the Court should specify where the deficiencies lie, and direct the Legislature, as the entity charged with primary responsibility under the Article for maintaining the state's system of public education, and the Executive, who shares responsibility with the Legislature for raising state revenues and allocating state resources for that system, to remedy them.

Plaintiffs instead ask this Court to "initiate an appropriate legislative/judicial dialogue" (Pl. Br. at 132) by issuing "guidelines" that define the process by which the Legislature should restructure New York's entire public education system statewide.[31] Such an extraordinary and sweeping remedy is

[31] Plaintiffs, relying on the Supreme Court decision in R.E.F.I.T, suggest an intrusive remedy is appropriate based on "the history of the State's failure to respond" to calls for

a dimension of the aspirational concept of a public education that plaintiffs seek to impose as a constitutional minimum. If adopted, it would be a radical departure from the remedial approach normally taken by this Court, and result in unprecedented judicial entanglement with the legislative process. Such relief would also undermine the joint responsibility that the State and localities have historically shared for primary and secondary education. Furthermore, plaintiffs' proposal for a statewide remedy far exceeds the scope of this lawsuit, which is limited to the New York City school system, notwithstanding the reverberations that a decision in plaintiffs' favor would have on the State's 700 other school districts. Finally, plaintiff's proposed statewide remedy would impose staggering costs on the State of New York. For all these reasons, plaintiffs' proposal should be rejected.

Plaintiffs ask the Court to establish and oversee implementation of four separate directives or guidelines that define a process that plaintiffs believe will best achieve their goal of overhauling public education and the public education financing system in New York: (1) Determine the actual costs of

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reform of the education finance system. (Pl. Br. at 131 & n.37). But in that case, this Court held that those plaintiffs had failed to establish a constitutional violation. See R.E.F.I.T., 86 N.Y.2d at 285 ("the school financing scheme of the State of New York has not been shown in this case to be unconstitutional"). The State cannot be faulted for failing to act where no constitutional violation was found.

the resources needed to provide the opportunity for a sound basic education in every school district in the State through an "objective costing-out study;" (2) Ensure that every school district in the State has sufficient funds to provide a sound basic education to students in all of its schools; (3) Establish a comprehensive accountability system that ensures efficient utilization of funds, involves members of the local communities, and promotes long-term planning by school districts; and (4) Establish a determinate timetable for the above to be accomplished. Examination of each of these proposed guidelines illustrates the problems of judicial entanglement with the legislative process and of overbroad remedies.

As a "threshold task," plaintiffs' call for a study to identify the costs of resources necessary for providing a sound basic education (Pl. Br. at 135-37). Their demand for such a study at this late date illustrates the self-contradictory nature of their approach. After a seven-month trial devoted to ascertaining whether the State's educational financing system deprives New York City students of the opportunity for a sound basic education, plaintiffs have never established the cost of sound basic education in New York City, let alone elsewhere in this State. Their demand that this Court now direct the State to calculate the cost of providing such an education merely demonstrates that the insubstantiality of their assertion that

the current levels of spending are insufficient, particularly where the evidence at trial showed that New York City school system spends more money per pupil than almost any other large urban school district in the United States.[32]

In addition, to require the State to fund education in accordance with a "costing-out study" would represent a severe encroachment on the legislative prerogative. Whether or not such a study might be desirable or helpful as a matter of education policy, it is for the legislative process, not the courts, to determine what formula should be used to determine the level of educational spending and, above all, how that spending should be balanced with the State's other needs. See Levittown, 57 N.Y.2d at 47-48 & n.7.

Plaintiffs' further suggestion (Pl. Br. at 137 n.42) that the State should accept the findings of a costing-out study prepared by plaintiffs' hand-selected "experts" must be rejected out of hand. Any "costing-out study" is a policy-laden venture, requiring expertise and judgment with regard to the kinds and mix of pedagogical services, instrumentalities of learning, and facility improvements that will best accomplish the objective of eliminating any proven deficiency. Levittown makes clear that

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[32] The City's assertion in its amicus brief (pp. 16-17, 20) that it requires in the range of $1.125 to 1.69 billion annually in additional funding to provide a sound basic education lacks any evidentiary foundation.

plaintiffs' reliance on recommendations of various task forces on excellence in education is inappropriate. See id. 57 N.Y.2d at 47 n.6 ("What . . . has been urged on the Legislature as sound educational policy is to be clearly distinguished from the command laid on the Legislature by the Constitution.").

These kinds of judgments should remain within the discretion of the legislative and the executive branches, who may rely on the advice and expertise of the State Education Department, the Board of Regents and any others whose advice they decide to take. And such experts may employ any of several methodologies to determine the programmatic and fiscal requirements for providing an appropriate education, which may or may not include a request for wish-lists from each school district (see Berne 12558) (discussing the "professional judgment" methodology for determining the kinds of educational programs necessary to achieve specific standards and their costs). Furthermore, placing responsibility for overseeing a "costing-out" task in the hands of a court, which is removed from the democratic process and has no expertise in education, is neither warranted nor efficacious.

Plaintiffs' second guideline, that the Court "require that the state education finance system ensure that every school district has sufficient funds, taking into account variations in local costs, to provide the opportunity for a sound basic

education to students in all of its schools" (Pl. Br. at 138-39), likewise ranges far beyond the scope of this lawsuit, which was limited to purported deficiencies in New York City alone. Plaintiffs made no effort to demonstrate that students outside New York City are not receiving a constitutionally adequate education, and accordingly there is no basis for any judicial remedy to go beyond the New York City schools.

In any event, it would be completely impracticable to do as plaintiffs ask and repose responsibility in a single judge in Manhattan for ensuring that the needs of each of the State's 700-plus individual school districts, from Cobleskill-Richmondville Central School District in Schoharie County, to Saranac Central School District in Clinton County, to West Valley Central School District in Cattaraugus County, to the Buffalo City School District in Erie County, is properly catalogued and assessed. It is simply not appropriate for a trial court to assume this role as overseer of New York's entire system of public education.

Plaintiffs' third guideline, that the State be required to "establish a comprehensive accountability system" (Pl. Br. at 139-41), would also inappropriately encroach on the power of the Legislature and Executive to conduct their business and to decide how the state's limited resources should be allocated to address its many priorities, as well as threaten to upset New York's longstanding balance between state and local control over public

education. Likewise, plaintiffs' demands that the State be required to ensure that the education finance system be "as comprehensible to the public as possible," and provide "sustained, stable funding" (Pl. Br. at 141), would represent an inappropriate interference in the legislative process. While "transparency" of the finance system and "stable funding" may be desirable as a matter of policy, plaintiffs have failed to demonstrate that the measures they propose are necessary to ensure that constitutional requirements are met. See Levittown, 57 N.Y.2d at 48 n.7 ("once it is concluded that there is an educational system in New York State which comports with the constitutional requirement, it is immaterial that the Legislature in its wisdom has seen fit to provide financial support under complex formulas with a variety of components, even were it to be concluded that the maze of financial support measures was not entitled itself to be characterized as a 'system.'"); New York Pub. Interest Research Group, Inc. v. Steingut, 40 N.Y.2d 250, 257 (1976) ("it is not the province of the courts to direct the legislature how to do its work") (citations omitted).

In addition, while stable funding of education is important for New York, the State's resources are not unlimited. Other priorities, such as making assistance available to the needy and protecting public safety, cannot be ignored by the Legislature, particularly in difficult economic times when revenues are

reduced and needs for governmental assistance increased. This Court in Levittown made clear that "decisions as to how public funds will be allocated among the several services for which by constitutional imperative the Legislature is required to make provision are matters particularly appropriate for formulation by the legislative body (reflective of and responsive as it is to the public will)." 57 N.Y.2d at 48. Plaintiffs' effort to have the judiciary oversee legislative processes and determinations that set priorities and allocate limited resources should be rejected.

Moreover, this Court has expressly held "the preservation and promotion of local control over education" to be "a legitimate State interest." Levittown, 57 N.Y.2d at 44. Disregarding the principle of local control, plaintiffs maintain that while acknowledged deficiencies exist in the City's use of the resources made available to it, the State should in effect be held solely responsible for these deficiencies.[33] Plaintiffs' analysis would thus seem give the State, rather than the City, responsibility for overseeing the day-to-day operations of all

[33] Plaintiffs lip service to the principle of local responsibility by contending that the State's "accountability system" should "involve member of local school communities in taking responsibility for creating in their schools a climate conducive to effective teaching and learning" (Pl. Br. at 141). It is clear from the structure of plaintiffs' proposed remedy, however, that they seek to hold the State, rather than New York City, accountable for any failures in the City's schools.

New York City schools to ensure efficient use of resources. The Education Article has never been interpreted in this manner. See Levittown, 57 N.Y.2d at 45-46 ("Any legislative attempt to make uniform and undeviating the educational opportunities offered by the several hundred local school districts . . . would inevitably work the demise of the local control over education available to students in individual districts.").[34] Such a fundamental change in the governance structure of public education in New York should not be imposed by judicial declaration.

Finally, plaintiffs' demand for a new "comprehensive accountability system" ignores the significant systematic reforms that the State has authorized at New York City's request and that give the New York City Mayor greater control over and

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[34] In Levittown, this Court quoted with approval an amicus brief filed by 85 school districts that emphasized the importance of New York's tradition of local control:

> For all of the nearly two centuries that New York has had public schools, it has utilized a statutory system whereby citizens at the local level, acting as part of school district units containing people with a community of interest and a tradition of acting together to govern themselves, have made the basic decisions on funding and operating their own schools. Through the years, the people of the State have remained true to the concept that the maximum support of the public schools and the most informed, intelligent and responsive decision-making as to the financing and operation of those schools is generated by giving citizens direct and meaningful control over the schools that their children attend.

57 N.Y.2d at 46.

responsibility for the New York City public schools. By seeking to make the State alone accountable for the failures of the City schools, plaintiffs' proposal threatens to undermine these important reforms. Indeed, these recent reforms largely moot plaintiffs' request for enhanced accountability to reduce mismanagement and fraud.

For their proposed fourth guideline, plaintiffs ask this Court to specify a prompt effective date for the implementation of their proposed remedy. Any such time limitation is inappropriate. If the Court reaches the question of remedy, it will necessarily have adopted a new interpretation of the Education Article that will cause substantial dislocations in the provision of public education in this State and in the legislative budgeting processes. Accommodation of such a constitutional standard will require time, even assuming it is possible to comply with the standard plaintiffs propose. A proper respect for the legislative and executive branches of government should presume that the defendants will undertake reasonably expeditious compliance. Under these circumstances, imposition of a timetable for compliance is jurisprudentially inappropriate.[35]

[35] Indeed, it may be appropriate for this Court to stay its order for a reasonable period of time to give the State time to effect appropriate changes to the system.

Plaintiffs rely (Pl. Br. at 142-43) on several decisions of the Court to support their request for extraordinarily broad relief. Plaintiffs' reliance on these cases is misplaced because each of these cases involved an issue substantially more limited in scope than the education and education-financing issues presented here. Matter of Lavette M., 35 N.Y.2d 136 (1974) involved housing for the mentally ill; Heard v. Cuomo, 80 N.Y.2d 684 (1993) was concerned with treatment of children in need of supervision; and McCain v. Koch, 70 N.Y.2d 109 (1987) addressed homelessness. Yet even in these cases this Court avoided the danger of judicial overreaching by carefully tailoring the remedy to the identified constitutional or statutory violation. See Lavette M., 35 N.Y.2d at 142 ("It should not be our province to determine what is the best possible treatment or to espouse an ideal but perhaps unattainable standard. Rather, our role should be to assure the presence of a bona fide treatment program."); Heard, 80 N.Y.2d at 691 ("Courts, after all, must be mindful not to arrogate to themselves a larger authority or remedy than that which lies within judicial and juridical competence."); McCain, 70 N.Y.2d at 119 ("Supreme Court decided that defendants, having undertaken to provide the homeless with emergency shelter, were obliged to furnish shelter meeting minimum standards.") The dangers of overreaching and the need for a "disciplined perception of the proper role of the courts," Levittown,

57 N.Y.2d at 50, are even more pronounced in this case, given the pervasiveness of public education in New York and the impact that plaintiffs' proposed remedy would have on the lives of almost every New Yorker.

The decisions from other states upon which plaintiffs rely are also inapposite. Those decisions implemented state constitutional provisions vastly different from New York's Education Article as it has been construed by this Court, and their remedial provisions are therefore not appropriate models for the present case. For example, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989), makes clear that in Kentucky providing a public education is strictly a state, and not a local, responsibility, and that the quality of education must be substantially uniform statewide:

> The system of common schools must be substantially uniform throughout the state. Each child, every child, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education. This obligation cannot be shifted to local counties and local school districts.

Id. at 211. The Kentucky Supreme Court therefore undertook to specify in some detail the essential characteristics of the uniform system that the state legislature was required to

implement statewide. Id. at 212-13. That court made clear that the role, if any, to be played by "local school entities" in Kentucky is strictly supplementary.

Similarly, in Campbell County School District v. Wyoming, 907 P.2d 1238, 1279 (Wyo. 1995), the Wyoming Supreme Court concluded that Wyoming constitution required the state legislature to "design the best educational system," ensure that the same "'proper' educational package" be available to each student regardless of locality, and fully fund the system regardless of competing priorities. Accordingly, in its remedial order the court set forth various elements that it believed a "proper education" in Wyoming would include.[36]

In New York, by contrast, this Court has made clear that education is in large part a matter for local control, and that the Legislature's obligation is to ensure that "minimally adequate" educational opportunities are made available statewide. See CFE I, 86 N.Y.2d at 317; Levittown, 57 N.Y.2d at 46-48. The

[36] Hull v. Albrecht, 950 P.2d 1141 (Ariz. 1997), also relied upon by plaintiffs, is inapposite because in that case the Arizona Supreme Court rejected an attempt by the state legislature to comply with an earlier decision mandating the elimination of disparities in capital expenditures among school districts throughout the state. In its initial decision, the court had left it to the legislature to decide how to eliminate the constitutional deficiencies. See Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 816 (Ariz. 1994) ("There are doubtless many ways to create a school financing system that complies with the constitution. As the representatives of the people, it is up to the legislature to choose the methods and combinations of methods from among the many that are available.")

Kentucky and Wyoming approaches are manifestly incompatible with the approach outlined by this Court, and plaintiffs' reliance on the Rose and Campbell remedial schemes is therefore unwarranted.

Finally, examination of the experiences in other states exposes that plaintiffs' idealized concept of a legislative-judicial dialogue is not realistic. Instead, given the separation-of-powers issues that arise, the experience has often proven adversarial and engendered perpetual litigation, as illustrated by the case histories discussed below. Moreover, plaintiffs have not demonstrated, either factually in the trial court or in their brief to this Court, that litigation in other states has substantially enhanced educational outcomes for the students in those states.

New Jersey's experience represents a decades-long adversarial exchange between the judiciary and the legislature and executive, where the state's highest court has visited the subject of the state's educational responsibilities at least a dozen times. In Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973) (Robinson I), the New Jersey Supreme Court rendered its first decision on the subject, concluding that the state failed to provide a "thorough and efficient" education as required by that State's Constitution.[37] The court found that the principal

[37] N.J. Const. art. VIII, § 4, cl. 1, provides: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the

cause of the constitutional deficiency was the state's heavy reliance on local property taxes to fund public education, which resulted in unacceptable discrepancies in funding among its school districts. 303 A.2d at 295-97. The case dominated the court's docket for the next three years, during which there were a "series of constitutional confrontations" between the judiciary and other branches of state government resulting in six more Supreme Court decisions. Paul L. Tractenberg, The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947, 29 Rutgers L.J. 827, 900 (1999). See Robinson v. Cahill, 63 N.J. 196, 306 A.2d 65 (1973) (Robinson II); Robinson v. Cahill, 67 N.J. 35, 335 A.2d 6 (1975) (Robinson III), and juris. retained, Robinson v. Cahill, 69 N.J. 133, 351 A.2d 713 (1975) (Robinson IV); Robinson v. Cahill, 69 N.J. 449, 355 A.2d 129 (1976) (Robinson V); Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (Robinson VI), modified, 70 N.J. 464, 360 A.2d 400, and dissolved, 70 N.J. 465, 360 A.2d 400 (1976).

During that time the legislative and executive branches expended considerable effort to devise and fund a plan that met the court's view of the state's constitutional responsibilities. In 1975, the legislature enacted legislation that the New Jersey Supreme Court upheld as facially constitutional if fully funded,

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instruction of all the children in the State between the ages of five and eighteen years."

but retained jurisdiction. When the legislation was not funded by the court's deadline, the court shut down the state's entire public school system. Within days, the legislative and executive branches provided funding for the 1975 Act, and in 1976, the court relinquished jurisdiction.

But in 1981, another group challenged the 1975 legislation as unconstitutional because it failed to remedy financial disparities between the neediest school districts and property-rich districts. In Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990) (Abbott II),[38] the court held the 1975 legislation unconstitutional as it applied to poor districts and ordered the legislature to pass legislation that would ensure that funding in poor urban districts was substantially equivalent to that in property-rich districts. Id. at 408. Over the next decade, the Abbott plaintiffs returned to the New Jersey Supreme Court several more times. Each time the legislative and executive branches attempted to comply with the court's rulings by enacting statutes. Each time the court was dissatisfied with the actions of the legislative and executive branches, disagreeing with their determination that the new legislation would ensure that high-needs districts had adequate funds. See Abbott v. Burke,

[38] In Abbott v. Burke, 100 N.J. 269, 495 A.2d 376 (1985) (Abbott I), the court merely addressed the procedural issue of the proper tribunal to consider the parties' evidence.

136 N.J. 44, 643 A.2d 575 (1994) (Abbott III); Abbott v. Burke, 149 N.J. 145, 693 A.2d 417 (1997) (Abbott IV); Abbott v. Burke, 153 N.J. 480, 710 A.2d 450 (1998) (Abbott V). Finally, in Abbott V, the court approved the lower court's intrusive plan, which required specific education programming and an accountability system. Even then the case returned to the New Jersey Supreme Court several more times for further intervention. Abbott v. Burke, 163 N.J. 95, 748 A.2d 82, clarified by 164 N.J. 84, 751 A.2d 1032 (2000); Abbott v. Burke, 170 N.J. 537, 790 A.2d 842 (2002); Abbott v. Burke, 172 N.J. 294, 798 A.2d 602 (2002). Eventually, almost 30 years after Robinson I, plaintiffs and the state reached an agreement for programmatic and funding changes for poor districts. Whether this marks the last chapter in New Jersey's education finance litigation remains to be seen.

Ohio has embarked on what promises to be a similarly long and adversarial experience; their lawsuit has resulted in four separate decisions from that state's highest court in the past five years. In DeRolph v. State, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997) (DeRolph I), the Ohio Supreme Court found Ohio's system of education to be inadequate and underfunded,[39] and therefore ordered the legislature to "create an entirely new

[39]Ohio Const. art VI, § 2, provides: "The general assembly should make such provisions, by taxation, or otherwise, and, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state . . .."

school financing system." Id. at 747. While the court did not presume to tell that legislature what it must do, it noted its dissatisfaction with local property taxation as the primary source of education funding. Id. at 741, 747. Following DeRolph I, the state legislature passed a series of measures in an attempt to comply with the court's decision. Dissatisfied, the plaintiffs returned to court seeking a determination that the revised system was still unconstitutional. In DeRolph v. State, 89 Ohio St. 3d 1, 728 N.E.2d 993 (Ohio 2000) (DeRolph II), the Ohio Supreme Court issued such an order. Despite acknowledging some progress, the main complaint of the court was the legislature's failure to end heavy reliance on local property taxes to fund schools. The court noted that reliance on property taxation was the "primary impediment" to improvement, and the "major factor in the previous funding system found unconstitutional in DeRolph I." DeRolph II, 728 N.E.2d at 1015. Accordingly, the court ordered more change, but gave the state an extension to effect that change.

Following DeRolph II, the legislature adopted further measures addressing school facility deficiencies, remedying statutory provisions imposing unfunded mandates, establishing procedures to prevent fiscal problems in school districts, prescribing a new formula for determining the amount of state funds to be distributed to the various school districts based on

the amount required to provide a constitutionally adequate education, and establishing a new system of academic standards and testing to gauge the success of Ohio students and schools. However, the school funding system still relied primarily on property taxes.

Back the plaintiffs came to the court seeking yet another order that the state was in violation of the constitution. In DeRolph v. State, 93 Ohio St. 3d 309, 754 N.E.2d 1184 (2001) (DeRolph III), the court ultimately accepted the maintenance of a primarily property-tax-based system of finance on the condition that the legislature would adopt certain specific changes. The court noted that "[n]one of us is completely comfortable with the decision we announce in this opinion," and "the greater good requires us to recognize 'the necessity of sacrificing our opinions sometimes to the opinions of others for the sake of harmony.'" Id. at 1189-90 (quoting Thomas Jefferson). DeRolph III was essentially a full retreat for the court, after the legislature had twice refused to obey its command to enact a funding system that was not primarily reliant on property taxes.

The Ohio Supreme Court was so uncomfortable with DeRolph III, however, that it vacated its decision on motion for reconsideration only one year later. DeRolph v. State, 97 Ohio St. 3d 434, 780 N.E.2d 529 (Ohio 2002) (DeRolph IV). Declaring that "we have changed our collective mind," 780 N.E.2d at 530,

the court returned to its former position that a totally new funding system was constitutionally required. The court observed that despite some increase in funding, the General Assembly had not focused on the core constitutional directive of DeRolph I: "a complete systematic overhaul" of the school-funding system. Today we reiterate that that is what is needed, not further nibbling at the edges." Id. The resolution of the Ohio experience remains to be seen.

Should a remedy be required, defendants ask this Court to do no more than specify any constitutional deficiencies that it finds and direct the proper parties to eliminate such deficiencies. Further intrusion of the judiciary into the legislative-executive processes at this time would not be warranted or prudent.

POINT V

THE APPELLATE DIVISION PROPERLY DISMISSED PLAINTIFFS' CLAIM UNDER TITLE VI DISPARATE IMPACT REGULATIONS

Plaintiffs cannot successfully assert a claim for violation of disparate impact regulations promulgated by the United States Department of Education pursuant to section 602 of Title IV of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d - 2000d-7). This claim has now been foreclosed by the Supreme Court's

decisions in Alexander v. Sandoval, 532 U.S. 275 (2001)[40], and Gonzaga University v. Doe, 536 U.S. 273 (2002), which hold that where Congress expressed no intent to confer an enforceable right of action for disparate impact discrimination under Title VI, plaintiffs cannot enforce an agency's disparate impact regulations.[41] Accordingly, the Appellate Division correctly dismissed plaintiffs' claim for alleged violation of disparate impact regulations.

There is no right of action, either implicitly under Title VI of the Civil Rights Act or its implementing regulations or under 42 U.S.C. § 1983, to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964. In Sandoval, the Supreme Court held that there is no implied private cause of action under Title VI itself to enforce disparate impact

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[40] This Court's decision in C.F.E. I that plaintiffs stated a cause of action for violation of the Title VI disparate impact regulations, 86 N.Y.2d at 321-24, predated the Supreme Court's definitive decision in Alexander v. Sandoval, 532 U.S. 275 (2001), that no such implied right of action exists.

[41] The Department of Education's regulation, 34 C.F.R. § 100.3(b)(2) (1999), relevant to this case reads:

> A recipient [of federal funds] 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, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

regulations promulgated under section 602 of that statute. See 532 U.S. at 293. The linchpin of the ruling was the absence of congressional intent to create a private right of action to enforce such regulations.[42] See id. The absence of congressional intent to create a private right of action to enforce disparate impact regulations promulgated under section 602 is also fatal to plaintiffs' contention that such regulations are enforceable under 42 U.S.C. § 1983.

Sandoval makes this clear. At issue in that case was whether plaintiffs had an implied right of action to enforce disparate impact regulations applicable to recipients of federal funds and promulgated by the United States Department of Justice and Department of Transportation. Plaintiffs in Sandoval sought to challenge the decision of the Alabama Department of Public Safety to administer state driver's license examinations only in English on the ground that the decision had a disparate impact on non-English speaking persons. The Court held unequivocally that no private cause of action to enforce Title VI disparate impact regulations exists because Congress evinced no intent to create a right not to be subjected to unintended disparate impacts. 532 U.S. at 288-91.

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[42] The Supreme Court in Sandoval assumed for purposes of that case that regulations promulgated under § 602 may validly proscribe activities that have a disparate impact on racial groups, even though § 601 of the statute prohibits only intentional discrimination. See 532 U.S. at 281-82. Likewise here, the validity of the disparate impact regulations themselves is not challenged, and the Court need not reach that issue.

The Supreme Court's approach to Sandoval applies to the present case as well. The Court reviewed the genesis of the requirement that there be congressional intent to create such a right:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. . . . The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. . . . Statutory intent on this latter point is determinative. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

532 U.S. at 286-87 (citations omitted). It then looked for congressional intent to create a private right of action to enforce the federal agencies' disparate impact regulations, and found none:

> We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI. Section 602 authorizes federal agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." . . . It is immediately clear that the "rights-creating" language . . . is completely absent from § 602. Whereas § 601 decrees that "no person . . . shall . . . be subjected to discrimination," . . . the text of § 602 provides that "each Federal department and agency . . . is authorized and directed to effectuate the provisions of [§ 601]," . . . Far from displaying congressional intent to create new rights, § 602 limits agencies to "effectuating" rights already created by § 601. . . . So far as we can tell, this authorizing portion of § 602 reveals no congressional intent to create a private right of action.

Id. at 288-89 (internal citations omitted). The Court also examined the enforcement mechanisms prescribed in the statute for the agencies administering the federal funds and concluded that they "tend to contradict a congressional intent to create privately enforceable rights through § 602 itself." Id. at 290. Finally, the Court rejected plaintiffs' argument that because the regulations themselves contain rights-creating language, they are privately enforceable: "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." Id. at 291.

Although plaintiffs argue otherwise, the Supreme Court's decision in Sandoval precludes enforcement of the Title VI discriminatory impact regulations under 42 U.S.C. § 1983. The Supreme Court concluded that there exists no private right of action directly under the statute because that Congress evinced no intent to create one. The Supreme Court's recent decision in Gonzaga, 536 U.S. 273 (2002), holds that congressional intent to create a federal right is also a prerequisite to a cause of action to enforce a right under section 1983, and thus forecloses plaintiffs' argument.

In light of Gonzaga, plaintiffs' reliance on Justice Stevens' dissent in Sandoval is misplaced. In Gonzaga, the Court addressed the viability of a section 1983 cause of action alleging a violation of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. FERPA provides that no

federal funds be made available to educational agencies having a policy or practice of releasing education records without written consent. The Court held that the key to deciding whether rights are enforceable under section 1983 is precisely the same as the key to deciding whether rights are enforceable in a private cause of action implied directly under the statute: Did Congress intend to create a federal right? The Court explained:

> We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, it is rights, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section. This being so, we further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.
>
> We have recognized that whether a statutory violation may be enforced through § 1983 "is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute." . . . But the inquiries overlap in one meaningful respect -- in either case we must first determine whether Congress intended to create a federal right.

Gonzaga, 536 U.S. at 283 (internal citations omitted).[43] The Court concluded: "A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context. . . . Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries." Id. at 285. The majority expressly rejected Justice Stevens' dissenting approach, which would not require a strict finding of Congressional intent to create a right in the context of a section 1983 claim. Id. at 286. Thus, finding no congressional intent to create an enforceable right under FERPA's nondisclosure provisions, the Court held that plaintiffs had no cause of action under section 1983 to enforce those provisions. Id. at 290.

In view of the Supreme Court's analysis in Gonzaga, its conclusion in Sandoval – that Congress in Title VI intended to confer individual rights to sue only for intentional discrimination, not disparate impacts, is controlling here. The absence of congressional intent to create a right of action to enforce disparate impact regulations absolutely precludes a section 1983 cause of action. Indeed, since Sandoval was

[43] The Court recognized that it had previously held that § 1983 provides a private remedy to enforce rights under Title VI with regard to intentional discrimination. 536 U.S. at 284 and n.3, citing Cannon v. University of Chicago, 441 U.S. 677 (1979). At the same time the Court referenced Sandoval, where the enforceability of Title VI disparate impact regulations was at issue, as an instance where no rights-creating language could be found. Id. at 287.

decided, a number of courts have expressly held that plaintiffs cannot sue under 42 U.S.C. § 1983 to enforce Title VI disparate impact regulations. E.g., South Camden Citizens in Action v. New Jersey Dept. of Envtl. Protection, 274 F.3d 771, 791 (3d Cir. 2001) (because "Congress did not intend by adoption of Title VI to create a federal right to be free from disparate impact discrimination . . . [EPA's disparate impact regulations] do not create rights enforceable under section 1983"), cert. denied, __ U.S. __, 122 S. Ct. 2621 (2002); Gulino v. Board of Educ.,236 F. Supp.2d 314, 338-39 (S.D.N.Y. 2002); Ceaser v. Pataki, 2002 U.S. Dist. LEXIS 5098 (S.D.N.Y. March 25, 2002); Lechuga v. Crosley, 228 F. Supp.2d 1150 (D. Or. 2002), adopting 2001 U.S. Dist. LEXIS 23589 (D. Or. 2001) (magistrate judge's decision). Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002), the only recent appellate decision to uphold a disparate impact cause of action under section 1983, was wrongly decided. Although decided shortly after the Supreme Court decided Gonzaga, the Tenth Circuit in Robinson did not cite Gonzaga but relied on Justice Stevens' dissent in Sandoval. See Robinson, 295 F.3d at 1187. Because, as discussed above, the Gonzaga Court expressly disavowed the reasoning of Justice Stevens' dissent, the Tenth Circuit's decision is incorrect.

CONCLUSION

FOR THE FOREGOING REASONS, THE ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT SHOULD BE AFFIRMED.

Respectfully submitted,

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GLOSSARY OF EDUCATION ACRONYMS

BCAS: Building Conditions Assessment Survey. In 1988, independent consulting engineers who had been retained by the New York City Board of Education (BOE) completed a comprehensive survey (known as the BCAS) of the condition of school buildings throughout the City school system for the BOE' s own operational and planning purposes.

BOE: New York City's Board of Education. In the past, the overall supervision of the New York City school system was vested in the BOE, which was charged with management and control of all aspects of educational affairs in the City. The BOE was comprised of seven members, with one member appointed by the President of each of the five boroughs and the remaining two members appointed by the Mayor. The BOE also appointed a Chancellor, who was responsible for the school system's operation. In addition, the BOE had broad powers, including teacher hiring, maintenance of school property and facilities, curriculum, and provision of equipment, books and instrumentalities of learning. Under recent statutory reforms, the Mayor now has greater control over the schools and new powers, including the power to appoint the new Chancellor. The BOE has been expanded from seven to thirteen members, with the Mayor having the power to appoint seven members of the BOE and the five borough presidents appointing the remaining members, who must be parents of children currently in public schools in the City.

CAT: California Achievement Test (published by CTB/McGraw-Hill). A version of this test has been administered by New York City's public school system.

CSD: Community school district. In the past, New York City's public elementary and middle schools were governed by 32 sub-districts known as CSDs. Each CSD had a superintendent and locally elected school board. However, recent statutory reforms will eliminate the City's existing 32 community school boards in June 2003.

CTB-R: California Test Bureau's Reading Test (now published by CTB/McGraw-Hill). A version of this test has been administered by New York City's public school system.

CWR: Combined Wealth Ratio. Because local revenues for public education are raised primarily though property taxes and the

local tax base varies widely among school districts, statutory formulas for allocating supplemental state aid to those districts are designed to offset those disparities. In order to achieve this goal, allocations of state aid are based in part on the CWR, which measures school district wealth as an average of property value per pupil and income per pupil. Lower wealth districts receive far more state aid per student than higher wealth districts.

ELA: English Language Arts. To ensure that all students are learning the skills that will prepare them for Regents study in high school, and ultimately for a Regents diploma, 4th- and 8th-grade students in the State's public schools have since 1999 been required to take examinations in ELA and mathematics geared to the new Regents Learning Standards (RLS) in those core subject areas.

ELL: English language learner. An ELL is a national-origin -minority student who is limited-English-proficient. This term is often preferred over limited-English-proficient (LEP) as it highlights accomplishments rather than deficits.

ENA: Extraordinary Needs Aid. Under current state aid formulas, ENA is provided to local school districts based principally upon the concentration of students in poverty, and Limited English Proficient (LEP) students.

GED: General Educational Development Diploma. The GED is a high school equivalency certificate awarded upon successful completion of a test. The GED measures academic skills in five areas: writing, social studies, science, interpreting literature and the arts, and mathematics.

IDEA: Individuals with Disabilities Act. This Act addresses the needs of children with disabilities. It provides funds and resources so children with disabilities are able to receive a Free Appropriate Public Education (FAPE). At public expense, each child will receive a free education in preschool, elementary school, or secondary school.

IEP: Individual Education Plan. A person that qualifies for special education services under IDEA will have an IEP, which is a plan written by the parent and the school that details goals for the special education student and specific methods used to reach those goals.

LEP: Limited-English-proficient (see ELL).

PASS: Performance Assessments in Schools Systemwide reviews. To assess school quality, the New York City Board of Education (BOE) employs the PASS review system, under which schools are evaluated in a variety of categories, including quality of curriculum and instruction, professional development, and instructional resources. PASS reviews are usually conducted over two days, and consist of reviews of school documents, such as school plans; an entry conference with the school leadership team; classroom observations; and an exit conference. Schools are rated using a five-point scale. A "5" indicates that the school fully meets the standard of an exemplary school; a "3" indicates that the school approaches the standards of an exemplary school; and a "1" indicates that a school is below acceptable standards.

PEP: Pupil Evaluation Program. This test provides for early identification of students who need special help in developing the basic skills of reading comprehension, mathematics and writing. The test is administered in the third and sixth grades in reading and mathematics, and in the fifth grade in writing.

PET: Program Evaluation Test. This test is administered in science (fourth grade), and in social studies (6^{th} and 8^{th} grades). The science test is designed to measure the effectiveness of the elementary science programs in grades K-4. The social studies tests are designed to measure the effectiveness of the elementary and middle school social studies programs.

RCT: Regents Competency Test. RCTs are achievement tests designed to assess basic proficiency in the areas of reading, writing, mathematics, science and social studies. In the past, schools could award local high school diplomas to students who passed all six tests as well as the required coursework. Currently, the SED is phasing out the eligibility of students in public schools to take these tests in accordance with a timetable established by the Board of Regents. Students will instead be required to pass the more rigorous Regents examinations in order to receive a high school diploma.

RLS: Regents Learning Standards. These new learning standards, which will be fully phased in by the year 2005, are detailed goals and standards describing what the Board of Regents believes students should know and be able to do at each grade level and in order to graduate from high school prepared for college or work. Those standards -- which have been described by the SED as "world class" and "demanding" and as mandating achievement well beyond basic competency standards -- require all students to study a

"rigorous core of courses in English, history, mathematics, science, technology, arts, health, physical education and foreign language." The Regents examinations have been aligned with these standards.

SASS: System of Accountability for Student Success. The SASS, recently adopted by the Board of Regents, is designed to provide objective and consistent information about school effectiveness in preparing students to meet the State's new learning standards and hold schools accountable for results. All public schools must now meet the following school accountability performance criteria: (i) 90 percent of students must be at or above Level 2 in elementary and middle school English Language Arts and elementary and middle school mathematics, and such percentage of students must be at or above Level 3 as the State Commissioner of Education shall annually designate; and (ii) 90 percent of students in the annual high school cohort (mainly those who first entered ninth grade three years earlier) shall meet the Regents' graduation requirements in reading and writing and mathematics, and the drop out rate shall not exceed 5 percent.

SCA: School Construction Authority. Established by the Legislature in 1988 for the purpose of constructing and renovating educational facilities throughout New York City, the City's SCA is responsible for building new public schools and managing the repair and renovation of capital projects in the City's more than 1,200 public school buildings. Under a new state law, the City's Mayor now has sole control of the SCA, which was previously under the control of the BOE's school facilities division.

SED: State Education Department. The Regents are charged with overseeing the SED, which is the Regents' administrative arm, and is charged with the general supervision of the State's public schools.

SES: Socioeconomic status. An assessment of an individual or family's relative economic and social ranking comprises the SES.

SURR: School Under Registration Review. The Registration Review Process is the primary method by which New York currently holds "failing" schools accountable for educational performance. Through this process, the State Education Department (SED) identifies a number of the State's lowest-performing schools and then tries to help those schools and the districts that operate them to implement strategies for improving the academic performance of their students. If these schools fail to improve

within an allotted time, they can be redesigned or closed. The schools placed "under registration review" are those that are farthest from meeting the State's performance standards as measured on yearly standardized tests or identified as being a "poor learning environment."

U-Ratings (U/S Ratings): Unsatisfactory Ratings (Unsatisfactory/Satisfactory Ratings). In the past, New York City's Board of Education (BOE) has prepared annual performance reviews of all teachers, conducted by principals and other teacher supervisors. These teacher performance reviews measure a range of qualities, including teacher punctuality, professional attitude, professional growth, resourcefulness and initiative, the teacher's effect on the character and personality growth of pupils, control of class, and maintenance of classroom atmosphere. They also measure overall performance, with an "S" rating indicating satisfactory teacher performance, and a "U" rating indicating unsatisfactory performance.