To Be Argued By:
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New York County Clerk's Index No. 111070/93

Court of Appeals
of the
State of New York

CAMPAIGN FOR FISCAL EQUITY, INC., AMINISHA BLACK, KUZALIAWA BLACK, INNOCENCIA BERGES-TAVERAS, BIENVENNIDO TAVERAS, TANIA TAVERAS, JOANNE DEJESUS, 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.

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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Plaintiffs-Appellants The Campaign for Fiscal Equity, Inc., *et al*., respectfully submit this Memorandum of Law in support of their appeal in the matter captioned *The Campaign for Fiscal Equity, Inc.*, et al. *v. The State of New York*, et al., New York County Index No. 111070/93, from a decision and order of the Appellate Division, First Department dated June 25, 2002, reversing the decision and order of the trial court dated January 31, 2001, and dismissing this case in its entirety.

PRELIMINARY STATEMENT

This case is fundamentally about the meaning of two words in the Education Article of the State Constitution. That Article requires the Legislature to "provide for the maintenance and support of a system of free common schools, wherein ***all*** the children of this state may be ***educated***." This appeal turns on whether the word "all" includes the 1.1 million children in New York City, many of whom come to school disadvantaged by poverty and other circumstances not of their own making. And it turns on whether the word "educated" means something more than acquiring the skills and knowledge necessary to complete the eighth grade and to obtain menial employment.

After conducting a seven-month trial, the trial court concluded, in an exhaustive, 182-page opinion, that the New York City public school system had failed to provide the City's children with the opportunity to obtain a sound basic education. The proof of this failure is overwhelming and permeates the trial record. It is found in the voluminous reports and records of the Legislature and State education officials detailing gross resource inadequacies that have persisted for decades: too many unqualified teachers; too many buildings with overcrowded classes and insufficient or non-existent libraries, laboratories and gymnasiums; and too many students denied the appropriate curriculum and remedial services they need to overcome the educational handicaps arising from their social and economic circumstances.

The proof of failure is also found in the voluminous data showing the New York City public school system's gross inability to educate its students: One-third of the system's elementary students are functionally illiterate; 40 percent of students who enter the ninth grade do not receive a high school diploma; and more than half of the City's high school graduates who attend the City University require extensive remedial education in basic English and math skills. The human toll exacted by this failure is staggering: ***Since 1986, more than 250,000 New York City students have failed to complete high school.***

On the basis of this substantial evidence of systemic failure, the trial court found that "the majority of the City's public high school students leave high school unprepared for more than low paying work, unprepared for college and unprepared for the duties placed upon them by a democratic society." The trial court concluded that virtually all New York City students have the ability to achieve academic success and graduate from high school, but that the New York City public school system has failed for decades to provide the resources necessary for all of its students to have the opportunity to do so. The trial court also held that the State must accept ultimate responsibility for this failure, both because the State has exercised pervasive control over virtually all aspects of the City's public schools and because the resource inadequacies in the public schools are causally linked to the State system of education finance.

The trial court's findings and conclusions were neither original nor surprising. They mirror and affirm the findings and conclusions of the Legislature, the Board of Regents, the State Education Department and all of the other agencies, boards, commissions and independent experts who have examined and reported on the condition of the City's schools for the last decade.

Despite this overwhelming record of failure, the Appellate Division reversed, with three justices joining in a majority opinion. It did so by eviscerating the command of the Education Article that ***"all"*** of the state's children be ***"educated."*** It said that the word "educated" means nothing more than what students are expected to learn by the eighth grade, or what students need to know in order to get a "low-level" job. Having determined that ***no child of this State is entitled by constitutional right to anything more than an eighth grade education,*** the Appellate Division then ignored the gross record of educational failure because, under its eighth grade standard, students are not entitled to actually graduate from high school, they are not entitled to be prepared for college, and they are not entitled to anything more than menial work.

The Appellate Division also concluded that the command of the Education Article to educate "all" of the state's children does not reach those who are disadvantaged by their economic and social circumstances. The Appellate Division put the blame for New York City's educational failure on poor students and their families, accepting the premise urged by the State at trial that the failure of New York City's students to learn is explained by their socioeconomic status, and not by the lack of adequate resources or other failings of the New York City public school system. It accepted this premise even though outside of the courtroom it is the official policy of New York State that "all children can learn, but children who have been placed at risk [of educational failure] by poverty, homelessness, poor nutrition, or inadequate care, often require special educational and support services to master basic competencies."

Having thus stripped the Education Article of any substantive meaning by adopting a hollow standard and blaming the children for their educational failures, the Appellate Division then concluded that the New York City public school system passed constitutional muster. It based this conclusion on a review of the evidence that can be described as cursory, at best. The

Appellate Division's opinion ignores virtually the entire record. It rests on a few simplistic and misguided assertions and contentions that are illogical, internally inconsistent and contradicted by the overwhelming weight of the evidence, including all of the reports, studies, analyses and data produced by the State's education officials and the Legislature. Indeed, given the complexity and importance of the issues raised by this case, the Appellate Division's complete failure to give serious consideration to the massive trial record is inexplicable.

If the opinion of the Appellate Division is allowed to stand, it will enshrine a hollow "standard" of education that shocks the conscience and is inconsistent with the prior rulings of this Court. It is a standard abhorrent to the values and intent of the framers of the Education Clause, who understood that the fundamental purpose of public education is to promote the civic and material prosperity of the state and its citizens. This prosperity can only be assured, as the framers knew, if the public schools provide an opportunity for intellectual development and personal achievement.

The framers of our Constitution rejected the degrading and pessimistic view of the Appellate Division that public education is nothing more than preparation for the least demanding of society's tasks. For, as the framers understood even in 1894, "[t]he public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before." The Appellate Division failed to even acknowledge this constitutional history, substituting its excuses for educational failure for the expectation of educational achievement embraced by the framers. This alone justifies reversal.

The opinion must also be reversed because it rests on the false and pernicious premise that the failures of the New York City public school system arise from the poverty and race of its students, rather than the lack of adequate resources. The overwhelming evidence at trial, much

of it generated by the State and embraced by its experts at trial, established that all students in New York City, even at-risk students, can meet the State's learning standards if they are provided with adequate educational resources.

And, fundamentally, the opinion must be reversed because the overwhelming weight of the evidence supports the trial court's findings concerning the gross inadequacy of the educational resources provided by the New York City public school system and the gross educational failure of that system. The Appellate Division's invocation of a meaningless standard to reach a contrary result is a clear refusal to accept the premise of this Court's holding in *CFE I* that the Education Article has substantive meaning and that the children of this state may look to the courts to protect their rights under that Article.

It is difficult to convey on the flat pages of an appellate brief the full measure of the gross inadequacies suffered by vast numbers of New York City public school children as they passed through the City's schools. But as Justice Saxe's dissent makes clear, a fair reading of the massive record can lead to only one conclusion: "A large segment of the City's public school students is not, in fact, being given the opportunity to receive even a minimally adequate education." Children have been denied this opportunity because of the collective and cumulative effect of inadequate resources – collective in the sense that multiple inadequacies reinforced each other and cumulative because the inadequacies continued year after year, the effects snowballing.

When a child is subjected to succeeding years of poor teaching; dilapidated, unsafe and overcrowded facilities; empty or non-existent libraries and laboratories; insufficient remedial programs to overcome learning disadvantages; a dearth of guidance counselors, school nurses and other professionals; the absence of music, art and physical education programs; and too few books, computers and scientific equipment, that child has not had the opportunity to obtain a

sound basic education. But this was the typical experience of the classes passing through the New York public schools over the last two decades.

When children face these conditions year after year, it is not surprising that one third of them cannot pass the most basic literacy tests in elementary school, that they score at the bottom of the state on social studies and science tests in junior high school and that they drop out of high school in massive numbers.

This Court now has the opportunity to say that the Education Article extends a promise of something better to all of the state's children. And so we ask this Court to clearly and forcefully say that what happened in the New York City schools was a constitutional wrong that must not be repeated.

* * * * *

In seeking reversal, we ask the Court for a three-part ruling:

First, we ask this Court to adopt a constitutional standard making clear that all of the children of this state are entitled to the opportunity to obtain an adequate high school education that will prepare them for competitive employment and to function as capable and productive civic participants. This standard reflects a broadly held consensus (well documented in the trial record) that the demands of the modern economy and of contemporary citizenship require that students be able to master complex tasks, be technologically adept, and be able to evaluate and communicate about a wide range of concepts, ideas and issues; in order to do so, they must acquire high school-level academic skills. Any lesser standard would threaten to deny all of the state's children the opportunity to receive an education that will prepare them to function productively.

Second, we ask this Court to affirm the trial court's fundamental conclusion "that the education provided New York City students is so deficient that it falls below the floor set by the Education Article." If the conditions of learning that have prevailed for decades in the New York City school system can pass constitutional muster, then the Educational Article has no substantive meaning.

It is of critical importance to ***all*** of the state's children that the Court condemns what has happened in the New York City public schools as a constitutional wrong. The Legislature, the Executive and all of the state's public school districts must know that children have a constitutional right to conditions of learning that will give them the opportunity to learn to read, to master mathematics, to understand the lessons of civics and history and, ultimately, to complete a meaningful high school education. The conditions that have prevailed in New York City denied that opportunity to large numbers of children.

Third, we ask this Court to order the State to promptly take effective action to ensure that the gross resource inadequacies in the New York City public school system are alleviated. We do not seek an order requiring a specific increase in funding or the provision of certain resources, and we do not seek to have the courts make education policy, proscribe detailed regulations or oversee the day-to-day operations of any school district. We seek, instead, an order incorporating a few broad guidelines requiring the State to undertake within a reasonable time those reforms of the State education finance system, and of governance and accountability, that the State determines in good faith may be necessary to ensure the opportunity for a sound basic education.

Specifically, we ask that the Court include the following remedial guidelines in its order: (a) determine the actual costs of providing the resources necessary to provide students with an

opportunity for a sound basic education; (b) reform the current education finance system to ensure that the requisite resources are provided to all school districts; and (c) create a comprehensive accountability system that will ensure that funds are utilized efficiently to produce the conditions for teaching and learning necessary to enable schools to provide all students with the opportunity for a sound basic education.

It is critically important that this Court impose a clear order on the State to meet its responsibilities. As the record makes clear, the State has been on notice of the gross inadequacies and gross educational failures in the New York City public school system for decades. The reports and recommendations of numerous panels, commissions and experts calling for reform have been largely ignored. Without the imperative of an order from this Court, there is no guarantee that succeeding classes of school children in New York City – and elsewhere – will not be doomed to the same devastating inadequacies that have been visited on New York City public school students for the past two decades.

QUESTIONS PRESENTED FOR REVIEW

This appeal presents the following legal questions for review by the Court:

1. Does "the constitutional concept and mandate of a sound basic education" as guaranteed by the Article XI, § 1 of the New York State Constitution (the "Education Article") require that students be provided with an opportunity to obtain more than eighth to ninth grade-level knowledge and skills?

   The Appellate Division erroneously said no, holding that the Education Article requires no more than eighth to ninth grade-level skills that prepare students for menial jobs.

2. Has the New York City public school system failed to provide students with the opportunity for a sound basic education?

   The Appellate Division erroneously said no, ignoring the overwhelming evidence of gross resource inadequacies and massive educational failure.

3. Does the State bear ultimate responsibility for the sustained failure to provide a sound basic education?

   The Appellate Division erroneously said no, ignoring the express terms of the Education Article and this Court's prior holdings, as well as the pervasive control that the State exercises over the financing and operation of the New York City public school system, and overwhelming evidence of major deficiencies in the State education finance system.

4. Does evidence demonstrating that the State education finance system provides minority students less funding than their non-minority peers give rise to a cause of action under 42 U.S.C. § 1983 to enforce the implementing regulations of Title VI of the Civil Rights Act of 1964?

   The Appellate Division said no, failing to properly apply relevant authority.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to entertain this appeal and review the questions raised pursuant to CPLR § 5601(b)(1) because this appeal is taken from an order of the Appellate Division, First Department that finally determined this action and which directly involves the construction and application of Article XI, § 1 of the New York State Constitution. The order of the Appellate Division reverses the decision of the trial court below, enters judgment on the merits in favor of Defendants-Respondents, and dismisses Plaintiffs-Appellants' cause of action

in its entirety. The Appellate Division's order disposes of all the issues in this case and finally determines this action in accordance with CPLR § 5611.

Notice of entry and a copy of the Appellate Division's Order of June 25, 2002, were served on Plaintiffs-Appellants by mail on or about June 27, 2002. On July 22, 2002, Plaintiffs-Appellants served and filed their Notice of Appeal to appeal to this Court as of right pursuant to CPLR § 5601(b)(1). Appendix at A3-A4. On July 29, 2002, Plaintiffs-Appellants submitted their Jurisdictional Statement pursuant to the Court's Rules of Practice § 500.2. *Id.* at A193-A199. On August 1, 2002, the Court notified Plaintiffs-Appellants that it would conduct a *sua sponte* examination of its jurisdiction in this case pursuant to Rule of Practice § 500.3. *Id.* at A200. At the Court's invitation, on August 8, 2002, Plaintiffs-Appellants submitted written comments further justifying the Court's retention of subject matter jurisdiction in this case. *Id.* at A201. On September 13, 2002, the Court notified Plaintiffs-Appellants that it had terminated its jurisdictional inquiry and that this appeal would proceed as of right. *Id.* at A208.

STRUCTURE OF THE BRIEF

The structure of this brief is dictated by the extraordinary scope of this case and by the Court's prior decision sustaining Plaintiff's Amended Complaint. *See Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307 (1995) (hereinafter, "*CFE I*"). In that decision, the Court clearly delineated the issues that it expected the lower courts to address and that it anticipated would be presented on appeal. These three issues are:

1. What is the "constitutional concept and meaning of [a] sound basic education" guaranteed to all children of New York State under the Education Article of the state Constitution? *CFE I* at 317.

2. Does the New York City public school system provide an opportunity for its students to meet this standard? *Id.*

3. If not, does the State bear legal responsibility for that failure? *Id.* at 317-18.

Following a short summary of the background and procedural history of this litigation, the Argument includes four major parts. Each of the first three parts is addressed to one of the three questions posed by the Court. In Part I, we define sound basic education to mean the opportunity to obtain an adequate high school education that will prepare students for competitive employment and for capable and productive civic participation. In Part II, we show that the overwhelming weight of the evidence supports the trial court's conclusion that the New York City school system fails to provide the opportunity for its students to meet this standard, or any meaningful standard that the Court might adopt. In Part III, we show that under the express terms of the Education Article, the prior jurisprudence of this Court, and by virtue of its own actions in asserting pervasive control over the New York City school system, and administering a flawed education funding system, the State must bear legal responsibility for that failure. Finally, in Part IV, we address the appropriate remedy for the decades-long violation of the

Education Article. The questions addressed in each of these Parts involve complex issues of law, fact and public policy.

The record in this case consists of over 4,000 exhibits and 23,000 pages of testimony taken during a seven-month trial. Because of the scope of this record and the complexity of the issues raised in each Part, this brief does not contain a preliminary Statement of Facts. Instead, the facts relevant to each issue are summarized where appropriate within each Part.

In addition to direct citations to the record,[1] we also include within each Part frequent citations to appropriate paragraphs of Plaintiffs-Appellants' 1,100-page Proposed Findings of Fact and Conclusions of Law ("PFOF"), which was submitted to the trial court at the conclusion of the trial.[2] The PFOF is an exhaustive and comprehensive examination of all of the evidence in this case, including nearly 5,000 citations to the record. We include citations to the PFOF to assist the Court in considering any particular issues of fact in more detail, while limiting the length of this brief.

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[1] Citations to the trial transcript are denoted by a reference to the specific page and line numbers of the transcript preceded by the name of the testifying witness. For example, a citation to the portion of Superintendent Cashin's testimony from line 17 of page 321 of the trial transcript to line 10 of page 322 would be Cashin 321:17-322:10. Citations to exhibits in the record are denoted by the prefix "Px" for Plaintiffs' exhibit, and "Dx" for Defendants' exhibit, followed by the exhibit number and, where appropriate, a page number of the exhibit, *e.g.*, Px 5 at 11, Dx 17024 at 3. The entire trial transcript, as well as relevant portions of the exhibits, including those cited herein, are included on Plaintiffs' CD-ROM that is submitted herewith as part of the Reproduced Record on Appeal.

[2] The PFOF is included in the Reproduced Record on Appeal at pages 495 to 1690, as well as in electronic form on Plaintiffs' CD-ROM. Citations to the PFOF are denoted by the prefix "PFOF" followed by the appropriate paragraph numbers referenced therein, *e.g.*, PFOF ¶ 243, or PFOF ¶¶ 495-501.

PROCEDURAL HISTORY AND BACKGROUND OF THE LITIGATION

Nearly eight years after this Court first considered this case, Plaintiffs again ask the Court to correct an erroneous decision by the Appellate Division. In 1994, a year after this lawsuit was filed, the Appellate Division reversed a decision of the trial court allowing Plaintiffs to proceed on several of their claims and dismissed the case in its entirety. *See Campaign for Fiscal Equity, Inc. v. State of New York*, 205 A.D.2d 272 (1st Dep't 1994). In 1995, Plaintiffs asked this Court to correct that error. *See CFE I*, 86 N.Y.2d 307 (1995). Reversing the Appellate Division, this Court found that Plaintiffs had stated a legitimate claim under both the New York State Constitution and the anti-discrimination provisions of the federal Title VI's implementing regulations. *Id*. at 319, 323. The Court then remanded the case to the Supreme Court, New York County, for "discovery and the development of a factual record." *Id.* at 317.

After a lengthy bench trial, the trial court found in Plaintiffs' favor on both the constitutional claim and the federal Title VI claim and issued an exhaustive decision declaring the State education finance system unconstitutional and directing the Legislature to remedy the deficiencies. *See Campaign for Fiscal Equity, Inc. v. State of New York*, 187 Misc. 2d 1 (Sup. Ct. New York County 2001) (DeGrasse, J.) (hereinafter, "*Trial Ct.*"). The State, at the Governor's behest, appealed the trial court's decision, and in June, 2002, the Appellate Division, First Department reversed the trial court and once again dismissed the case in its entirety. *See Campaign for Fiscal Equity, Inc. v. State of New York*, 295 A.D.2d 1 (1st Dep't 2002) (hereinafter, "*App. Div*.").

I. The Parties Conducted Extensive Discovery Prior to Trial

For over four years following this Court's 1995 remand, the parties engaged in extensive discovery that ultimately resulted in the exchange of at least 500,000 pages of documents and more than 170 depositions (including, by agreement of the parties, the depositions of all 30

expert witnesses identified by the parties). *See* Reproduced Record on Appeal at 1740-41, 1808-27 (Affirmation of Joseph F. Wayland dated July 24, 2000 ("Wayland Aff.") at ¶¶ 11-14, Ex. G).

II. The Parties Developed an Extensive Record at Trial

The case proceeded to trial before Justice Leland DeGrasse of the Supreme Court, New York County, sitting without a jury, against Defendants the State of New York, Governor Pataki and Tax Commissioner Urbach.[3] Opening statements were given on October 12, 1999, and the first witness was called the following day. The last witness left the stand on May 15, 2000. Closing arguments were held on July 27, 2000. In total, testimony in the trial was taken during 111 court days over a seven-month period. The settled transcript exceeds 23,000 pages; more than 4,000 exhibits (constituting more than 140 boxes of material) were admitted into evidence and considered by the Court. Plaintiffs' direct case spanned 75 court days and included 56 witnesses. Defendants called a total of 15 witnesses over 36 court days.

III. The Trial Court Issued a Well-Reasoned and Detailed 182-Page Decision

The trial court issued its 182-page slip opinion on January 10, 2001, finding in Plaintiffs' favor on both the constitutional question and on Plaintiffs' federal Title VI claim. The trial court's conclusions are based on documents authored by the State and the testimony of the State officials authorized to speak on matters of public education. Its decision is a chronicle of the decades-long failure of the State to provide New York City school children with the opportunity for a sound basic education that the Constitution guarantees to them. Although the trial court

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[3] Through various stipulations, a number of the original additional parties to the case, including the legislative leaders and the state comptroller, were dismissed under the express condition that they not use their dismissal as a ground to oppose any relief or remedy ultimately granted by the courts of this state. *See* Reproduced Record on Appeal at 1783-94 (Wayland Aff., Exs. C, D). Since trial, Tax Commissioner Arthur J. Roth has replaced Tax Commissioner Urbach.

ultimately ruled for the Plaintiffs on all of the claims then remaining in the case, it did not accept all of Plaintiffs' contentions or arguments. In sum, the trial court concluded that a sound basic education is one that prepares schoolchildren for productive citizenship and competitive employment, that the New York City public schools have for years failed to provide the opportunity for such an education, particularly to children who are at risk for academic failure, and that the State bears ultimate responsibility for this failure.

IV. The Appellate Division's Decision Rejects The Legal Conclusions And Factual Findings of The Trial Court

The Appellate Division heard argument on Defendants' appeal of the trial court's decision in October 2001 and on June 25, 2002, issued its opinion reversing the decision of the trial court. In stark contrast to the trial court's decision, the Appellate Division's majority opinion is cursory and contains little analysis of the evidence at trial. In fact, certain of the Appellate Division's new findings were ***not advanced by either party at trial.*** In sum, the Appellate Division found that a sound basic education consists only of the skills necessary to obtain "low-level" employment and to discharge one's civic duties, that these skills are imparted between the eighth and ninth grade, and that the City schools are meeting this standard, even in the case of at-risk students. In addition, the Appellate Division concluded that Plaintiffs had failed to establish a causal link between funding and educational quality because, in part, the educational failures of City students are a result of socioeconomic factors rather than resource inadequacies.

Justice Saxe dissented from the majority opinion, finding that "the evidence [] so strongly supported the trial court's fundamental conclusions with regard to the education being provided to 'at-risk' students that the trial court can only be reversed by ignoring either much of the evidence or the actual circumstances of the City's student population." *App. Div*. at 28.

Moreover, he rightly rejected the majority's bleak conclusion that the State's constitutional obligation is satisfied merely by providing students with eighth grade-level skills, noting that, as a matter of logic, the majority's conclusion means the State "has no meaningful obligation to provide any high school education at all." *Id*. at 33.

Notice of entry was served on June 27, 2002. Plaintiffs timely filed their notice of appeal on July 22, 2002.

ARGUMENT

STANDARD OF REVIEW

To resolve this case, this Court must choose between the varying interpretations of the facts offered by the two lower courts. While this Court's "appellate jurisdiction is ordinarily limited to consideration of issues of law," *Hunts v. Bankers & Shippers Ins. Co*., 50 N.Y.2d 938, 940 (1980), in cases such as this one, where the Appellate Division has substituted its assessment of the record for that of the trial court and reversed or modified nearly all of that court's findings of fact, the CPLR expressly directs the Court to conduct a much more complete review:

> The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered.

CPLR § 5501(b) (McKinney's 2002); *see also Loughry v. Lincoln First Bank*, 67 N.Y.2d 369, 380 (1986); *Suria v. Shiffman*, 67 N.Y.2d 87, 97 (1986) ("When confronted with an Appellate Division order of modification which, as here, 'has expressly or impliedly found new facts and a final judgment pursuant thereto is entered' this court may also review questions of fact.").

Where, as here, the Appellate Division reverses specific findings of fact, "it becomes [this Court's] duty to determine which findings are supported by the weight of the credible evidence." *Electrolux Corp. v. Val-Worth, Inc*., 6 N.Y.2d 556, 563 (1959); *see also Glenn v.*

Hoteltron Systems, Inc., 74 N.Y.2d 386, 391 (1989) ("On an appeal from a final judgment entered pursuant to [an order of the Appellate Division which expressly or impliedly found new facts], this court may review questions of fact to determine which court's findings more nearly comport with the weight of the evidence."); *Suria v. Shiffman*, 67 N.Y.2d at 97-98 (when Appellate Division has expressly or impliedly found new facts, "we will determine which of the findings more nearly comports with the weight of the evidence"); *Miller v. Merrel*, 53 N.Y.2d 881, 883 (1981) (same). In the course of such review, however, it is imperative to "tak[e] into account in a close case 'the fact that the trial judge had the advantage of seeing the witnesses'." *Miller*, 53 N.Y.2d at 883 (quoting *York Mortgage Corp. v. Clotar Constr. Corp*., 254 N.Y. 128, 134 (1930)). The "weight of the credible evidence" analysis now before this Court can yield only one conclusion – the trial court's findings and judgment should be reinstated.

PART I

THE STATE HAS THE OBLIGATION TO ENSURE THAT THE PUBLIC SCHOOLS PROVIDE STUDENTS WITH THE OPPORTUNITY TO OBTAIN AN ADEQUATE HIGH SCHOOL EDUCATION THAT PREPARES THEM FOR COMPETITIVE EMPLOYMENT AND TO FUNCTION AS CAPABLE AND PRODUCTIVE CIVIC PARTICIPANTS

In *CFE I*, this Court recognized that "the constitutional concept and mandate of a sound basic education" must rest on a fully-developed factual record. *Id*. at 317. The Appellate Division ignored this clear directive and made up its own constitutional standard without any apparent consideration of the vast record developed at trial.

The Appellate Division concluded that the Constitution requires that the state's public schools provide no more than the opportunity to acquire the level of skills "imparted between grades 8 and 9," since this is the level of skills sufficient to obtain "low-level" employment and to read simple voting information and juror instructions. *App. Div.* at 8. This baseless "standard" is so offensive to any reasonable understanding of the purpose of education in a

democratic society that even the Defendants have condemned it: "I could not disagree more strongly with that logic and that decision. . . . I believe that in the 21st century we have to make sure that every single kid gets at least a good high school education with high standards . . . ." (Remarks of Governor George Pataki at Pace University, Sept. 12, 2002)

There is absolutely no support in the record for the standard adopted by the Appellate Division. No witness called by either party sponsored or supported it. And there is not a single study, report, analysis, or piece of data that provides any basis for a standard that would deny the students of this state the constitutional right to an education beyond what is necessary to perform menial labor.

To the contrary, the standard adopted by the Appellate Division is at odds with *all* of the extensive evidence concerning the level of skills and knowledge necessary for productive and responsible civic participation. Much of this evidence was created by the State's education officials and embraced by the Legislature and the Executive. This evidence supports the commonsense notion that a sound basic education requires that students have the opportunity to obtain a high school diploma demonstrating that they have acquired the skills and knowledge necessary to obtain competitive employment and to function as capable and productive civic participants. The record, in fact, demonstrates that New York State's current high school graduation requirements were adopted only after an extensive process intended to determine the minimal level of skills and knowledge necessary to provide students with that opportunity.

The Appellate Division's adoption of a constitutional standard far below high school learning now requires this Court to unequivocally affirm what seemed self-evident both as a matter of common sense and as a matter of constitutional responsibility: ***The State has the obligation to ensure that the public schools provide students with the opportunity to obtain an***

adequate high school education, one that prepares them for competitive employment and to function as capable and productive civic participants.

This foundational standard, however, cannot exist in a vacuum. As the Court recognized in *CFE I*, the full "constitutional concept and mandate of a sound basic education" must also include guidance as to what constitutes sufficient "opportunity." *CFE I* at 317-18. The record leaves no doubt that schools must provide sustained and sufficient access to certain essential educational resources in order to provide the opportunity for a student to obtain a constitutionally adequate high school education.

I. A Sound Basic Education: The Foundational Skills Standard

In *CFE I*, the Court set forth a "template" conception of a sound basic education. The Court explained that:

> We do not attempt to definitively specify what the constitutional concept and mandate of a sound basic education entails. Given the procedural posture of this case, an exhaustive discussion and consideration of the meaning of a "sound basic education" is premature. Only after discovery and the development of a factual record can this issue be fully evaluated and resolved.

Id. at 317. The template made clear that the constitutional concept of a sound basic education must encompass at least two elements. First, the constitutional concept must include a foundational standard, *i.e.*, a minimum level of skills and knowledge that public schools should be responsible for imparting to their students. Second, the constitutional concept must include criteria for measuring whether a school district is providing the opportunity for students to achieve the required minimum level of skills and knowledge.

With respect to the foundational skills standard, the Court's template provided that schools must ensure that students have:

> [The opportunity to acquire] the basic literacy, calculating and verbal skills necessary to enable children to function productively as civic participants capable of voting and serving on a jury.

Id. at 318. With respect to measures of the opportunity to meet that standard, the Court observed generally that the State will have satisfied its obligation:

> If the physical facilities and pedagogical services and resources made available. . . are adequate to provide children with the opportunity to obtain these essential skills.

Id. at 316. The Court went on to enumerate some "essential" resources that the State must assure are provided so that students will be able to obtain the foundational skills:

> a. minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn;
>
> b. minimally adequate instrumentalities of learning such as desks, chairs, [and] pencils;
>
> c. reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies; and
>
> d. sufficient personnel adequately trained to teach those subject areas.

Id. at 317. The Court also suggested that student outcomes could provide a useful measure of that opportunity; the Court noted that the Amended Complaint referred to standardized test results and observed that these results are "helpful" but must be "used cautiously." *Id*.

A. The Lower Courts' Foundational Skills Standards

After the development of a full record, both of the lower courts concluded that this Court's template foundational skills standard should be partially modified. *Trial Ct.* at 15; *App. Div.* at 7-8. The most significant modification adopted by both courts is the explicit recognition, envisioned by the Education Article, that one of the fundamental purposes of public education is to provide students with the opportunity to compete for gainful employment. *Trial Ct.* at 15; *App. Div*. at 7-8. The record includes extensive evidence supporting this modification and the

State did not challenge on appeal the trial court's finding that preparation for the workplace is "a universally understood purpose of public education." *Trial Ct.* at 15; PFOF ¶¶ 133-40. Other than this modification, the foundational standards adopted by the lower courts closely track this Court's template.

The trial court concluded that:

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

Trial Ct. at 17-18 (emphasis added).

In addition to its reference to "competitive employment," the trial court (1) included the term "civic engagement" to embrace a wider conception of citizenship that includes, but is not limited to, voting and serving on a jury, and (2) substituted "foundational skills" for the Court's "basic literacy, calculating and verbal skills" to summarize its findings concerning the range of basic cognitive skills students need for civic engagement and competitive employment. *Id.*

The Appellate Division largely affirmed the template modifications adopted by the trial court. It restated the foundational skills standard as:

> ***[A] 'sound basic education' should consist of the skills necessary to obtain employment, and to competently discharge one's civic responsibilities.***

App. Div. at 8 (emphasis added).

Although the two foundational standards adopted by the lower courts seem similar on their face, the opinions incorporating these standards reflect a stark and fundamental disagreement about the level of skills and knowledge that students should have the opportunity to acquire in the state's public schools. The trial court concluded that students should at least have the opportunity to acquire the skills and knowledge necessary to graduate from high school with the ability (a) to compete for "competitive employment," or to pursue higher education and (b) to

understand, evaluate and rationally communicate about issues confronted by citizens in the exercise of their civic responsibilities. *Trial Ct.* at 13-17.

In the Appellate Division's view, students need only be provided with the minimum skills and knowledge necessary to stay off the welfare rolls. *App. Div.* at 8. The Appellate Division, therefore, concluded that students have no constitutional right to acquire high school-level skills, since such skills are not necessary to obtain low-level employment, or to responsibly exercise the duties of citizenship. *Id*. According to the Appellate Division, the skills necessary for low-level jobs and citizenship are "imparted between grades 8 and 9." *Id*.

B. Plaintiffs' Proposed Foundational Skills Standard

This Court should modify its original template definition of a sound basic education to recognize, as both lower courts found, that employment is a fundamental purpose of public education. In light of the Appellate Division's inexplicable adoption of an eighth grade standard, this Court should make clear that the schools must do more than prepare students for menial labor. And it should make clear that every student of this state must have the opportunity to graduate from high school.

Plaintiffs therefore propose that the Court adopt the following foundational learning standard:

> ***The State has the obligation to ensure that the public schools provide students with the opportunity to obtain an adequate high school education, one that prepares them for competitive employment and to function as capable and productive civic participants.***[4]

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[4] Other state high courts have in recent years defined the constitutional concept of an adequate education. Especially influential has been the definition issued by the Kentucky Supreme Court in *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989), which the trial court held to be "detailed and ambitious" and beyond this Court's concept of a sound basic education, but which it noted has been adopted by three other state supreme

The record leaves no doubt that any lesser standard will leave students, as the trial court found, "unprepared for more than low-paying work, unprepared for college, and unprepared for the duties placed upon them by a democratic society." *Trial Ct.* at 68.

The Court need not, and should not, attempt to define the specific skills and knowledge necessary to obtain competitive employment and to discharge the responsibilities of citizenship. This task properly belongs to the Board of Regents, which (with the State Education Department) has been charged by the Legislature with responsibility for setting the State's education policy. N.Y. Educ. L. § 207.[5] The Regents and the SED, not the courts, are best

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courts. *Trial Ct.* at 9. Recently, the Supreme Court of Arkansas became the fourth state supreme court to adopt the *Rose* definition. *See Lakeview Sch. Dist. v. Huckabee*, 2002 Ark. Lexis 603 (Ark. Nov. 21, 2002).

The North Carolina Supreme Court is the only other state high court, besides this Court, to use the specific term "sound basic education" to describe its constitutional standard for an adequate education. It defined that term as follows:

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

Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997).

[5] Pursuant to Section 207 of the Education Law, determinations of the Regents are deemed the educational policy of the State, unless countermanded by the Legislature. Neither the Legislature nor the Governor has ever attempted to countermand the Regents Learning

suited to determine whether, for example, an adequate high school education requires that students master trigonometry, algebra or calculus. As the Court recognized in *Levittown Union Free School District v. Nyquist*, 57 N.Y.2d 27 (1982), it is appropriate to defer generally to "the State-wide minimum standards of educational quality and quantity fixed by the Board of Regents." *Id.* at 38.

Indeed, the difficulties courts encounter in attempting to define specific levels of academic skills are illustrated by the Appellate Division decision in this case. The Appellate Division concluded that this Court's reference to "basic" skills permitted it to define a constitutional threshold in terms of specific skill levels well below high school. *App. Div.* at 8. It somehow settled on the skills imparted between the eighth and ninth grade, and then, incredibly, went on to criticize the lower court and the dissent for not identifying a precise level of skills that would permit the courts to ascertain whether a high school dropout had acquired a sound basic education. *Id*. at 9.

It makes no sense to impose on courts the duty of assessing a precise grade level of reading, mathematics, or other skills that might conceivably constitute a sound basic education or of assessing whether some number of high school dropouts might be capable of obtaining competitive employment. The courts should defer to the Board of Regents in determining the exact level of skills and knowledge necessary to provide that opportunity, in the absence of proof that the Regents' standards are not sufficient to ensure that students have the opportunity to obtain a sound basic education.

Standards. On the contrary, the Legislature and the Governor have firmly endorsed them. *See* Px 2552 at 2-3; Px 2554 at 57, 60, 62-63; Px 2593 at 10.

As the record makes clear, the Regents have diligently and responsibly undertaken to determine the level of skills and knowledge necessary to provide the opportunity to obtain competitive employment and discharge the duties of citizenship. PFOF ¶¶ 163-81. The State's current high school graduation standards are intended to ensure that students have an opportunity to acquire that level of skills and knowledge. Thus, it is appropriate for this Court to adopt the broad foundational standard proposed by Plaintiffs-Appellants and to defer to the determinations of the Regents and SED concerning the specific skills and knowledge necessary to meet that standard.

II. The Basic Components of a Sound Education

There is substantial evidence in the record concerning the skills and knowledge students need in order to have the opportunity to obtain competitive employment and to function as capable and productive citizens. PFOF ¶¶ 133-214. This evidence, ignored by the Appellate Division, includes the extensive findings of the Board of Regents and the State Education Department ("SED").

More than a decade ago, New York State's Commissioner of Education sought to follow up this Court's decision in *Levittown v. Nyquist* by explicitly defining a "sound basic education" and, at the same time, to respond to the call of President George H. W. Bush's National Education Summit to articulate explicit standards that would define the level of learning expected of American public school students. Sobol 962:9-963:10. To accomplish these purposes, the Commissioner convened committees of teachers, principals, academic experts and a broad cross section of citizens representing a variety of interests from throughout the state, including business, industry and union representatives, and created an over-arching Council on Curriculum and Assessment. Sobol 1013:7-1015:8; Px 485 at 2*;* PPOF ¶¶ 189-92. Their express charge was to identify the specific skills that high school graduates would need for employment

and for citizenship, including voting and serving on a jury, in the 21st century. Darling-Hammond 6460:19-21; 6472:12-6473:17; Px 1948 at 8-9, 63-65.

The Commissioner's committees and Council considered all of the major federal and state reports on the specific skills students need for employment in the contemporary economy, PFOF ¶ 190, Px 1948 at 8, as well as the skills necessary to carry out the "modern tasks of citizenship in today's society." Darling Hammond 6480:9-13. This process led in 1996 to the Regents' adoption of "Learning Standards" in seven areas of study. Mills 1151:23-1153:11; Kadamus 1565:16-1566:3. The Learning Standards provide detailed guidance to the state's teachers concerning the skills and knowledge that students should be expected to master as they move from elementary school through high school.

The Regents Learning Standards set forth the determinations, after exhaustive study and deliberation by the officials charged by our state Constitution and the Legislature with the responsibility for overseeing education in New York State, of the minimum foundational proficiency skills and knowledge that the public schools should impart. As the Commissioner of Education testified, "youngsters who grow up to be adults who don't have these skills can't take part in a free society. They would not be able to bear the burdens of citizenship. They would not be able to have a choice of work . . . . [I]t is absolutely of critical importance that all students have this knowledge and these skills." Mills 1132:7-24. The Chancellor of the Board of Regents explained that the intent of the Learning Standards is "to give our young people the skills and knowledge they need in order to be effective citizens . . . and people who can compete in an economy that is in the midst of a dramatic transformation." Hayden 1300:8-24.

The Regents' findings and a host of other evidence, including the reports of independent experts and commissions, reflect a broadly-held consensus that the demands of the modern

economy and of citizenship require that students be able to master complex tasks, to utilize technology and to evaluate and communicate effectively about a wide range of concepts, ideas and issues and that, in order to do so, they should acquire high school-level skills in math, science, social studies and English.

The Appellate Division cited no evidence to the contrary. Instead, the Appellate Division simply decided that students have no right to be prepared for the modern economy or to be effective citizens and concluded, without any evidentiary support, that the responsibilities of citizenship and menial labor each require the same low-level skills and knowledge. The Appellate Division could reach this conclusion only by ignoring the direction of this Court that the constitutional conception of a sound basic education must be founded on a full factual record.

A. Skills Needed for Competitive Employment

The record reflects a universal consensus that preparation for ***competitive*** employment should be a basic responsibility of the state's public schools. PFOF ¶¶ 133-40. Indeed, it is the official education policy of New York State, as announced by the Regents and endorsed by the Legislature, that the public schools undertake "to prepare our children to compete successfully in today's demanding global society." Px 1 at 2; *see* Px 1041 at 1; *see also* Mills 1131:12-1132:6; Hayden 1300:5-24 (the State's two most senior education officials acknowledge the need to prepare students for competitive employment). As Plaintiffs' experts confirmed, this policy is the contemporary articulation of a long-recognized, fundamental principle of public education. Sobol 1764:22-1765:9; Darling-Hammond 6457:5-20. In fact, the defense expert with the most

experience in actually running school districts agreed that preparing students for competitive employment is one of the primary responsibilities of a school system. Murphy 17402:3-12.[6]

With respect to skills needed for competitive employment, the Regents' committees, relying on their own research and a substantial body of national research, concluded that students needed "higher level" skills (as distinguished from the skills sufficient in earlier generations) that will provide them with the reasoning and analytical skills necessary to perform jobs of increasing technical complexity. PFOF ¶¶ 189-90. The national research underlying the committees' conclusions recognized that:

> In addition to basic skills, all individuals must be able to think their way through the workday, analyzing problems, proposing solutions, communicating, working collaboratively and managing resources such as time and materials.

Px 1190 at 1; *see also* Schwartz 2582:14-2583:23; Darling-Hammond 6459:14-6460:21; Levin 12106:10-12107:9.

The conclusions of the Regents' committees are consistent with a general consensus concerning the skills and knowledge necessary for competitive employment and productive citizenship. For example, the record includes the findings of an independent task force convened

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[6] The substantial record of a national consensus that a minimally adequate education must include providing the opportunity for students to obtain competitive employment is reflected in the decisions of numerous state courts that have defined the right to education under state constitutions. *See, e.g., Abbott v. Burke,* 693 A.2d 417, 428 (N.J. 1997)*;* ("[A] constitutionally adequate education has been defined as an education that will prepare public school children for a meaningful role in society, one that will enable them to *compete effectively* in the economy and to contribute and to participate as citizens and members of their communities.") (emphasis added); *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997) ("[A]n education that does not serve the purpose of preparing students to participate and *compete* in the society in which they live and work is devoid of substance and is constitutionally inadequate.") (emphasis added); *Serrano v. Priest*, 487 P.2d 1241, 1258-59 (Cal. 1971) (education is "crucial to . . . the functioning of democracy" and to "an individual's opportunity to *compete successfully* in the economic marketplace . . .") (emphasis added).

by Mayor Rudolph Giuliani in May, 1998, to study significant issues confronting the City University of New York ("CUNY"). The task force retained a wide range of outside expert consultants and conducted extensive hearings and investigations. In June, 1999, the task force issued a multi-volume report (the "CUNY Report") that included, *inter alia*, comprehensive findings concerning the nature of the skills and knowledge necessary to obtain employment in New York. The CUNY Report found that:

> Opportunities for less-educated workers are likely to keep declining, while continued increases in the services sector will bring more good jobs to people with computer skills who are literate, can write, and are well-grounded in science and mathematics.

Px 311 at 17.

The change in the nature of the state's job market was also illustrated by the unchallenged testimony of the Chief Financial Officer of Bell Atlantic (now Verizon), one of New York's largest employers. He testified extensively about the increased educational demands arising from rapidly changing technology, including the introduction of digital and fiber optic equipment. Salerno 5682:12-5683:17; PFOF ¶ 153. Most of the company's 9,000 management positions require at least some college education and all of the company's 33,000 non-management positions require a high school diploma. Salerno 5671:24-5672:25; PFOF ¶ 154. In fact, the technological sophistication of non-management craft positions has attracted many college-educated applicants. Thus, an increasing number of jobs at the telephone company now require even more than a high school degree. PFOF ¶¶ 153-54.

Plaintiffs' experts also offered extensive, unrebutted testimony concerning the nature of the skills and knowledge required for employment. One expert testified, for example, that the movement in the labor market from assembly-line production to "customized production" and participatory organizations required workers to have more advanced skills than simple arithmetic

and elementary reading ability. Levin 12095:5-12097:22, 12136:4-12137:11; *see also* Sobol 1768:4-25. To be competitive, workers need strong reasoning, communication, problem-solving, decision-making and information-gathering skills. Levin 12107:17-12110:14; Px 2782. These skills were specifically incorporated into the Regents Learning Standards for English Language Arts, mathematics, science and social studies. Levin 12110:22-12117:13.

The Appellate Division made no findings concerning the skills needed for competitive employment. Instead, the Appellate Division determined without any support in the record that the public schools should only prepare students for low-level work and that the skills needed for such work could be obtained with an eighth grade education. *App. Div.* at 8. In making this determination, the Appellate Division identified neither the kind of low-level jobs that students might hope to obtain without a high school education, nor exactly what skills would be necessary to perform those jobs.

The Appellate Division's adoption of its eighth grade standard rests neither on facts nor evidence in the record, but instead on its unfounded world-view that "[s]ociety needs workers in all levels of jobs, ***the majority of which may very well be low level.***" *Id.* (emphasis added). According to the Appellate Division's conception, "the ability to 'function productively' should be interpreted as the ability to get a job, and support oneself, and thereby not be a charge on the public fisc." *Id.* Thus, since some students will eventually assume "low-level jobs," the State has no obligation, according to the Appellate Division, to offer all students the opportunity to attain the skills they would need to compete for higher-level positions. *Id.* Even the State's expert witnesses rejected this understanding of public education. *See, e.g.*, Murphy 17402:3-9 (schools have a responsibility to prepare *all* students to compete in society).

In addition to lacking any basis in the record, the Appellate Division's theory that the role of the public schools is to provide just enough education to keep students off the welfare roles is repugnant to any reasonable understanding of the purpose of education in a democratic society, and it would condemn tens of thousands of poor, mostly minority children to an education that would prepare them for nothing more than menial labor. In New York City, where over 80 percent of the students are low income, immigrants or minority children, relegating large numbers of students to no more than the possibility of low-level employment from the outset threatens to perpetuate patterns of class and racial segregation. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."); *Unified Sch. Dist. No. 2229 v. State*, 885 P.2d 1170, 1195 (Kan. 1994) ("Having small pockets of well-educated students does not support an economy or society in the 1990s and beyond.").

More than a century ago, the framers of the Education Article explicitly rejected the Appellate Division's Dickensian view that public education is nothing more than preparation for the most menial of society's labors. The framers understood that the public schools provide the foundation for the material prosperity of the state and for the material and intellectual advancement of its citizens. They also understood that the Education Article would impose significant obligations on the state legislature to provide an adequate education for all students, and that the concept of "adequacy" must evolve to keep pace with societal needs.

The Education Article had its origins in the "common school" movement of the late 19th century. This movement sought to replace the prior "patchwork pattern of town schools partially supported by parental contributions, church schools, 'pauper schools,' and private schools, [with a] school common to all people [that] would be open to all and supported by tax funds."

Lawrence A. Cremin, *American Education: The National Experience 1783-1876*, 138 (1980); *see also* Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society*, 1780-1860 (Hill and Wang eds., 1983).[7]

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

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

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

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[7] The common schools sought to implement the vision of the educational needs of a revolutionary new democratic society that had been repeatedly articulated by the founding fathers of the American republic. *See* Cremin, *supra* at 3. John Adams, for example, stated in no uncertain terms that:

> [A] memorable change must be made in the system of education and knowledge must become so general as to raise the lower ranks of society nearer to the higher. The education of a nation instead of being confined to a few schools and universities for the instruction of a few, must become the national care and expense for the formation of the many.

Letter from John Adams to Mathew Robinson, March 31, 1786, *quoted in* David McCullough, *John Adams* 364 (2001); *see also* Lorraine Smith Pangle & Thomas L. Pangle, "What the American Founders Have to Teach Us About Schooling for Democratic Citizenship," *in Rediscovering the Democratic Purposes of Education* 21, 30 (Lorraine M. McDonnell *et al*. eds., 2000).

The delegates also clearly expected that the common schools envisioned by the Education Clause would provide an education adequate to meet contemporary needs. In their report to the Convention, the drafters of the Clause explained:

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

4 Revised Record at Constitutional Convention of 1894, at 695 (emphasis added).

The trial court, therefore, correctly reflected the intent of the framers of the Education Article when it declared it "axiomatic" that "the definition of sound basic education must evolve." *Trial Ct.* at 16; *cf.* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 9 (1995) ("No one disputes our role – indeed our responsibility – to draw and redraw the bounds of socially tolerable conduct by explicitly adapting established principles to changing circumstances."); Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 Vt. L. Rev. 49, 54 (1988) ("[I]nterpreting our constitution cannot stop with values of the past. It necessarily involves as well the community's present values.").[8]

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[8] Virtually every state court that has defined a concept of adequate education under its constitution's education clause has agreed. *See, e.g., Leandro*, 488 S.E.2d at 255 (holding that framers of education clause intended to allow students to "participate fully in society as it existed in his or her lifetime"); *McDuffy v. Secretary*, 615 N.E.2d 516, 555 (Mass. 1993) ("Our Constitution, and its education clause, must be interpreted 'in accordance with the demands of modern society or it will be in constant danger of becoming atrophied. . . .'"); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) (holding that contemporary adequacy standards must be pegged well above a nineteenth century "reading, writing and arithmetic" level); *Seattle Sch. Dist. No. 1 v.*

The framers also understood that "the rising generation" must be prepared by the public schools for productive engagement in the state's economy. The Education Committee Report to the 1894 Constitutional Convention recognized the importance of education "not only for the intellectual but also for the material prosperity of the State." 4 *Revised Record at Constitutional Convention of 1894*, at 694. The Report further declared that "the connection is manifest between the improvement and growth of [the state's] schools and its material prosperity." *Id.* at 697; *see also* 3 *Revised Record at Constitutional Convention of 1894*, at 732.

The constitutional record, therefore, makes clear that the framers created a dynamic Education Article that would evolve to reflect the civic and economic needs of the state. Both the record and the constitutional history fully support the commonsense notion embraced by the trial court that the economic needs of the state today require that its citizens have more than an eighth grade education.

B. The Skills Needed For Capable and Productive Citizenship

In order to function productively as civic participants, students must obtain the skills and knowledge needed to undertake civic responsibilities in a complex society.[9] The record contains

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State, 585 P.2d 71, 94 (Wash. 1978) ("[T]hat which may have been 'ample' in 1889 may be wholly unsuited for children confronted with contemporary demands.")*; Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (holding that although a high school education was not an attribute of a thorough and efficient education in 1895, it clearly is today).

[9] Preparing students to be civically engaged in the public affairs of their time was clearly understood to be a major purpose of the common schools. As Horace Mann, the founder of the common school movement, put it:

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

extensive evidence (including unchallenged Regents' findings) concerning the skills and knowledge necessary for this task, including the responsibilities of voting and serving on juries. PFOF ¶¶ 133-62.

The Regents' Council on Curriculum and Assessment and the subject area committees convened to develop the new Learning Standards concluded that to properly function as voters and jurors and undertake other civic responsibilities, students required: (1) "knowledge about the functioning of the system of government that we have in this country;" (2) the ability to "analyze and reason about the evidence presented for different . . . points of view or policy ideas;" and (3) "the analytic ability . . . to work from various kinds of data or evidence about issues to make judgments and decisions in the voting booth and as a citizen." Darling-Hammond 6472:12-6473:17; Px 1948 at 8-9, 63-65.

These findings are consistent with this Court's holding in *People v. Guzman*, 76 N.Y.2d 1 (1990), that "[a]t a minimum, a juror must be able to understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations and comprehend the applicable legal principles, as instructed by the court." *Id*. at 5. The specific content of the Regents Learning Standards in basic subject areas like mathematics, science, and social studies incorporated the particular skills needed for civic participation, as well as competitive employment.[10] Darling-Hammond 6473:1-6480:13;

> for the faithful and conscientious discharge of all those duties which devolve upon the inheritor of a portion of the sovereignty of this great republic.
>
> The Massachusetts System of Common Schools: Tenth Annual Report of the Massachusetts Board of Education 17 (1849) (*quoted in McDuffy*, 615 N.E.2d at 555).

[10] For example, the social studies standards promote analytic and evaluative skills as well as an understanding of the roles of the citizen in the American constitutional democracy.

6522:12- 6534:20; s*ee also* Jaeger 13452:11-13455:13, 13456:25-13460:25; Px 2547-A; Px 2548-A; 2549-A; Px 2551.

In response to a request from the trial court, Plaintiffs' experts also analyzed the text of a charter revision question posed on the actual New York City election ballot in November, 1999, and sample jury instructions and documentary evidence actually considered by jurors in state and federal cases in New York. PFOF ¶¶ 198-202. They testified that to understand the issues presented by the charter reform proposal, a voter would need to have "content knowledge about how the city government operates," analytic reading skills, the ability to support his or her ideas with evidence, and "a reasoning process of understanding evidence and applying it to a conclusion." Darling-Hammond 6483:19-6491:18. In order to comprehend and apply a basic concept like the "preponderance of evidence," a juror would need to be able to "understand how to weigh the evidence, how to decide what the preponderance of the evidence might mean, what

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Thus, the Regents Learning Standard for "Civics, Citizenship and Government" expects that:

> Students will use a variety of intellectual skills to demonstrate their understanding of the necessity for establishing governments; the governmental system of the United States and other nations; the United States Constitution; the basic civic values of American constitutional democracy; and the roles, rights, and responsibilities of citizenship, including avenues of participation.

Px 322 at 1; *see also id.* at 28-29. The Learning Standards for English Language Arts make the connection between basic language skills and civic competency explicit; examples of task mastery in the English standards include asking students to "point out propaganda techniques (such as 'bandwagon,' 'plain folks' language, and 'sweeping generalities') in public documents and speeches," "listen to speeches of two political candidates and compare their stands on several major issues," and "deliver a 'campaign' speech using a variety of persuasive strategies to influence an audience." Px 318 at 11-12.

kind of testimony is credible and how to use the evidence in drawing an opinion." Darling-Hammond 6516:9-23.

The Appellate Division ignored all of this evidence and determined that the skills required to vote and serve on a jury, like the skills necessary for low-level employment, are instilled between the eighth and ninth grade. *App. Div.* at 8. The Appellate Division's only purported support for this conclusion was a passing reference to "evidence that jury charges are generally at a grade level of 8.3, and newspaper articles on campaign and ballot issues range from grade level 6.5 to 11.7." *Id*. Apparently, the Appellate Division was referring to the testimony of a State expert that was explicitly rejected by the trial court, *Trial Ct.* at 14, that was not credible on its face, and was not offered to prove that an eighth grade education is sufficient preparation for citizenship. This expert simply claimed to have performed a "readability" analysis to determine the exact grade level of skills necessary to read a few newspaper passages, a sample jury charge and ballot proposition questions. PFOF ¶¶ 213.

Incredibly, the expert's analysis relied on reading scales that focus on sentence length and other mechanical factors, rather than on the cognitive level of the materials being reviewed, and the analysis purported to show that the *New York Times* and the *New York Daily News* require the same level of reading comprehension. Walberg 17185:7-10, 17200:11-17201:15, 17335:15-17336:14. Moreover, the expert selectively omitted the more difficult passages of the reading samples that would have required a higher level of reading skills. Walberg 17215:16-21, 17317:4-1721:15. The underlying assumption of this analysis was that voters do not need literacy skills because they do not consult primary documents, and they do not need critical

judgment or analytic skills to comprehend, synthesize and assess the information that is provided by the mass media.[11]

As the Supreme Court noted two decades ago, the electoral process "depends on an informed electorate; a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed." *San Antonio Indep. School Dist. v. Rodriguez,* 411 U.S. 1, 36 (1973); *see also Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (June 24, 2002) (Thomas, J., concurring) ("But without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment."); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978) ("Education plays a critical role in a free society. It must prepare our children *to participate intelligently and effectively* in our open political system to ensure that system's survival") (emphasis added). There is no evidence to support the Appellate Division's conclusion that a student's reading skills and thought processes will be sufficiently developed by the eighth grade to discharge the responsibilities of citizenship. To the contrary, the vast weight of the evidence supports the trial court's conclusion, as well as the determinations of the Regents and the SED, that the full development of these skills and thought processes requires a high school education.

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[11] Defendants' experts did not even discuss, let alone provide any justification for, these implicit assumptions, which are belied by all of the empirical evidence of the skills that voters and jurors actually need. *See, e.g.*, Samuel L. Popkin & Michael A. Dimock, *Political Knowledge and Citizen Competence in* Citizen Competence and Democratic Institutions 116 (Stephen L. Elkin & Karol Edward Soltan eds., 1999) (failure to vote results from lack of knowledge of what government is doing and where parties and candidates stand); Arthur Lupia & Mathew D. McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know* (1998) (voting requires citizens to utilize analytic reasoning skills to assess the reliability of information received from various sources and synthesize it to reach conclusions); Norman N. Nie *et al*., *Education and Democratic Citizenship in America* (1996) (discussing specific characteristics of democratic citizenship and specific types of political knowledge citizens need to advance their interests).

C. The Opportunity to Obtain an Adequate High School Education

The notion that a constitutionally adequate education today requires that students have at least the opportunity to obtain a meaningful high school diploma seems self-evident; it is difficult to imagine any reasonable argument to the contrary. Certainly no parent, educator or employer would accept any lesser standard. The defendant Governor has asserted that every student is entitled to "a good high school education." (Remarks of Governor Pataki at Pace University, Sept. 12, 2002.) And no evidence in the record supports any lesser standard. To the contrary, the record includes substantial evidence of a wide consensus within New York State and across the nation that students must complete high school in order to obtain the skills and knowledge (described in the preceding sections) now necessary to obtain competitive employment and for productive citizenship. As New York State's former Education Commissioner testified:

> The high school diploma is the *lingua franca* of our society educationally. You can't go anywhere without it. You can't speak to anybody in employment or in civic activity, unless you have it.

Sobol 1088:17-21.

The evidence of a national consensus includes the nationwide efforts over the last two decades to improve the quality of education provided in the nation's schools. One of the fundamental premises of these reform efforts has been that students must graduate from high school and that high school-level curricula must be sufficiently rigorous to prepare students for the technological and intellectual challenges posed by the modern economy.

The record included extensive evidence concerning the national standards-based reform movement, which was precipitated by the specter of a "rising tide of mediocrity" in American public schools identified by the findings of government commissions and corporate leaders. PFOF ¶¶ 142-46. Three national education summits were convened by President George H. W.

Bush and President Bill Clinton between 1989 and 1999, in part because of widespread concern about "the practice of awarding high school diplomas to students who are not prepared to succeed in college or the workplace,"and they called for the development of state academic content standards that would ensure that recipients of high school diplomas have "the knowledge and skills demanded by the 21st century." Px 1189 at 3; *see also* Sobol 913:11- 916:18; Schwartz 2542:18-21; Jaeger 13619:6-12; Podgursky 16477:17-24; PFOF ¶¶ 142-45, 182-88.

As discussed above, in New York State, the Regents responded to this call by undertaking the intensive deliberations about the knowledge and skills students need for competitive employment and civic participation that led to the issuance of their Learning Standards. The entire process was specifically intended to identify the minimum skills that ***high school graduates*** would need for competitive employment and civic engagement, and to develop them on a cumulative basis in elementary and middle school, and culminating at the high school graduation level. Darling-Hammond 6477:7-24.

In connection with the development of the Regents Learning Standards, the Regents also increased high school course requirements and developed a new assessment system, including new graduation requirements. The new graduation requirements changed the former two-track diploma system, which had offered students the option of obtaining either a "local" diploma or a "Regents" diploma. Under the new requirements, students can graduate only if they pass five state-administered Regents examinations in the core areas of English, mathematics, social studies and science.[12] Both the Legislature and the Executive have approved the current high school graduation requirements.

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[12] Students who pass eight Regents examinations and meet certain additional course requirements are awarded an "advanced Regents diploma." Px 1032 at 4.

Apart from the Regents' recognition that a high school-level education is necessary for competitive employment and the responsibilities of citizenship, there is substantial additional evidence reflecting the virtually universal recognition that an adequate education means a high school-level education, including:

- Unrebutted expert testimony concerning the economic disadvantage suffered by high-school dropouts. *See, e.g.*, Darling-Hammond 6460:5-13.

- Unrebutted evidence that all but the most menial jobs and career opportunities require a high school diploma; for example, a person without a high school degree cannot apply for any of the telephone company's 42,000 jobs, cannot serve in the armed forces or the New York City Police and Fire Departments, and cannot work as a New York City sanitation worker. PFOF ¶¶ 150-56.

- The fact that the State Education Department assesses the adequacy of education provided in public school systems, in part, by considering the percentage of dropouts who leave before completing high school; high dropout rates are evidence of inadequacy. Px 1 at 58-60.

- The fact that Congress recently enacted legislation providing for assessments based, in part, on high school graduation rates. *See* 20 U.S.C. § 6311(b) (defining "adequate yearly progress" under the No Child Left Behind Act in terms of, *inter alia*, "graduation rates for public secondary school students").

The Appellate Division's adoption of a lower standard is inexplicable. It appears to rest on a complete misreading of *CFE I*, a failure to consider the extensive evidence of consensus concerning the need for a high school-level education and an unfounded reliance on one aspect of the Regents' former graduation requirements.

Throughout its opinion, the Appellate Division focused on this Court's use of the phrase "minimally adequate" in *CFE I* and assumed that ***minimally*** meant something much less than a high school-level education. *See, e.g*., *App. Div*. at 9-10. To the Appellate Division, minimal meant preparation for a low-level job and excluded the prospect even that students should be prepared for ***any*** post-secondary education. *Id*. at 7-8. Nothing in this Court's opinion in *CFE I* or in any of the Court's prior jurisprudence suggests that this Court intended to accept the radical

proposition that the State has no constitutional obligation to ensure that students have the opportunity to obtain a high school education. And even if this Court's use of the term "minimally adequate" in *CFE I* was meant to suggest that something less than a high school standard might pass constitutional muster if it were supported "after discovery and the development of a factual record," *CFE I* at 317, there is nothing in the record that supports a lesser standard.

The Appellate Division appears to suggest that certain evidence concerning the Regents Competency Tests ("RCTs") may support a lesser standard, *App. Div.* at 14-15, but it failed to understand the purpose or history of the RCTs. The RCTs are a set of high school examinations that were eliminated by the Regents after their extensive re-examination of high school graduation standards precisely because they do ***not*** measure the minimum skills and knowledge necessary to obtain competitive employment and to function as a capable and productive citizen.[13] The Regents had originally employed the RCTs years ago primarily for the purpose of identifying students in need of remediation. ***The RCTs "were never intended to be a measure of what a sound basic education ought to be."*** Sobol 1000:6-9. In explaining the Regents' decision to phase out the RCTs, the Commissioner of Education emphasized that the RCTs did not measure the skills and knowledge necessary for productive citizenship:

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

Mills 1222:13-21.

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[13] There is no dispute that the RCTs measure eighth grade reading skills and sixth grade math skills. Kadamus 1579:2-10; Walberg 17202:22-17203:5; PFOF ¶ 1588.

The committees convened by the Regents explicitly rejected the use of the RCTs, since they concluded that in order to function effectively as productive citizens today, students need "strong skills and knowledge," including reasoning and analytical skills. Px 1032 at 1; *see also* Mills 1146:22-1147:9; Darling-Hammond 6460:14-21. The skills and knowledge identified by the committees reflect a general accord that the demands of the modern workplace and the demands placed upon voters and jurors have raised the *minimum* level of literacy, verbal and calculating skills that are considered necessary to function productively substantially above the level tested by the RCTs. In addition, the CUNY Report specifically singled out the RCTs for criticism because the skill levels tested by the RCTs were not sufficiently high to prepare students even for the introductory courses offered at CUNY's community colleges.

In short, there simply is no evidence to support the Appellate Division's view that a level of education substantially below the high school level is sufficient to provide a sound basic education.

In adopting its lesser standard, the Appellate Division ignored this Court's command that the constitutional conception of a sound basic education rest on the factual record. The overwhelming weight of the evidence supports only one conclusion: The constitutional concept of a sound basis education must include the opportunity to obtain a high school-level education. Any lesser standard would render the Education Article meaningless.[14]

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[14] Other state courts considering the constitutional standard have recognized the right to a high school level education. *See, e.g., Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1278 (Wyo. 1995) ("Educational success must be defined as graduating from high school equipped for a role as a citizen, participant in the political system and competitor both intellectually and economically."); *Roosevelt Elementary Sch. Dist. v. Bishop*, 877 P.2d 806, 817 (Ariz. 1994) (Feldman, J., specially concurring) ("Arizona's children have the right to receive a free, public, basic education through high school."); *Robinson*, 303 A.2d at 295 ("Today, a system of public education which did not offer high school education would hardly be thorough and efficient.").

D. Requiring That Students Have the Opportunity to Obtain a High School Level Education Reflects a Proper Balance of Responsibilities Among the Branches of Government

Both of the lower courts were concerned that certain aspects of the Regents Learning Standards ("RLS") might exceed the constitutional conception of a sound basic education. *Trial Ct.* at 12; *App. Div.* at 9. These concerns reflect a fundamental misunderstanding of the relationship between the RLS and the constitutional conception of a sound basic education.

In *Levittown,* this Court recognized that it was appropriate to defer generally to "the State-wide minimum standard of educational quality and quantity fixed by the Board of Regents[.]" *Levittown,* 57 N.Y.2d at 38. The RLS, the related tests, and graduation requirements together constitute the current statewide minimum standard of educational quality fixed by the Board of Regents. The standards stand as the official educational policy of the State, N.Y. Educ. L. § 207, and they have been firmly endorsed by the Legislature and the Governor. *See* Px 2552 at 2-3; Px 2554 at 57, 60, 62-63; 93 at 10.

If the Court adopts the foundational skills standard proposed by the Plaintiffs – requiring that the state's public school districts provide all students with the opportunity to obtain a high school level education – then the Regents' current statewide minimum standards of educational quality and quantity will necessarily serve as a benchmark in applying that standard: 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.

This result is not inconsistent with the Court's recognition in *CFE I* that "[p]roof of noncompliance with one or more of the Regents' or Commissioner's standards may not, standing alone, establish a violation of the Education Article." *CFE I* at 317. *CFE I* was decided before the promulgation of the RLS and the related graduation requirements and was addressed to the sufficiency of the allegations set forth in the Amended Complaint. The "standards" put at issue

by the Amended Complaint were narrowly focused regulatory provisions in effect at the time that required schools to provide very specifically identified resources, such as minimum ratios of guidance counselors or certain numbers of library books.[15]

In contrast, the RLS and related graduation requirements reflect generalized statewide minimum standards of quality. The appropriate inquiry in utilizing these standards as benchmarks is not whether a school district is in compliance with a particular regulation (*e.g.*, does the district provide the minimal required number of guidance counselors), but whether the overall level of resources available is sufficient to provide students with opportunity to meet the standards.

Moreover, as a practical matter, the RLS and the related graduation requirements are mandatory standards for New York public school students. PFOF ¶ 207. It makes no sense that a lesser standard should apply in assessing the constitutional adequacy of educational opportunity. If something less than the resources sufficient to meet high school graduation requirements could pass constitutional muster, then students would have no right to an adequate high school education.

Deference to the Regents' statewide minimum standards of quality also avoids the need for courts to undertake the task of determining the exact level of skills and knowledge sufficient to provide the opportunity to obtain competitive employment and discharge the duties of citizenship. As the record makes clear, the Regents have diligently and responsibly undertaken to determine the level of skills and knowledge sufficient to provide the opportunity to obtain

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[15] *See* Am. Compl. ¶¶ 49-62; *CFE I* at 317. Although this Court considered that compliance with some of the particular Regents regulations in the past to be "aspirational," the current Regents graduation requirements are mandatory.

competitive employment and discharge the duties of citizenship. That determination, therefore, is entitled to judicial deference.

Of course, the Regents in the future may adopt new high school graduation requirements or different learning standards. If these requirements or standards encompass the skills and knowledge necessary to obtain competitive employment and to competently discharge the responsibilities of citizenship, then providing the opportunity to meet those requirements would satisfy the constitutional obligation to provide a sound basic education. On the other hand, if the graduation requirements were so deficient as to require, for example, nothing more than the equivalent of an eighth grade education, then providing an opportunity to meet such requirements, without more, would not meet the constitutional obligation.

The decisions of other state courts reflect a consistent deferral to the determinations of state education agencies in setting statewide standards. For example, the North Carolina Supreme Court specifically held that the trial court may consider "[e]ducational goals and standards adopted by the legislature . . . for its determination as to whether any of the state's children are being denied their right to a sound basic education."[16] *Leandro v. State*, 488 S.E.2d at 355; *see also Abbott v. Burke*, 693 A.2d 417, 427-28 (1997) (concluding that the state's educational "standards are consistent with the Constitution's education clause" and "are facially adequate as a reasonable . . . definition of a constitutional thorough and efficient education"); *Unified Sch. Dist No. 229 v. State*, 885 P.2d 1170, 1186 (Kan. 1994) ("These standards were

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[16] The trial court in North Carolina, like the trial court in this case, did extensively consider the state's new educational standards, and it held that constitutional compliance should be assessed by whether every student is being given the opportunity to meet grade-level criteria for academic achievement as measured by the state standards. Utilizing that standard, it determined that plaintiffs were being denied such an opportunity. *Hoke County Bd. of Educ. v. State*, No. 95CVS1158, 2000 WL 1639686 (N.C. Sup. Ct. Oct. 12, 2000).

developed after considerable study by educators from this state and others . . . . [T]he court will not substitute its judgment of what is 'suitable', but will utilize as a base the standards enunciated by the legislature and the state department of education."); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 734 (Idaho 1993) ("Balancing our constitutional duty to define the meaning of the thoroughness requirement of art. 9 § 1 . . . with the political difficulties of the task has been made simpler for this Court because the executive branch of government has already promulgated educational standards pursuant to the legislature's directive . . . ."); 20 U.S.C. § 6311(b) (utilizing existing state academic content standards as the primary criterion for determining "adequate yearly progress" under the No Child Left Behind Act).

The danger of usurping the Regents' authority in this area is demonstrated by the Appellate Division's opinion. The Appellate Division disregarded the Regents' carefully considered standards and substituted its own vague ideas about education to adopt a standard that deprives the state's students of the right to a high school education. This is a radical form of judicial activism that has no support in the record, in any decision of this Court, or in any reason of public policy.

In short, adopting a constitutional standard that provides clear guidance to the Legislature, the Executive, local school districts and the public that the students of this state are entitled to the opportunity to obtain an adequate high school education, while deferring to the Regents' determinations of the specific minimum skills and knowledge that constitute such an education, reflects a proper balance of the roles of the branches of government. There is no basis in the record for any other course; no evidence supports a lesser standard and no evidence supports any alternative to the Regents' "State-wide minimum standards of educational quality and quantity."

III. Essential Resources: The Necessary Conditions for Learning

As part of its template definition of a "sound basic education," this Court held in *CFE I* that "[t]he State must assure that some essentials are provided" so that students have the opportunity to obtain foundational skills. *CFE I* at 317.

After a thorough review of the extensive evidence, the trial court restated, and in certain areas modified and expanded, the template's tentative list of essential resources as follows:

(1) Sufficient numbers of qualified teachers, principals and other personnel.

(2) Appropriate class sizes.

(3) Adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum.

(4) Sufficient and up to date books, supplies, libraries, educational technology and laboratories.

(5) Suitable curricula, including an expanded platform of programs to help at risk students by giving them "more time on task."

(6) Adequate resources for students with extraordinary needs; and

(7) A safe orderly environment.

Trial Ct. at 114-15. The Appellate Division did not question any of the trial court's reformulations and modifications of the list of essential resources. Indeed, the Appellate Division's opinion cites the trial court's resource categorization with approval and recognizes that these seven categories are an appropriate restatement and enhancement of the original "essentials" set forth by this Court in 1995. *App. Div.* at 9-10 ("The IAS court adopted [the Court of Appeals'] outline, and advanced seven categories of resources, which essentially fall within the three areas set forth by the Court of Appeals.").

In fact, *all* of the trial court's modifications to this Court's template list of essential resources were supported by substantial evidence.

A. "Sufficient Numbers of Qualified Teachers, Principals and Other Personnel"

The trial court's substitution of the more specific phrase "teachers, principals and other personnel" for the template's general description of "personnel" was compelled by the evidence, which demonstrated that New York City children, even if provided with properly qualified teachers, still require an infrastructure of administrators and support personnel who can ensure that the teachers are able to do their jobs well. PFOF ¶¶ 489-91. *See* discussion, *infra* at 67-72. The trial court also substituted the broader term "qualified" for the original "adequately trained" to reflect the State's own emphasis on ensuring that all teachers entering the classroom are properly certified from the outset – and that, in addition, they receive appropriate, on-going professional development support. PFOF ¶¶ 510-18; *see also* 20 U.S.C. § 6319(b)(8) (requirement that by the 2005-2006 school year all teachers in core academic subjects must be "highly qualified" as defined in the No Child Left Behind Act).

B. "Appropriate Class Sizes"

There was extensive evidence concerning the importance of appropriate class size. *See infra* at 78-82. The Court's concept of "sufficient" implicitly encompasses the concept that the schools have enough teachers to permit classes of a reasonable size. The extensive findings of overly large classes in New York City schools called for an explicit emphasis on "appropriate class sizes."

C. "Adequate and Accessible School Buildings With Sufficient Space to Ensure Appropriate Class Size and Implementation of a Sound Curriculum"

The trial court reformulated this Court's template's reference to "minimally adequate physical facilities and classrooms" to reflect the fact that the evidence conclusively demonstrated that "minimally adequate" means more than physical space alone. Facilities must not only provide "enough light, space, heat and air to permit children to learn," but they must also

accommodate appropriate class sizes, support instrumentalities of learning (such as computers), and provide suitable space for libraries and laboratories. Dilapidated, overcrowded facilities limit the amount of usable instructional space, constitute health hazards and make learning a physical challenge. *See* discussion *infra* at 72-78.

Moreover, since more than 75 percent of New York City's schools are not accessible to those with limited mobility, the trial court properly stated that buildings must be not only "adequate," but also "accessible." *See* 29 U.S.C. § 794; 42 U.S.C. § 12132; 28 C.F.R. § 150; 34 C.F.R. § 104.22 (requiring school districts to ensure accessibility to all programs and services.)

D. "Sufficient and Up-To-Date Books, Supplies, Libraries, Educational Technology and Laboratories"

The evidence at trial starkly demonstrated that "instrumentalities of learning" now means more than the desks, chairs, pencils and current textbooks that met the needs of previous generations. In today's technologically-focused society, computers, well-stocked libraries, and functioning laboratories have become essential for a sound basic education. The Regents have specifically stated that to meet state standards, students need access to "contemporary technology and other instructional materials," Px 1 at 168; Px 3 at 168; Px 5 at 295, a position that reflects the consensus of all the business leaders and educators who testified at the trial that computer technology skills are imperative to meet the demands of the modern workplace. PFOF ¶¶ 984-91.

The trial court's inclusion of the word "supplies" among the stated examples of instrumentalities of learning is supported by evidence that New York City public schools suffer from a chronic lack of the most basic classroom consumables such as chalk, markers, writing paper and construction paper. PFOF ¶¶ 972-80. The harsh realities of the absence of basic

supplies in New York City's schools requires a reference to the obvious need for basic classroom supplies in the list of essential resources. *See* discussion *infra* at 82-87.

E. "Suitable Curricula, Including an Expanded Platform of Programs to Help At-Risk Students By Giving Them 'More Time On Task'"

The trial court substituted the broader term "suitable" for the template's reference to "up-to-date" curricula, and added an explicit provision calling for "an expanded platform of programs to help at-risk students by giving them 'more time on task'." *Trial Ct.* at 114-15. This addition recognizes the need to ensure that the curriculum takes into account students' actual needs in order to meet the Educational Article's mandate that "all" children be provided with the opportunity for a sound basic education.

For the 73 percent of New York City children who are at risk of educational failure, the evidence showed that extra services, which may include after-school or summer programs or small group literacy programs, are an essential part of the curriculum. Without them, too many children simply will not learn to read or write. The evidence also showed that these extra services work. These programs, therefore, are an inherent part of any "basic curriculum" intended to impart minimal competency. *Trial Ct.* at 37; s*ee also* discussion *infra* at 90-91; *Campbell County Sch. Dist. v. State*, 19 P.3d at 545 ("Some number of students in every school district present extraordinary educational challenges that frequently require services of a nature or quantity that imply extra costs."); 20 U.S.C. § 6311(b)(2)(c) (mandate in the No Child Left Behind Act holding school districts responsible for academic progress of each school as a whole and also specifically for the achievement of "economically disadvantaged students," "students from major racial and ethnic groups," "students with disabilities" and "students with limited English proficiency").

The trial court's specification of an expanded platform of programs for at-risk children is not, however, a mandate for endless funding of programs to compensate for all the academic problems of at-risk children. Contrary to the implication by the Appellate Division, *App. Div.* at 16, Plaintiffs have never taken the position that *all* socioeconomic disadvantages can be overcome through additional educational resources. But the evidence makes clear that *many* of these disadvantages can be overcome, Sobol: 1083:8-1091:13, 1773:20-1775:7, and the trial court properly recognized that the Education Article's guarantee of the opportunity for a sound basic education for all children would be an empty promise if good-faith, reasonable efforts are not made to provide a meaningful *opportunity* for at-risk students to obtain a sound basic education. *Trial Ct.* at 63.

F. "Adequate Resources For Students With Extraordinary Needs"

The trial court included an item for "students with extraordinary needs" to ensure that students with disabilities and English Language Learners ("ELL"), as well as at-risk students, obtain the resources they need to have a meaningful opportunity for a sound basic education. Assurance of adequate resources to meet the needs of these students has been clearly recognized and explicitly mandated by both state and federal laws. *See, e.g.*, 20 U.S.C. § 1401, *et seq.*; N.Y. Educ. L. § 4201, *et seq.;* 20 U.S.C. § 6311(b)(1)(6c). The record includes substantial evidence demonstrating that students with physical and mental disabilities and ELL require additional resources in order to meet their educational needs, *see* discussion *infra* at 87-90; PFOF ¶¶ 1224-29, a proposition which the State has never disputed.

As with the provision of extra resources for at-risk students, the trial court's specific inclusion of this essential resource is an affirmation of the Education Article's requirement that *all* children receive the opportunity for a sound basic education, and is meant to provide a

reasonable level of programs and services to meet their needs, consistent with existing legal requirements, but not to guarantee that all of their disabilities will be fully overcome.

G. "A Safe, Orderly Environment"

The trial court's inclusion of a "safe, orderly environment" on its list of essential resources is a commonsense acknowledgement of the fact that safety and decorum are the *sine qua non* for creating an effective climate for teaching and learning. The evidence at trial established that that the extensive crime, violent gangs and drug culture that are endemic to poor urban centers impede learning and strongly impact personnel recruitment and retention. PFOF ¶¶ 1442-48; *see also* 20 U.S.C. § 7912 (requiring states to ensure that all students who attend a "persistently dangerous" school be allowed to transfer to a safe school).

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The trial court, following the pattern established by this Court in the original template, identified the essential resources by category only, without specifying how much or what level of any particular resource is required in order to meet the constitutional minimum. *CFE I* at 114-15. This approach is appropriate because, as the record in this case makes clear, the specific circumstances of each district must be considered in determining the adequacy of any particular resource, or the overall adequacy of all resources. For example, the determination of what class size is "appropriate" will depend on the educational needs of the students, the ability and training of the teachers, the availability of other resources such as guidance counselors and remedial assistance, and the cumulative sufficiency of resources provided to students over several years. Thus, the appropriate class size in a district with few at-risk students that is staffed by well qualified teachers and substantial support services in modern facilities may be higher than a district with a high percentage of at-risk students taught by poorly qualified teachers who lack access to sufficient services to address the extraordinary educational needs of their students.

PART II

THE OVERWHELMING EVIDENCE OF RESOURCE INADEQUACIES AND EDUCATIONAL FAILURE PROVES THAT THE NEW YORK CITY PUBLIC SCHOOL SYSTEM FAILS TO PROVIDE THE OPPORTUNITY FOR A SOUND BASIC EDUCATION

The record produced during the seven-month trial of this case includes extensive evidence concerning virtually every aspect of the New York City public school system. The trial court's exhaustive findings concerning resource inadequacies and educational failure are supported by the overwhelming weight of this evidence, which proves beyond any doubt that that "the education provided to New York City students is so deficient that it falls below the constitutional floor set by the Education Article of the New York State Constitution." *Trial Ct.* at 4.

For decades, the New York City public school system has had too few resources and too many needy students. So, while the system has always had some qualified teachers, some modern laboratories, some remedial programs and some schools with appropriate class sizes, it has never had enough of these or any other essential resource. As a result, the system – at every level – must continually make decisions about which thousands of students will *not* get adequate resources.

The testimony of Dr. Lester Young, Superintendent of District 13 (who has 30 years experience as a teacher and administrator), succinctly summarizes the extensive evidence of educational triage that has persisted over the last 20 years in New York City:

> At the classroom level . . . I have observed that teachers who have large classes of at-risk students are not able to devote enough time to the needs of all their students. When additional resources have been made available, I have observed that teachers must choose who among many needy students will receive these services, because there is never enough money to provide adequate services to all needy students.

> At the school level, I have observed . . . that principals must decide which classes will be provided with qualified teachers, because too many teachers in most of our schools are not properly prepared for effective classroom instruction. I have observed principals deciding which classes should receive up-to-date textbooks, because there was not enough money to buy books for every class.
>
> At the district level, I have observed . . . that superintendents must choose between a host of competing needs: between more reading specialists or more staff developers, between more books for inadequate libraries or more computers for underserved classrooms, between providing a comprehensive range of art and music classes or adding advanced courses for high achievers. In my experience, there has never been enough money available to allow superintendents to provide qualified teachers in every classroom; to provide adequate, functioning facilities in every building; to reduce class sizes to levels necessary to meet properly the needs of our students; and to provide the extended day, extended school year and other academic support services that our at-risk students clearly require.

Px 2900-Young Stmt. ¶¶ 14-16

The Appellate Division's failure to accept that this history of inadequacy deprived New York City students of a sound basic education appears to rest on three fundamental errors. First, the Appellate Division assumed that the socioeconomic conditions of many of the City's poor and minority students provide an excuse for failure, rather than evidence of educational need. So, rather than reviewing the evidence with the understanding that adequate resources are especially important to ensure that at-risk students achieve academic success, the Appellate Division assessed the adequacy of resources as if the particular needs of the City's students were not relevant.

Second, the Appellate Division assumed that it should assess the overall adequacy of the entire system by examining each of the various educational resources in a historical vacuum, without considering the cumulative and collective effect of resource inadequacies over time. So,

rather than assessing overall adequacy, the Appellate Division made individual findings about specific resources as if these resources had no effect on one another.

Third, the Appellate Division failed to base its decision on the weight of the evidence. Instead, the Appellate Division relied on unfounded opinion, made-up concessions and the misinterpretation of isolated facts to support its conclusions regarding each of the individual resources it found to be constitutionally sufficient.

Collectively, these three errors reflect an underlying failure by the Appellate Division to accept what this Court made explicit in *CFE I*: The Education Article is not merely "hortatory," but imposes a meaningful duty on the Legislature to ensure the availability of a sound basic education to all the children of the state, and it is the responsibility of the state's courts to "adjudicat[e] the nature of that duty" and remedy any violation. *CFE I* at 315. The Appellate Division abdicated its judicial responsibility, refusing to act even in the face of overwhelming evidence of resource inadequacies and educational failure.

We address each of these three errors in turn.

I. The Appellate Division Grounded Its Analysis on the Baseless Assumption That At-Risk Children Cannot Succeed Even If They Are Given Appropriate Educational Resources

Perhaps the most egregious error made by the Appellate Division is its contention that "both parties agree that the City students' lower test results in comparison with the rest of the State are largely the result of demographic factors, such as poverty, high crime neighborhoods, single parent or dysfunctional homes, homes where English is not spoken, or homes where parents offer little help with homework and motivation." *App. Div.* at 16. Having wrongly assumed that this pernicious argument was a proven fact, the Appellate Division concluded that schools could do nothing to overcome whatever learning disadvantages might arise from such conditions. It could then determine that "the cure lies in eliminating the socio-economic

conditions facing certain students," rather than holding the State to its constitutional obligation to provide adequate educational opportunity to all school children. *Id.*

Plaintiffs never agreed with the Appellate Division's view of at-risk children and the Appellate Division's assumption that at-risk children are irretrievably doomed to failure is contradicted by the overwhelming weight of the evidence, including extensive reports and findings of the State, through the Board of Regents and the State Education Department, as well as the State's own experts at trial. As the trial court and Justice Saxe found, and the record overwhelmingly establishes, a student who grows up in an underprivileged home is not barred from academic success if schools provide adequate educational resources. *Trial Ct.* at 71, 75-76; *App. Div*. at 29-31 (Saxe, J., dissenting in part).

A. All Children, Including Those At Risk, Can Achieve If They Are Provided With the Resources They Need

The record establishes beyond doubt that children who are at risk for educational failure can and do learn if they are provided with the extra resources they need, and that socioeconomic background is not the primary determining factor of a child's academic abilities. This evidence reflects a broad consensus recognizing the ability of all children to achieve at high levels, and the State's own education policy is founded on this principle. Indeed, the Regents' annual reports to the Legislature have for years emphatically acknowledged that "all children can learn." *See, e.g.*, Px 1 at 3; Px 3 at 3; Px 5 at 3; Px 21 at 123. The 1999 655 Report confirmed that "children from even the worst circumstances, if given appropriate instruction and support, can succeed in school. We have daily evidence that this is so, demonstrated by caring, effective teachers and children in pockets of excellence obscured by statewide averages." Px 1 at 167. Defendants' own experts testified that "there's ample evidence . . . that poor kids can learn just as less poor kids or better-off kids," Hanushek 15928:8-14, and that socioeconomic status is no excuse for the

system's failure to educate at-risk children. Murphy 16650:6-11. And the State also knows that it takes extra resources to compensate for the factors that render children at risk for educational failure: "We know that all children can learn, but children who have been placed at risk by poverty, homelessness, poor nutrition, or inadequate care, often require special educational and support services to master basic competencies." Px 1 at 68.

The record also contains concrete examples of the kinds of extra resources that, properly deployed, can make a tremendous difference in at-risk students' achievement and academic advancement. There is broad consensus, shared by State officials and Defendants' experts alike, about what resources and programs will allow at-risk children to overcome their educational deficiencies: Better teachers, smaller class size, adequate facilities, and appropriate instructional materials all have particular benefits for at-risk students. Px 1027; Ferguson 5981:20-5982:14; Hanushek 15928:8-16; PFOF ¶¶ 278-91. Similarly, resources and programs that provide more "time on task," *i.e.*, increase the amount and intensity of academic instruction, are extraordinarily helpful. Px 1027; PFOF ¶¶ 1073-76.

At-risk children generally need more time on task than children whose academic work may receive more reinforcement outside of school. They can get this time if they are in smaller classes, if they are assigned to small group reading tutorials, if they have access to extended day and summer school programs. There is substantial evidence that providing these types of resources over time will dramatically increase the chances for academic success.

For example, successful programs like Reading Recovery and Success For All provide clear proof that extra resources can compensate for risk factors. In the 1997-98 school year, ***99 percent*** of the lowest performing first grade students in the City who participated in a Reading Recovery program were able to meet first grade reading standards, compared to just 38 percent

of at-risk first graders who did not participate and 61 percent of first graders who are not considered at risk. Px 3161 at 3. With respect to Success For All, the State itself has found that the program "significantly improves reading performance, especially for students in the lowest 25 percent of their class." Px 1027 at BOR 02330. These programs work, but, as the record makes clear, they have never been implemented on a sufficient scale to reach all of the children who would benefit.

B. At-Risk Children Also Have a Right to a Sound Basic Education

The Education Article expressly requires the State to provide for the education of "*all* the children of this state." N.Y. Const. Art. XI, § 1 (emphasis added). If, as this Court has held, this provision is more than merely "hortatory," *CFE I* at 315, New York City's 800,000 at-risk children must also enjoy this right. But a system that ignores their needs, fails to provide them with the opportunity to obtain a sound basic education, and dooms them to failure cannot, under any reasonable interpretation, be deemed to satisfy the Education Article's mandate that the State provide for "all the children." Any examination of the State education system must therefore account for their needs, just as it accounts for the needs of children from privileged backgrounds.

In his dissent, Justice Saxe recognized that factoring out socioeconomic factors as the majority did "limits the State's responsibility to that of providing whatever educational experience would be necessary for some theoretical student, without socioeconomic disadvantages, to obtain the requisite education." *App. Div.* at 29. But the Education Article does not permit the State to educate a fiction; it must educate the City's real children. In Justice Saxe's words, "[t]o properly weigh whether a minimally adequate education is being offered to New York City's public school students, the actual circumstances and needs of all the students must be considered." *Id*. at 30.

Thus, in assessing the adequacy of the resources provided in the New York City public school system, the Appellate Division should have considered the needs of the system's children. It may be that children from more fortunate circumstances can achieve academic success in large classes, taught by unprepared teachers in decrepit buildings without libraries and laboratories. But the record makes clear that these conditions are not sufficient to provide the opportunity for hundreds of thousands of New York City children to obtain a sound basic education.

II. The Appellate Division Failed to Acknowledge That Education Is a Cumulative Process, Reflecting the Collective Effect of Resources

Common sense requires that any inquiry into the adequacy of the resources available to New York City students account for the fact that education is a cumulative process in which student achievement is affected, not only by the resources that are available in any particular, isolated year, but more importantly by the resources that have been provided over the course of a student's time within the system. A student's skills and knowledge at the end of twelfth grade are a function of what she learned and experienced over the course of her entire educational career.

As Defendants' own expert Dr. John Murphy agreed, the effects of an educational system are cumulative on children. Murphy 16630:2-5. Dr. Murphy's opinion reflected his own experience as a school superintendent, when he observed that students who received additional resources beginning in kindergarten showed greater improvement than children who did not begin receiving such resources until second grade. Murphy 16630:16-19; *see also* Px 3376. Dr. Murphy's testimony is consistent with the testimony of Plaintiffs' expert, who explained that the curriculum frameworks that formed the basis for the RLS were developed on the premise that "education is a cumulative activity and so everything that's represented at the commencement level [of the Learning Standards] really begins much earlier." Darling-Hammond 6477:7-17.

Just as education itself is cumulative, the negative effect caused by each category of inadequate resources is compounded by the inadequacies of other resources. For example, teachers who are already unqualified are made even less effective when they are placed in over-sized classes, large classes are even more difficult to manage and instruct when they are held in inadequate facilities and without the benefit of appropriate textbooks or classroom supplies, and a curriculum cannot be implemented without qualified teachers, appropriate class sizes, and adequate facilities and instructional materials, no matter how well it is designed.

The collective and cumulative effect of resource inadequacies is magnified for at-risk children. At-risk children are less likely to receive academic reinforcement outside of school; they are less likely to have as many books, up-to-date computers, parents with sufficient time to help with homework and opportunities for academically enriching experiences as children from more affluent homes. Thus, if an at-risk child falls behind in the early years of school, there is a greater chance of academic failure in later years.

Nowhere in the Appellate Division's opinion is there any indication that the majority understood the cumulative and collective effect of resource inadequacies in general, or on at-risk children in particular. Instead, the court's opinion reflects a snapshot-like view of education that is frozen in time and divorced from history, one in which pervasive and sustained inadequacies dating back years are of no consequence at all to the challenges faced today. Under the Appellate Division's approach, a child who may happen to be taught by a qualified teacher in a decent facility in eleventh grade is receiving the opportunity for a sound basic education even though sustained inadequacies throughout her academic career have prevented her from learning what is necessary to succeed in the eleventh grade.

The Appellate Division simply refused to consider the overall effect of resource inadequacies. The Appellate Division's opinion erroneously pretends that each of the resources it reviews exists independently of other resources, divorced from any cumulative and collective effect, and it reflects no effort to determine whether the resources in New York City are sufficient when considered as a whole and in relation to one another.

III. The Trial Court's Findings Establish a Constitutional Violation

The trial court's findings of gross resource inadequacy and massive educational failure establish beyond doubt that the State has failed to meet Plaintiffs' proposed constitutional standard, or any meaningful standard. The trial court found major deficiencies in every major resource category:

- **Teachers**: "The quality of New York City's public school teachers – in the aggregate – is inadequate." *Trial Ct.* at 25.

- **Principals and Administrators**: The New York City public school system "has increasingly been unable to fill principal, assistant principal and other administrative positions with adequately qualified individuals because of low salaries and poor working conditions. . . . [T]hese administrators play a crucial role in building and maintaining effective schools." *Id.* at 35.

- **Facilities**: Every examination of the New York City's 1100 public school buildings over the last decade has found them to be in "parlous physical state" and "[t]he credible testimony at trial confirmed this bleak picture." *Id.* at 39. "A substantial number of BOE's approximately 1100 facilities require major infrastructural repair to items such as roofs and facades. Many more facilities are plagued by overcrowding, poor wiring, pock-marked plaster and peeling paint, inadequate (or non-existent) climate control, and other deficiencies that speak of a history of neglect." *Id.*

- **Class Size**: "[L]arge class sizes in New York City's public schools have a negative effect on student performance." *Id.* at 54.

- **Instrumentalities of Learning**: "At least since the early 1980s New York City has endured a chronic shortage of adequate textbooks." *Id.* at 57. "The books in New York City public school libraries are inadequate in number and quality." *Id.* "New York City public schools have in the last two decades suffered from inadequate classroom supplies and equipment. Science classes have suffered from a shortage of lab supplies such as beakers, Bunsen burners, beam balances, and microscopes. In the same period schools have suffered from a lack of basic supplies such as chalk,

paper, art supplies, and, in some schools, desks and chairs." *Id*. at 57-58. "For the last decade New York City public schools have failed to provide adequate instructional technology to their students." *Id.* at 58.

- **Resources for at-risk students:** "[A]t-risk students need specially tailored programs . . . in order to increase their academic achievement . . . [but these] programs have [not] been fully implemented in New York City public schools." *Id.* at 76. "Literacy programs are particularly important . . . [but] because of insufficient funds [these programs] are rationed to only the neediest students." *Id.*

- **Curriculum**: "Inadequate teaching and . . . inadequate school facilities and instrumentalities of learning have hampered the delivery of curricula." *Id.* at 37.

In addition to relying on its specific findings of resource inadequacies, the trial court also looked to measures of student outcomes. The trial court concluded that "City public school students' graduation/dropout rates and performance on standardized tests demonstrate that they are not receiving a minimally adequate education." *Id.* at 67.

Taken individually, each of the trial court's findings demonstrate failure in one resource area, but the trial court rightly did not single out any particular fact as the basis for its ultimate conclusion that "the education provided New York City students is so deficient that it falls below the constitutional floor set by the Education Article of the New York State Constitution." *Id.* at 4. Instead, the trial court's opinion is based on a careful consideration of the cumulative and compounding effect of resource inadequacies in New York City on a sustained basis over more than two decades. It is the continued and collective deprivation of these resources in the City school system that has created a school system in which only six in ten students actually graduate. The trial court also properly considered resource inadequacies and student outcomes together, noting that the evidence of educational failure reflected in student outcomes "becomes

overwhelming when coupled with the extensive evidence . . . of the inadequate resources provided the City's public schools." *Id.* at 67-68.[17]

In short, a fair review of the record of gross resource inadequacies and massive educational failure provides no basis to conclude that the system has satisfied any meaningful constitutional standard. The record fully supports the conclusion that the New York City public school system has for a long time failed to provide its students with the opportunity to obtain an adequate high school education sufficient to prepare students for competitive employment and the responsibilities of citizenship.

And there is substantial evidence that the system has not even provided the opportunity for students to obtain the eighth grade education embraced by the Appellate Division. In 1999, 65 percent of New York City's eighth grade students could not meet the State's standards for reading and 77 percent of those students could not meet the math standards. PFOF ¶¶ 1525-30. Moreover, New York City's junior high school students rank at the bottom on statewide tests designed to measure implementation of the science and social studies curriculum. PFOF ¶¶ 1531-34. High failure rates in high school courses and high dropout rates after the eighth grade also demonstrate that many New York City students are not mastering junior high school level skills. PFOF ¶¶ 1525-34.

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[17] Justice Saxe, in his dissenting opinion in the Appellate Division, acknowledged that the trial court's findings are well supported by the evidence, finding that there is "*more than ample* support for the [trial court's] central finding that the City's 'at-risk' students . . . are unable to obtain the education to which they are entitled." *App. Div.* at 28 (emphasis added). Justice Saxe also found that the "evidence supports the trial court's conclusion that it is deficiencies in the programs, personnel, tools and instrumentalities of learning provided by the City schools that prevent these at-risk students from obtaining an education, and that these deficiencies are due to a lack of funds needed to provide the needed programs, personnel and training." *Id*.

IV. The Trial Court's Findings Are Supported by the Overwhelming Weight of the Evidence and the Appellate Division Had No Basis to Reverse

There simply is no basis for the Appellate Division's claim that the trial court's findings were based on "anecdotal evidence." *App. Div.* at 10-11. The trial court's findings are supported by voluminous, detailed data concerning virtually every aspect of the New York City school system. Much of this data is contained in reports of systemic conditions produced for or by the Board of Regents and the State Education Department, the New York City Board of Education, individual district superintendents, independent commissions and agencies, and a host of other entities with extensive knowledge of the New York City public school system. The record also includes extensive expert analysis based on comprehensive databases.

The record supporting the trial court's findings includes testimony from a broad cross section of education officials and professionals with unquestioned depth and breadth of experience in New York City schools. Plaintiffs' witnesses included:

- **Ten New York City school district superintendents**, responsible for three of the City's five high school superintendencies, six of the City's 32 community school districts, and a special citywide district; collectively these superintendents were responsible for nearly one-third of the City's students.

- **Thirteen of the most senior central BOE administrators**, including the Deputy Chancellor for Operations and the executives in charge of finance, facilities, personnel and assessment;

- **Seven current or past senior officials of the State Education Department and the Board of Regents**, including the current Commissioner of Education, the former Commissioner of Education, and the Chancellor of the Board of Regents.

- **Eleven experts in education, teaching, testing and educational research**, each of whom had extensive experience in New York schools;

- **Several education and business leaders with substantial experience in New York City**.

In addition, the record also includes extensive documentary evidence, consisting primarily of numerous reports authored by agencies, panels and commissions (including the

Board of Regents, the SED, State Comptroller, Division of Budget, Independent Budget Office, New York City Council, New York City Board of Education and various independent groups) charged with conducting broad, in-depth examinations of education in New York State and in New York City specifically. One of the most comprehensive sets of documents detailing systemic conditions in the New York City Schools are the "Chapter 655 Reports on the State of the Schools" published annually by the SED pursuant to the New York State Education Law, Section 215-a.[18] The 655 Reports are among literally hundreds of documents authored by State officials admitting to and deploring the inadequacy of the New York City public school system. Their documents, and numerous other statements by State officials concerning educational adequacy, constitute admissions by the State that reason and common sense require be given great weight in this case.

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[18] The 655 Reports are required to detail:

> [E]nrollment trends; indicators of student achievement in reading, writing, mathematics, science and vocational courses; graduation, college attendance and employment rates; such other indicators of student performance as the regents shall determine; information concerning teacher and administrator preparation, turnover, in-service education and performance; information concerning school library expenditures and school library media specialist employment; expenditure per pupil on regular education and expenditure per pupil on special education and such other information as requested by the governor, the temporary president of the senate, or the speaker of the assembly. To the extent practicable, all such information shall be displayed on both a statewide and individual district basis and by racial/ethnic group and gender.

N.Y. Educ. L. § 215-a(1).

There is no question that State officials charged with managing the State education system have long recognized glaring inadequacies and educational failure in New York City. For example, the 1999 655 Report includes the following summary:

> Consider these contrasts between New York City and the more advantaged districts: Thirty-five percent – compared with two percent – of third-graders required remediation in reading. Twenty-two percent – compared with 60 percent – of graduates earned Regents diplomas. Seventy-three percent – compared with five percent – were eligible for free lunches. Despite New York City's large number of students placed at-risk by poverty and limited proficiency in English, the City's mean expenditure per pupil was two-thirds that in the most advantaged districts. Consequently, New York City must compete for teachers with suburban districts whose average teacher salary exceeds the City's by 36 percent.

Px 1 at page vi. Each of the 655 Reports alone establishes that the City schools are failing to provide a sound basic education. These reports are representative of the many State-authored documents submitted into evidence.

A. The Overwhelming Weight of the Evidence Proved Gross Inadequacies in the Teaching Force and the System's Administrators

The trial court's findings with respect to teachers and administrators were supported by, *inter alia*, (a) the direct observations of superintendents responsible for one third of the City's teachers, (b) the SED's analyses of teacher quality, (c) voluminous systemic data demonstrating high rates of uncertification, the poor performance of City teachers on certification exams, their high rate of inexperience and the inadequacy of teacher training and professional development programs, (d) other well-recognized measures of teacher quality, and (e) expert analysis. PFOF ¶¶ 345-94; Px 1043; Px 1233; Px 1482.

Among other indicia of failure, this data shows that more than 13 percent of New York City teachers are uncertified (compared to just three percent in the rest of the state), PFOF ¶ 353, and over 30 percent have failed the basic certification test at least once. PFOF ¶ 376. Many

more City teachers have difficulty demonstrating minimum competency in the subjects that they are assigned to teach: 42.4 percent of City math teachers failed the State's math content exam at least once; 37 percent of teachers who took the biology exam initially failed; 37 percent initially failed earth science, and more than 48 percent initially failed physics. PFOF ¶ 377.

The inadequacies revealed by this data were confirmed by each of the district superintendents who testified at trial. The superintendents told of staggering inadequacies in the City's teaching force, based on direct observations and their review of data concerning teacher performance. *See, e.g.*, Cashin 321:17-322:10; Destefano 5290:19-5291:2; Px 2900-Young Stmt. ¶¶ 71, 74. In fact, Defendants' own expert admitted that, after observing City teachers in preparation for his testimony in this case, he was forced to add a new "terrible" category to the bottom of his teacher evaluation scheme. Murphy 17439:12-17441:12; PFOF ¶ 348.

The Appellate Division apparently considered none of this evidence and its discussion of teacher and administrator quality in New York City is representative of the quality of its analysis of all of the evidence. After simply cataloging the objective measures of City teachers' inadequacies (and ignoring the testimony of the superintendents and the Defendants' own expert), the Appellate Division dismissed this evidence in a single sentence, opining without any further explanation that "[t]he mere fact, however, 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." *App. Div.* at 13. This statement misunderstands the record. It was not statewide comparisons that proved inadequacy, but the fact that the qualifications of the City teachers are objectively so low. Both Plaintiffs' and Defendants' experts agreed that the teacher qualification data in the record provide a useful basis for assessing adequacy. PFOF ¶¶ 352-67.

The Appellate Division also seized upon a discredited teacher review system, known as the U/S system, to justify its wholesale rejection of the trial court's findings. *App. Div.* at 13-14. There is no basis for the Appellate Division's reliance on this evidence.

1. The Trial Court Correctly Declined to Rely Upon the U/S System in Analyzing Teacher Adequacy in New York City

Each year, New York City teachers are reviewed by their principals and receive either a "U" for Unsatisfactory or an "S" for Satisfactory. Tames 3087:12-3088:17. Despite overwhelming evidence of widespread inadequacies in the teaching force, the records of the Board of Education's Division of Human Resources reveal that very few New York City teachers actually receive Us. Tames 3094:4-3095:15; Dx 11115; Dx 12739. Finding that the trial court "gave insufficient weight to [this] evidence," *App. Div.* at 13, the Appellate Division transforms this single fact into the basis of its rejection of all of the trial court's findings with respect to teacher quality. For a number of reasons, many of which apparently were not considered by the Appellate Division, the U/S system was discredited as a meaningful indicator of teacher quality.

As the trial court found, the evidence clearly established that the U/S system says little about teacher quality and much about the daunting challenges that administrators face in trying to replace underperforming teachers. *Trial Ct.* at 32. Five district superintendents testified that because there are no available candidates to replace an unsatisfactory teacher, administrators are faced with the unenviable dilemma of either allowing an unsatisfactory teacher to continue in the classroom or creating a vacancy. Cashin 333:14-334:3; Coppin 667:22-668:23; Ward 3220:20-3222:5; DeStefano 5431:4-5433:22; Santandreu 13723:17-13724:24. In such circumstances, principals have a significant disincentive to give out "U"s to all but the worst of the worst teachers.

Superintendent Coppin described this problem in detail with respect to the Brooklyn High School Superintendency:

> [W]e do have teachers that are not satisfactory but you can't replace them. So you have a vacancy and the kids would have a series of subs[titute teachers] day in and day out. Or you'd ask a teacher to take an additional class; instead of teaching five classes a day, [that teacher] would teach a sixth class. I need not tell you – [a] teacher can't do it beyond a certain period of time. So you wind up going with this weak teacher . . . sending someone to help him or her, and rating that teacher satisfactory simply because you cannot recruit someone to replace this individual.

Coppin 668:11-23, *see also* Cashin 333:14-334:3; Ward 3221:12-23; DeStefano 5431:4-5433:22; Santandreu 13723:17-13724:24; Dx 19469 at 6-7.

In addition, the evidence conclusively demonstrated that the administrative process required to rate a teacher unsatisfactory is so time-consuming and cumbersome that it is often easier to try to work with unsatisfactory teachers in a usually unsuccessful effort to improve their performance than it is to rate them unsatisfactory through the U/S system.[19] A senior State official explained that even when administrators do try to rate a teacher unsatisfactory, "there are so many roadblocks that are placed in the way that, traditionally, the teachers are rated satisfactory" anyway. Evans-Tranumn 1518:8-11. Superintendent DeStefano, a former principal, described the process as "arduous" for a principal. DeStefano 5430:15.

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[19] Furthermore, principals face other hurdles and disincentives to rating a teacher unsatisfactory. For example, principals are restricted from transferring teachers who receive an unsatisfactory rating out of their current schools for three years under the UFT contract. DeStefano 5428:11-5430:21; Podgursky 17650:9-17652:4; Px 1155 at 116. The reward, therefore, for a principal who rates a teacher unsatisfactory is that the teacher will remain the principal's problem. DeStefano 5434:18-5435:8. Defendants' own expert Dr. Podgursky recognized these problems when he stated that such internal transfer restriction systems create disincentives for principals to document professional malfeasance, and that under such a system it is easier for principals to award satisfactory ratings in the hope or with the understanding that an ineffective teacher will go elsewhere in the system. Podgursky 17651:17-17652:4.

The Appellate Division belittles and discounts the testimony of superintendents on this subject on the ground that teachers are directly evaluated by principals and not by superintendents. According to the Appellate Division, none of the evidence of the meaninglessness of the U/S system is worth consideration because "there was no testimony from principals, the ones who actually fill out the forms." *App. Div.* at 13. These assertions are representative of the Appellate Division's propensity to substitute its preconceived opinions for a genuine consideration of the record. There was no testimony from principals because the trial court ruled that such evidence was not "systemic." In fact, Defendants successfully objected to testimony from a superintendent concerning his experience as a principal because it was not systemic. Santandreu 13519:12-24.

Moreover, this argument ignores the facts that superintendents themselves visit classes and directly supervise the principals and teachers, and ***nearly all of the superintendents who testified at trial were themselves former principals who were at one time responsible for rating teachers under the U/S system***. Px 2026A-Zardoya Stmt. ¶¶ 4-5, 15; Px 2163; Px 2332A-Rosa Stmt. ¶¶ 3-4, 13, 18, 20; Px 2855A-Lee Stmt. ¶¶ 3, 8-9; Px 2900 Young Stmt. ¶¶ 3, 19; Cashin 227:13-228:23, 237:24-238:5; Coppin 556:10-559:4; Ward 3117:7-13, 3118:19-3119:3; DeStefano 5248:11-5249:21, 5255:2-5256:7, 5383:8-19; Fink 7702:3-14.

Finally, after faulting Plaintiffs for failing to take testimony from principals, the Appellate Division somehow divined 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 supposition that deficiencies are unreported due to sloth or fear." *App. Div.* at 14. But this opinion – and its implication that the principal-based U/S system is meaningful – is simply without evidentiary basis because, ***as the Appellate***

Division itself acknowledged, no party called any current principals to the stand, and witnesses who were called explicitly refuted this opinion. *Id.* at 13-14. The Appellate Division cannot simply elevate the U/S system over all of the other evidence presented in the absence of supportive testimony.

In sum, the U/S system provides no basis for the Appellate Division's rejection of the trial court's finding concerning inadequacy of the teaching force.

2. The Appellate Division Failed to Consider Administrator Quality

The trial court's findings concerning inadequacies in the administrative staff are supported by, *inter alia,* (a) data concerning the decline in the quality and quantity of applicants for administrative positions, (b) the testimony of superintendents, and (c) expert analysis and testimony. PFOF ¶¶ 492, 495-504.

The Appellate Division failed to address administrator quality and apparently accepted the trial court's findings. The evidence established that "administrators play a crucial role in building and maintaining effective schools," *Trial Ct.* at 35, and that New York City schools suffer from a critical shortage of qualified administrators. Px 2855A-Lee Stmt. ¶ 123; Ward 3236:4-15; DeStefano 5445:25-5446:24; Fink 7784:6-18, 7828:17-7829:3; Fruchter 14903:23-14904:9; Walberg 17251:3-16; Podgursky 17627:21-17628:3; PFOF ¶¶ 489-91. As of November 1, 1999, no less than 1,091 administrator positions were vacant in the City, including 575 assistant principal and 212 principal positions. Px 1275; Tames 3018:8-17; PFOF ¶¶ 497-98.

B. The Overwhelming Weight of the Evidence Proves that New York City's School Facilities Are Inadequate

The trial court's findings concerning the inadequacies in New York City's school facilities are supported, *inter alia*, by (a) the findings of numerous legislative, SED and City

commissions reported over the last two decades detailing extensive facility failings, (b) the direct observations of superintendents who testified (without rebuttal) that the photographs of abysmal facilities they sponsored into evidence were representative of conditions throughout their districts, and that many of their schools lacked adequate light, heat and air, as well basic necessities such as sufficient electricity to run computers and working plumbing, (c) voluminous statistical reports documenting the conditions of all the City's schools, and (d) budget documents showing chronic underfunding of the system's capital and maintenance needs. PFOF ¶¶ 677-884.

The State's own systemic assessment of the quality of the City's facilities concluded that:

> The situation in New York City is at the breaking point. Decades of neglect, deferred maintenance and mismanagement have resulted in overcrowded classrooms, leaking roofs and flooded gymnasiums. Parts of roofs and walls are dangerously falling apart through lack of timely repair. Unhealthful environments exist for many teachers and students. Resources have been wasted by energy inefficient buildings. Large numbers of students have been denied access to science laboratories, technology or other learning environments necessary to meet the high standards needed for success in today's world. Current spending in New York City is not even able to stabilize existing buildings and prevent further deterioration. There is no money for new construction, technology or modernization.

Px 1028 at SED00082977.

Indeed, every official, agency or commission that has studied the New York City public school system has concluded that the New York City facilities are terribly inadequate as a result of years of disrepair, overcrowding, lack of usable libraries, laboratories, art rooms, music rooms and gymnasiums, and the absence of adequate infrastructure to support modern electrical systems and instructional technology.

Nevertheless, the Appellate Division completely rejected the trial court's findings with respect to New York City school facilities on the basis of three "facts" that it purported to extract

from the record: (1) all "immediately hazardous" conditions in school buildings had been repaired by the time of trial, and all buildings had been made watertight, *App. Div.* at 10; (2) there was no proof that the absence of science labs, music rooms and gyms "are so pervasive as to constitute a system-wide failure," *id.*; and (3) overcrowding in City schools "can also be dealt with by less expensive means [than new construction], such as transferring students between schools, extending the school day or providing year-round education." *Id.* at 11. None of these findings reflect the weight of the evidence.

1. New York City's School Facilities Are Not Being Repaired

Even if it were true that all "immediately hazardous" conditions in City schools had been remedied, it is difficult to conceive of a lower and more meaningless standard of adequacy than the mere fact that children can attend schools without fear of sustaining physical injury on a day to day basis. In any event, the reality is that necessary repairs and improvements are ***not*** being made. Nine years ago, as a result of the shortage of funds, the Board of Education was forced to narrow the "scope of its central maintenance operation to only those repairs needed to keep critical building systems – roofs, plumbing, electrical, boilers, windows, and such – basically operational." Px 729. But the BOE has not even been able to meet this standard; there was extensive evidence of major system failures and superintendents reported that buildings lacked sufficient heating and adequate plumbing. PFOF ¶¶ 715-40. The Division of School Facilities receives approximately 30,000 work orders each year but is able to complete only about half to two-thirds of those requests. Zedalis 4367:6-12. As a result, thousands of repairs go undone each year. Zedalis 4361:13-4363:24, 4368:3-4, 4368:21-4369:5.

2. New York City Public Schools Lack Necessary Educational Facilities, Including Laboratories and Libraries

The evidence shows that at least 31 of the City's high schools – approximately one-third of all high schools in the City system – have no science labs at all, despite the fact that the Regents require these students to take lab science courses. Px 1533; Zedalis 4750:3-4751:20, 4752:13-4754:2. Similarly, although fourth-graders are expected to take a hands-on science exam, most districts have no working science lab in any of their elementary or middle school buildings. Px 2050; Px 2332A-Rosa Stmt. ¶ 112; Px 2900-Young Stmt. ¶ 54; Cashin 308:23-310:6; Doran 4688:22-4689:19; DeStefano 5338:8-5339:11; Zardoya 6976:7-15, 7337:12-15; Young 12826:7-16, 12864:3-12865:4; PFOF ¶¶ 846-48. In addition, over the course of decades, functioning libraries were eliminated from most New York City schools. It was only in the mid-1990s that ***private funds*** were used to restore libraries in some elementary schools. At the time of trial, hundreds of schools continued to lack useful libraries. PFOF ¶¶ 961-67.

Art and music rooms are no more common. A survey by the Office of the Public Advocate found that, out of 43 surveyed elementary schools, only nine had art rooms and just four had music rooms. Px 489 at 1, 25-26, Table 24. The evidence also established that numerous students attend schools that lack functioning gymnasiums, or use rooms that are not suitable for physical education and may even be unsafe. Px 489 at 2, 27; Px 1321; Px 1764; Px 2047; Px 2855A-Lee Stmt. ¶ 94; Px 2900-Young Stmt. ¶ 56; Doran 4690:18-4691:8; Zedalis 4747:14-23; Virginia 5776:19-5778:9; Zardoya 6977:17-6978:14; Ward 9911:8-20.

3. New York City's Overcrowding Problems Cannot Be Remedied By The Appellate Division's Suggested Solutions

The evidence demonstrated that the Appellate Division's suggestions as to how to fix the overcrowding problems were rejected by the responsible officials long ago because they will not work. For example, several districts do try to manage overcrowding through bussing (which the

Appellate Division euphemistically refers to as "transferring"), but districts try to minimize its use because of its proved negative effect on learning and its extensive practical problems in New York City. Zedalis 4735:23-4736:13, 6828:13-20; DeStefano 5297:24-5300:20, 5307:25-5309:6, 5639:17-5640:22; Zardoya 6955:13-23; Rosa 11075:10-18; Lee 12716:18-12717:12; PFOF ¶¶ 809-11. Defendants' own expert Dr. Walberg testified that bussing, particularly in New York City, inhibits parental involvement in children's education, reduces the time available for study and learning and interferes with extracurricular activities. Walberg 17264:19-17265:11; *see also* Zedalis 4735:12-4737:6; Zardoya 6955:24-6956:14.

Similarly, the Board of Education has already explored and rejected the possibility of providing new seats through multi-track year round education because, in addition to increased facility costs, multi-track year-round education would conflict with remedial summer school. Px 108A at II-58, II-59, Figure IIC-23; Zardoya 6968:14-6969:8; 7333:3-14; Donohue 15283:17-15284:16. In any event, contrary to the Appellate Division's belief, the Board of Education is *not* free to implement multi-track year-round education. In order to be remotely financially feasible, year-round education requires state legislation to permit schools to obtain state aid for the summer on the same basis as the rest of the year. Px 108A at I-7. The state, however, has never passed this legislation. Donohue 15283:17-15284:9.

The Appellate Division's attempt to wish away the overcrowding problem by assuming that enrollment will drop by "about 66,000 students by 2008" is also unsupported by the weight of the credible evidence. *App. Div.* at 11. The enrollment projections used by the Board of Education are developed by outside consultants called the Grier Partnership whose projections show that enrollment will not drop below 1999 figures until 2005. Dx 17124. Although a potential decline later in this decade is anticipated, it will not have a substantial effect on the

current need for expanded capacity because "the further into the future projections extend, the greater the probability of substantial error." Dx 17124 at 6-7; Zedalis 4522:14-4525:10, 6904:25-6905:9, 6509:14-6909:5.

Defendants presented no reason to doubt the Board's interpretation of its consultant's figures, and, in fact, there is already reason to believe that the later-year projections will prove too low because the Grier projections included demographic and fertility data only through 1997.[20] Dx 17124 at 6. Subsequent data for 1998 indicates that birth rates have risen for the first time in years, Zedalis 6908:8-6909:4; O'Toole 19797:23-19798:18; Dx 17124 at 13, and that overall population in the City jumped substantially in 1998. Dx 17124 at 8. There is a "quite regular and predictable" historical relationship between population, births and enrollments, which shows that birth trends typically follow population trends by two years, and first-grade enrollments typically follow births by six years. Dx 17124 at 8. Immigration is also a key variable in the Grier projections. O'Toole 19795:2-9; Dx 17124 at 2. Recent data on immigration not available when the Grier Partnership made its projections suggests that the decline in immigration to the City might be short-term. O'Toole 19795:10-18; Dx 17124 at 9.

4. There Is Substantial Proof That Inadequate Facilities Impede Learning

The Appellate Division dismissed the extensive evidence of grossly inadequate facilities, in part, because there was no precise statistical data tying these inadequacies to student performance. *App. Div.* At 10. In effect, the Appellate Division imposed a requirement of proof

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[20] In the 1999-2000 school year, the public schools enrolled nearly 40,000 more students than the Grier figures projected. Dx 17123A; Dx 19733B. The figures for the 2001-02 school year show that the Grier projections underestimated enrollment by over 26,000 students (1,072,608 projected versus 1,098,832 actual). *See* New York City Department of Education Summary of Statistics *at* http://www.nycenet.edu/stats/ (Jan. 25, 2003).

that makes no sense and is contradicted by the evidence. First, this Court included "physical facilities and classrooms which provide enough light, space, heat and air to permit children to learn" among its list of "essentials" that schools must provide, reflecting the commonsense notion that decent facilities are a critical educational resource. *CFE I* at 317. Second, as discussed above, education is a cumulative and collective experience, and it is very difficult, if not impossible, to make such direct links. Instead, adequacy must be assessed by considering the entirety of available resources and by considering the full range of student outcomes.

Third, there was substantial evidence, including findings of the Legislature and the SED, concerning the educational importance of maintaining all facilities in good repair and the importance of providing particular facilities such as laboratories and libraries. PFOF ¶¶ 837-80. The Legislature has enacted into law its finding that "the physical deterioration of [New York City] schools is a serious impediment to learning and teaching." New York City School Construction Authority Act, L. 1988 c. 738 § 1. And the SED has concluded that "[s]tudents do not learn as well in decaying buildings built more than half a century ago. The best teachers are not attracted to poorly-equipped, poorly maintained schools. If we do not act, more children will be forced to attend school buildings we would never tolerate working in." Px 148 at 6. All of this evidence supports the commonsense notion that decent facilities are a critical educational resource.

C. New York City's Class Sizes are Too Large to Promote Effective Learning, Particularly In Light of Other Gross Inadequacies

The trial court's findings concerning class size were supported by, *inter alia*, (a) extensive data concerning City and statewide class sizes, demonstrating that most New York City classes are substantially larger than classes elsewhere, even though New York City students have greater educational needs, face substantial resource inadequacies and are taught by less

qualified teachers, (b) numerous State, City, federal and independent reports concerning class size, (c) the observations of superintendents, and (d) extensive expert testimony concerning the benefits of smaller classes, particularly for at-risk students. PFOF ¶¶ 595-634.

Extensive systemic evidence established the importance of reduced class sizes in improving learning for students of all ages and particularly for those at risk of educational failure. Programs implemented by the State, the City and the federal government are all based on this notion,[21] and compelling evidence such as the Tennessee STAR class size reduction study clearly demonstrated the educational benefits of smaller classes, benefits that last even after children move from smaller classes to larger classes. Finn 7949:8-7851:7. The Regents Task Force on Closing the Performance Gap confirmed "a growing body of research which demonstrates that one of the most critical and effective methods of providing extra time and extra help to children is through class-size reduction techniques." Px 1027 at BOR 02224.

The evidence also established, however, that New York City public school class sizes have long exceeded, by significant margins, those recommended by federal, State and City administrators and experts in the field. In fact, vast numbers of City school children are in classes far larger than those in other districts in New York State. As of October 1998, 27.1 percent of all City students in kindergarten through third grade (89,139 children), 66.6 percent of students in fourth and fifth grade (102,347 children), and 72.3 percent of children in sixth through eighth grade (148,869 children) were in classes of 28 or more. Px 2107A; Px 2107B; Px

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[21] At least half the states in the country, including New York, have implemented class size reduction programs. Pub. L. No. 106-113, 113 Stat. 1501, 1501A-263 (1999); N.Y. Educ. L. § 3602; Px 1027 at BOR 02224; Px 2855A-Lee Stmt. ¶¶ 82-84; Px 2900-Young Stmt. ¶ 103; Sanford 11397:20-11398:16; Cashin 315:22-316:11; Spence 2276:16-22, 2277:7-9; Evans-Tranumn 1396:7-15; Ward 3297:17-3298:12; Zardoya 6991:9-6993:25; Fink 7769:5-22; Finn 8076:8-19, 8081:21-8082:13, 8084:23-8085:22, 8091:14-8092:10; Santandreu 13715:12-13717:6; PFOF ¶¶ 596-616.

2107C. For years, the State itself has repeatedly singled out City class sizes as "substantially larger than classes in other school categories." Px 1 at 26; Px 3 at 26; Px 5 at 50; Px 7 at 43; Px 9 at 66; Px 11 at 47; Px 13 at 45; Px 15 at 41.

1. The Trial Court Did Not Find That a Sound Basic Education Requires Class Sizes of 20 or Less

Although New York City's large class sizes was a major issue at trial and was given considerable attention by the trial court in its decision, the Appellate Division's opinion ignores virtually all of the evidence and simply concludes "there was no indication that students cannot learn in classes consisting of more than 20 students." *App. Div.* at 11. But this is a strawman argument, because the trial court never made this finding, nor was it asked to do so by the Plaintiffs. Although the importance of class size to educational opportunity – and particularly to the educational opportunity afforded to at-risk children – was made clear by the record, the actual application of this finding will vary from district to district and school to school. The trial court's actual finding on this issue was that, given New York City's general educational inadequacies, including too many inadequate teachers, too few adequate facilities and other educational resources, New York City's class sizes are overall a significant contributing factor to its failure to offer its students the opportunity for a sound basic education. *Trial Ct.* at 27, 35, 56, 114-15. This finding is fully supported by the record.

2. The Appellate Division's Discussion of Catholic Schools Rests on Unsubstantiated Opinion That Is Contradicted by the Record

According to the Appellate Division, Plaintiffs conceded that "the City's Catholic schools have larger classes yet outperform the public schools." *App. Div.* at 11. In fact, Plaintiffs never conceded this point and the record provides no basis to make any meaningful comparison between the City's schools and Catholic schools. To the contrary, there is little probative

evidence in the record concerning the Catholic schools, and no comparable evidence at all concerning class size or student achievement in the Catholic schools.

The State could not even support the assertions of its witnesses concerning the costs of Catholic education. Although both its expert and one fact witness attempted to quantify those costs, neither offered any data to support their testimony. Defendants' expert claimed to base his opinions on financial data provided by the Archdiocese of New York, Walberg 17147:16-21; Dx 19305; Dx 19306; Dx 19308, but he failed to actually offer any of this data into evidence and he admitted his unfamiliarity with how the Archdiocese actually allocates costs among its schools. Walberg 17228:6-20.

The Defendants offered a fact witness who ventured a guess about the average per-pupil costs in the Diocese for Brooklyn and Queens, which differed from Dr. Walberg's estimate, but Defendants presented no documentation to support this guess, even though such data was apparently readily available.[22] The witness admitted his estimate did not account for the local, State and federal government assistance the Catholic schools receive, which includes Title I, Title II, City Council textbook funding, New York State Textbook Law textbook funding, transportation aid and computer-related assistance. Puglisi 19392:8-19393:15. The witness's cost estimates also failed to account for after-school and summer programs, which the Diocese provides at an additional charge to parents of as much as $75 per week, or almost $2,700 per student over a typical 36-week school year. Puglisi 19419:25-19421:17.

Moreover, the record is clear that even if there were probative evidence that the Catholic schools "outperform" the public schools, Defendants' only fact witness concerning the Catholic

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[22] The Diocese maintains detailed financial information for each of its schools, but Defendants never even asked to review it. Puglisi 19383:11-19384:22.

schools conceded that there are stark differences between students attending Catholic schools and the students in the New York City public schools. Puglisi 19399:24-19405:6, 19418:21-19419:16; Px 3694. For example, the Catholic schools enroll far fewer poor students than the public schools, Px 2 at 24; Px 3694 at 1-2, and enroll so few special education students that Defendants did not even present special education cost data for the Catholic schools. The Diocese also faces entirely different salary pressures than the City's public schools (since teachers are attracted to Diocese schools primarily by the opportunity to teach in a religious environment, not by salary considerations),[23] and benefit from substantial volunteer services that the City's schools do not enjoy.[24] In addition, the Catholic schools are able to exclude disruptive or hard to teach students by expelling them. Levin 12147:15-21; Puglisi 19425:20-19426:6.

In short, the Appellate Division's reliance on a passing reference to the Catholic schools to dismiss systemic evidence of inadequacy cannot withstand even a cursory review of the record.

D. The Overwhelming Weight of the Evidence Shows that New York City Schools Do Not Have Minimally Adequate Instrumentalities of Learning

The trial court's findings concerning inadequate instrumentalities of learning are supported by, *inter alia,* (a) numerous SED, City and independent reports detailing shortages of classroom and library books, laboratory equipment, supplies and other learning essentials; (b) the

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[23] The Diocese also engages in virtually no collective bargaining: The teaching staff is entirely non-union at the elementary level, and largely non-union at the high school level, Puglisi 19407:15-22, and all of its principals and assistant principals are non-union. Puglisi 19407:23-19408:2.

[24] Volunteer services range from volunteers who tutor English Language Learners after school, to parents in "Home School Associations" who perform simple administrative tasks in the schools, to "Local School Commissions" that help with issues such as enrollment and expenses, all at no cost to the schools. Puglisi 19335:2-20, 19388:17-19389:14, 19410:3-19411:21, 19412:10-19413:2.

testimony of superintendents and other observers; and (c) extensive testimony and reports chronicling the wholesale absence of functioning libraries and laboratories throughout the system. PFOF ¶¶ 935-1019.

Beyond decrepit facilities, overcrowded classrooms and inept teachers, the record shows that New York City school children are regularly forced to do without the basic nuts-and-bolts of any normal school experience, such as textbooks, library books, and basic supplies. For decades, textbooks were often shared among several classes because of inadequate supplies, and so students do not have their own books to take home for study. Even in schools that are lucky enough to have libraries, their collections are often tiny and decaying. And in schools that are blessed with laboratories, many nevertheless lack basic scientific tools, rendering the lab practically useless. Basic supplies and furniture are considered luxuries in City schools, with school officials often forced to solicit parents for donations of paper, markers, and even used furniture. In those schools that are equipped to support computers and other instructional technology, the evidence shows a chronic shortage of computers that can run basic software packages.

These deplorable conditions are confirmed in account after account in the record. For example, the evidence includes a 1996 New York City Comptroller's report entitled "Losing Ground: How Budget Cuts Have Affected Education" that found a chronic shortfall in textbook allocations in all of the 29 schools surveyed, as well as significant shortages in other basic supplies such as desks, chairs and even writing paper. Px 1469 at 42-44. Similarly, the 655 Reports reflect a woefully inadequate number of library books on a per student basis in New York City. Px 1 at 81; Px 3 at 81; Px 5 at 78; Px 1472 at 1. Another Comptroller's report in the record, entitled "Math and Service Programs: Making Them Count," found that "100 percent [of

19 schools surveyed] had substantial equipment deficiencies" in science laboratories and supplies. Px 1242 at iii.

In just two short paragraphs, the Appellate Division ignored much of this evidence, and in regard to textbooks claimed that "plaintiffs concede that recent funding has relieved the previous alleged inadequacies." *App. Div.* at 11. Plaintiffs conceded no such thing – nor could they have – because the evidence so overwhelmingly belies any notion that New York City children are provided with adequate textbooks – or libraries, laboratories, and supplies.

1. Libraries Are Not Filled With "Classics"

Perhaps the most bizarre assertion in the Appellate Division's opinion is its claim that "a library that consists predominantly of classics should not be viewed as one that deprives students of the opportunity of a sound *basic* education." *App. Div.* at 12 (emphasis in original). Apparently, the Appellate Division assumed without any evidentiary basis that references in the record to "old" books related to Shakespeare rather than to the reality that libraries (where they existed) were stocked with outdated and worn-out books filled with obsolete scientific and historical information.

There is, of course, no evidence to support any claim that the schools have a sufficient number of "classics" (however defined), or that if they do, such a collection would be sufficient to meet the academic needs of the system's students. In some other context, the Appellate Division's reference to "classics" might be dismissed as merely eccentric; advanced as part of a purportedly serious analysis of adequacy of the City's schools, however, it is indefensible. The abysmal conditions of New York City public school libraries deserve more than a ridiculous quip.

2. Longstanding Textbook Shortages

With respect to textbooks, the Appellate Division's specific finding that Plaintiffs "concede that recent funding increases have relieved a textbook shortage," *App. Div.* at 11, ignores the trial court's finding that "at least since the early 1980s New York City has endured a chronic shortage of adequate textbooks." *Trial Ct.* at 57. Evidence from the SED, the City Comptroller and the City Council all show that funding for textbooks was inadequate for years, making it impossible for schools to purchase and maintain an adequate supply of up-to-date materials. Px 1469 at 42-43; Px 2332A-Rosa Stmt. ¶¶ 101, 06; Px 2855A-Lee Stmt. ¶¶ 144-45; Px 3032 at 6; Dx 13272 at PCFE 003491, PCFE 003495; Cashin 247:11-248:2, 366:2-11, 504:18-24; Coppin 779:2-4; Hayden 1307:17-21; Chin 4903:14-4907:7; Casey 9962:13-17; Sanford 11411:16-23; PFOF ¶¶ 949-50.

Moreover, while it is true that recent funding increases have provided partial, short-term relief for a chronic shortage, as the trial court properly observed, "there is no structural funding mechanism that gives any assurance that the recent spike in textbook funding will continue." *Trial Ct.* at 57. As numerous witnesses testified, remedying the shortage of textbooks requires a substantial, ongoing commitment of additional financial resources, especially since the adoption of the Regents Learning Standards requires that many textbooks be replaced to conform to the Standards. Darling-Hammond 6450:12-24; Sanford 11411:20-23; Santandreau 13719:4-19; Sobol 1075:18-1076:5; Evans-Tranumn 1399:22-1400:3; DeStefano 5462:3-5; Px 2855A-Lee Stmt. ¶¶ 144-45. The substantial weight of the evidence showed, as the trial court concluded, that "[t]he NYSTL allocation is inadequate to cover the cost of all [instructional] materials." *Trial Ct.* at 57.

3. City Students Must Often Go Without Basic Supplies

With respect to classroom supplies, again the evidence established a chronic lack of even the most basic requirements, including chalk, markers, copier paper, classroom furniture and paper towels, with the worst performing schools suffering from the worst shortages. Px 1176C at SEDA 0020321; Weingarten 2742:2-6; Millman 3747:19-3748:6; Darling-Hammond 6450:12-24; Casey 9960:3-10; Santandreu 13556:18-13557:10, 13570:11-14; Lief 14976:12-19; PFOF ¶¶ 972, 977. Severe shortages in basic instructional supplies arose and persist because teachers in the New York City public schools are provided with inadequate resources to purchase classroom materials. The current allocation is $200 per teacher for general education, an amount that is not sufficient to cover basic classroom needs, particularly in light of the large class sizes in New York City. Px 1169 at 59; Px 2193 at 73; DeStefano 5462:6-17. There is substantial evidence that, in the absence of sufficient funds, teachers turn to an unreliable patchwork of financing – including personal money and revenue from food sales – to provide even the most basic of supplies. Px 1469 at 44; Cashin 246:12-247:10; DeStefano 5462:21-5463:3.

4. Inadequate Instructional Technology

Finally, the weight of the evidence supports the trial court's finding that "[f]or the last decade New York City public schools have failed to provide adequate instructional technology to their students." *Trial Ct.* at 58; PFOF ¶¶ 1005-06. This failure has resulted from a lack of technology, as well as a shortage of computer labs, electric power, and other infrastructure to support current technology needs in New York City public schools. *Trial Ct.* at 58-59. At many schools, the electrical system is unable to support modern computer and telephone equipment or even basic electricity services. PFOF ¶¶ 852-53. Even where facilities are adequate to support instructional technology, there are simply not enough computers and other equipment available to meet the educational needs of the students.

The Appellate Division attempted to dismiss the technology inadequacies in New York City by asking why obsolete computers cannot be used for introductory classes. *App. Div.* at 11. This query betrays a fundamental misunderstanding of computer technology. As the actual evidence in the record makes clear, the problem with these computers is not that they do not run the most advanced software, as the Appellate Division appears to imagine, ***but that they are so outdated that they cannot run any software produced today***. There is no evidence to the contrary in the record. Moreover, the suggestion that such outdated machines should be used for "introductory" classes, whatever that refers to, was not advanced by any witness at trial and there is no basis for it in the record.

E. The Evidence Established That the Overwhelming Majority of the City's At-Risk Children Do Not Receive the Extra Help They Desperately Need

The trial court's findings concerning the inadequacy of programs intended to provide more time on task to at-risk students are supported by, *inter alia*, (a) extensive data concerning student need and the availability and efficacy of programs for at-risk students; (b) numerous SED and City reports; (c) the testimony of superintendents concerning their inability to provide services to all of the students who qualify; and (d) expert testimony, including the admissions of the Defendants' expert concerning the need for such programs. PFOF ¶¶ 1073-1223.

While the State has clearly acknowledged that extra resources can and do help at-risk children to perform, the evidence is equally conclusive that many thousands of at-risk students in New York City are denied the help that they require. A brief look at some of the examples in the record shows that many at-risk children are being shut out from the resources they need:

- **Reading Recovery:** Despite the recognized effectiveness of Reading Recovery, less than 20 percent of the 17,000 students that the program is designed to assist were able to participate in the program during the 1999-2000 school year due to inadequate funds. Px 1169 at 41; Ashdown 21277:6-21278:23.

- **Project Read:** Project Read was established in 1997 to help at-risk students achieve basic literacy skills. PFOF ¶¶ 1113, 1121. Although it was shown to be remarkably effective, in 1998-99 only 40 percent of students in grades one to three were able to participate in any part of Project Read despite the fact that fully two-thirds of them are at risk of growing up illiterate under State standards. *Trial Ct.* at 79; Px 1658 at 77; Px 2172 at 7; Px 2173 at 5-7; Px 2176 at BOE 775927; Px 2194-Casey Stmt. ¶¶ 56-60; PFOF ¶¶ 1123-27, 1129-30, 1133-40.

- **Extended Time Programs:** In the years leading up to trial, there were some efforts to restore some extended time programs. Spence 2003:25-2004:19; PFOF ¶¶ 1077, 1203. But "[s]ubstantial funds are necessary to provide the expanded platform of educational resources necessary to boost the achievement of all at risk children." *Trial Ct.* at 79.

- **Summer School:** Summer school is widely recognized to help in "stemming achievement loss during the summer months, [which is particularly acute] among disadvantaged, high-risk students." Px 465 at 13; PFOF ¶¶ 1200-02. Only in the years immediately leading up to trial has the BOE been able to provide summer school to a significant number of students. Px 2192 at 2; Px 2194-Casey Stmt. ¶¶ 42, 45; Donohue 15205:24-15206:20. Even in 1999, summer school served barely one-quarter of the estimated students in kindergarten through eighth grade who were at risk of not meeting State and BOE literacy standards. Px 2170 at 1; Px 2192 at 2; Px 2194-Casey Stmt. ¶¶ 35-37, 42.

- **Pre-Kindergarten:** The value of pre-kindergarten is universally recognized but only a fraction of the City's population of four-year-olds attend pre-kindergarten. Px 11 at xxix; Px 15 at xxiii; Px 314 at 7, Px 367 at 14-15; Dx 17256 at 27; Murphy 16651:7-19; PFOF ¶¶ 1083-86. In 1992, only 32.2 percent of the estimated four-year-old population attended pre-kindergarten. Px 1 at 21. Five years later, that figure had risen only slightly to 34.3 percent. *Id*. The State's "Universal Pre-kindergarten" program is inadequate and unreliable. PFOF ¶¶ 1101-03, 1109. Existing state funding covers only a portion of the total cost of the program, and it is subject to reduction or elimination each year through the state budgeting process. Px 1169 at 270; Px 2194-Casey Stmt. ¶¶ 18-21; Px 3082B-Sweeting Stmt. ¶ 118.

The Appellate Division made no finding regarding these inadequacies; it simply suggested that, if these programs were useful, they should be expanded, without saying how the funds might be found to do so.

F. The Appellate Division Ignores the Needs of Special Education and ELL Students

The Appellate Division also failed to acknowledge the actual circumstances of the City's large population of students with disabilities who require special education services in order to

take advantage of the meager educational opportunity that the State currently provides, as well as English Language Learner ("ELL") students who cannot participate in English instruction. The evidence establishes that more than 13 percent of City children receive some form of special education services, such as resource room support for students with learning disabilities, or staff-intensive services provided to severely disabled students in separate classroom settings, but that the City lacks the resources to meet their needs. For example, in March 1999, the latest month for which data were available at trial, almost 10,000 students were on waiting lists for speech therapy services, and 2,000 were awaiting physical therapy services. Px 2075 at 16, 22. For disabled students, just getting in the schoolhouse door is difficult enough because only 20 to 25 percent of City school buildings are accessible to people with limited mobility. Erber 7569:21-25; Alter 9768:19-9769:5. Once they are in the door, the evidence also showed that children with special needs are the most likely to be subjected to the worst teachers: The proportion of uncertified teachers in programs for the severely and profoundly disabled is 25 percent, almost double the rate in the rest of the system. Erber 7579:24-7580:8.

The City's nearly 170,000 children who are classified by the State as lacking English language proficiency fare no better. While ELL students need many of the same resources that other at-risk students require, many also need qualified bilingual teachers, specialized guidance services, specialized instructional programs, and instructional materials that are designed to meet their needs. But the City lacks the necessary resources to ensure that ELL students have the opportunity to learn and achieve. Testimony at trial established that, for example, in 1999 the City projected a shortfall of approximately 4,700 to 5,700 bilingual teachers for ELL students. Hernandez 9179:14-9180:20, 9192:4-9193:15. Nearly half of bilingual special education teachers are uncertified. Px 2166A-Goldstein Stmt. ¶ 27. The City also lacks the resources to

provide the instructional programs and materials that ELL students require and that – when provided – are successful in addressing the intense needs of these students. PFOF ¶¶ 1366-71.

G. The Overwhelming Weight of the Evidence Proves that Inadequate Resources Prevent the Implementation of a Curriculum Necessary for a Sound Basic Education

The trial court's findings concerning curriculum deficiencies are supported by, *inter alia*, (a) all of the extensive evidence of resource inadequacies throughout the New York City public school system; (b) the testimony of superintendents, administrators and experts; and (c) the voluminous record of student outcomes that demonstrates a massive failure to educate large numbers of the City's children. PFOF ¶¶ 1020-72.

While it is true that the BOE has adopted a curriculum that encompass the skills and knowledge necessary to obtain a sound basic education, the evidence is clear that the curriculum has not made it to the classroom. A curriculum is just a statement about what *should* be taught. But unless it is matched up with actual resources, it is nothing more than a platitude. For example, a basic part of the BOE's curriculum has always been that students should learn to read before the third grade. But in 1997, over one-third of the City's third graders were effectively illiterate. PFOF ¶ 1518. The BOE's curriculum therefore did nothing to help those children learn to read.

With the introduction of the Regents Learning Standards, there is no question that the BOE has identified curricula that, in theory, constitute a sound basic education. Students simply are not given the facilities, classroom space, teachers or instructional materials necessary for them to learn the requested material in English, math, science, history or other subjects. Accordingly, "[t]he problem is not with the content of the curricula, but rather with its implementation," *Trial Ct.* at 37, and the Appellate Division made no finding to the contrary.

Every aspect of the New York City curriculum is affected by New York City's failure to provide sufficient resources to its students. For example, math and science are among the subjects staffed by the lowest percentage of certified teachers. As of October 1, 1999, 59,500 students were taught high school biology by an uncertified teacher, 19,000 students were taught high school chemistry by an uncertified teacher, and 54,375 students were taught high school mathematics by an uncertified teacher.[25] *Trial Ct.* at 26; Px 1205; PFOF ¶ 365.

This failure of the New York City curriculum in core subject areas has been exacerbated by the wholesale elimination of art, music and physical education instruction in many New York City schools. There was substantial, uncontroverted evidence that art, music and physical education classes are an essential part of the curriculum, particularly as a means for engaging at-risk students in core academic subjects. PFOF ¶¶ 1023-28; 1046-50. Yet, by the mid-1990s, most schools provided little or no instruction in the arts and physical education classes were severely limited by shortages of qualified instructors and the inadequacy of facilities.

V. The Cumulative and Collective Effect of Resource Inadequacies: No Opportunity for a Sound Basic Education

Each of the resource inadequacies identified in the prior sections has persisted over many years and, together, the inadequacies have had a compounding effect. Considered as a whole, this record of gross inadequacy establishes that the New York City public school system failed to provide the opportunity for a sound basic education.

The Appellate Division failed completely to consider how persistent, widespread resource inadequacies might affect an actual New York City public school student over time.

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[25] These conservative estimates are premised on the assumption that each teacher teaches at least one class of no more than 25 students. Accordingly, the number of certified teachers set forth in Px 1205 was multiplied by 25 to obtain these estimates.

But the record leaves no doubt about that overall effect: A real child faced enormous hurdles in attempting to achieve academic success in New York City.

When a typical child in one of the classes of students that have passed through the New York City public school system over the last two decades arrived in kindergarten, the odds were four to one that she had not had the pre-kindergarten classes common elsewhere in the state and she was placed in a class that was too large for her inexperienced and unprepared teacher to effectively teach. Her classroom was in an overcrowded building in a state of disrepair that may have lacked adequate plumbing, heat and operable windows. Over her elementary school years, she would probably be forced many times to share books with other children, because there were not enough books for everyone. Her school did not a have a useful library or a laboratory, there was no librarian and there were few computers and few teachers prepared to use them. As she passed through elementary school, the classes would become more crowded, the condition of the buildings would not improve and her teachers would continue to be unprepared and inexperienced. Although she would likely need additional help to master reading and basic math skills, the school could not accommodate all of the students who needed this help. By third grade, there was a one in three chance that the child could not read and at least one quarter of her class was functionally illiterate in sixth grade.

In junior high school, she would find the same inadequate facilities, even more crowded classrooms, and few, if any computers and little instruction in their use. There was a substantial chance that she would attend a class in a space never intended for classroom work, such as a converted cafeteria, the basement of an adjacent building, or a portable classroom set up where children should have recreation space. She could not do science experiments in a laboratory, and the library, if it had not been abandoned, was unlikely to contain up-to-date books. She would

have little opportunity for music or art instruction, and no physical education or team sports program. If she fell behind academically, there was little support – no extended day, no tutorials, limited summer school. Not surprisingly, her class had the lowest scores in the state on science and social studies exams and continued to have high illiteracy rates.

In high school, the inadequacies of her earlier education would cause many of her classmates to fail multiple courses. There was a significant chance that she would go to a school in a dilapidated, severely overcrowded building, with multiple shifts of students sharing a single facility. Her science and math teachers were probably not certified and they might well have failed their certification exams at least once. Each of her classes had well over 30 students. Although the Regents required that she take a laboratory science class, it is doubtful her school had a functioning laboratory or enough laboratories to provide sufficient lab time to all students. Her school also lacked a full cadre of experienced administrators and, as a result, many of her teachers failed to get necessary support and training. Many of her classmates would drop out before tenth grade and less than half of her class would make it to eleventh grade.

This child and her classmates did not have the opportunity for a sound basic education.

VI. The Cumulative and Collective Effect of Resource Inadequacy: Outcome Measures Demonstrate Massive Systemic Failure

There was substantial, undisputed evidence at trial that measures of student achievement are widely accepted as valid bases for assessing the adequacy of education provided by schools and school districts. The federal government, the Board of Regents, the SED and education experts (including all of Plaintiffs' and Defendants' testifying experts) routinely use test scores and other outcome measures, such as graduation rates, to assess adequacy. Indeed, one of Defendants' experts proffered an opinion as to the adequacy of the education provided by the New York City public school system solely on the basis of test scores. Mehrens 18479:10-16;

PFOF ¶ 1461. Both of the lower courts accepted the validity of using student outcomes as measures of adequacy.[26]

The record of student outcomes in New York City is based on extensive systemic evidence of educational failure. This failure begins in elementary school, is compounded in middle school, and culminates in massive failures in high school:

- **Elementary School Test Scores**. Despite four years of schooling, more than one-third of the City's third graders are functionally illiterate according to the State's own measure of literacy. PFOF ¶¶ 1518-19.

- **Middle School Test Scores**. By the end of middle school, one-third of the City's students still fail to demonstrate minimum competency and basic literacy and – no doubt as a consequence – they cannot master other core subjects. The City's middle school students consistently score at the bottom on tests used to measure whether they are learning key concepts in science and social studies. PFOF ¶¶ 1518, 1533.

- **High School Graduation Rates**. More than 40 percent of students who enter the ninth grade in New York City do not obtain a high school diploma. Of those that do, many nevertheless lack the foundational skills and knowledge necessary for competitive employment and civic responsibility. PFOF ¶¶ 1601-04.

- **City University Remediation Rates**. The failures of the City schools continue to haunt students far beyond their departure from the system: More than half of entering City University students – the vast majority of whom are New York City high school graduates – require substantial remediation in English and math before they have the skills to take basic CUNY English and math courses. PFOF ¶¶ 1612-14.

Much of this evidence of failure consists of student performance measures implemented by the State Education Department and approved by the Regents. The SED began testing elementary school students in 1965 for the specific purpose of "ensuring the provision of

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[26] Other state courts look to student outcomes in assessing adequacy. *See, e.g., DeRolph v. State*, 677 N.E.2d 733, 744 (Ohio 1997) ("[p]roficiency tests are a method of measuring education"); *Abbott v. Burke* 575 A.2d 359, 387, 400-01, 408 (N.J. 1990) (low percentages of students passing standardized tests).

essential educational services." Px 21 at 43. In the succeeding 35 years, the SED has consistently improved and expanded its student testing for elementary school, middle school and high school.

But the Appellate Division did not give any weight to SED outcome measures. Instead, the Appellate Division relied on two tests that the SED has specifically determined are not valid measurements of student achievement: the now-dead Regents Competency Test in reading and the average New York City scores on McGraw-Hill's norm-referenced standardized tests that also are no longer used in New York City schools. *App. Div.* at 15-16.

Remarkably, the Appellate Division provided no explanation for its refusal to consider the SED's current outcome measures, or its reliance on tests that the State and City authorities no longer consider accurate measures of student performance. Indeed, the Appellate Division appears to have fundamentally misunderstood the notion of standardized tests. We therefore begin with a brief review of the evidence concerning standardized tests.

A. The SED's Educational Achievement Testing System

1. 1965: The SED Begins Testing Elementary School Students

In 1965, the SED began to administer the Pupil Evaluation Program ("PEP") tests in reading and mathematics in third and sixth grade to identify students who were doing so poorly that they needed remedial help. Px 21 at 43; PFOF ¶¶ 1492-1501. The PEP tests were criterion-referenced tests. Px 21 at 43. The term "criterion-referenced" refers to how a student's score on a test is reported. A criterion-referenced score compares a student's performance to a standard set of knowledge that must be learned and is designed to provide information about the absolute level of skills shown by the student taking the test. Tobias 10192:14-24; Jaeger 13220:9-13221:16; Mehrens 18559:6-18560:6. Thus, a third grader who could not meet the State Reference Point ("SRP") level on the PEP reading test was effectively illiterate. Px 2900-Young

Stmt. ¶ 41; PFOF ¶ 1519. That student did not possess the skills needed to read basic written materials.[27]

The results from criterion-referenced tests are quite different from another method of reporting test scores, the norm-referenced score. PFOF ¶¶ 1508-09. A norm-referenced score is entirely relative. PFOF ¶¶ 1538-43. It only helps to determine whether a student can read as well as a sample group of students; it is not designed to identify any specific skills or knowledge shown by the student taking the test. Instead, the student's test results are compared to the scores of another group of students, a "norm reference group," that took a similar test. The resulting score states how well the student did, *compared only to the students in the norm group.* Norm-referenced tests, therefore, are irrelevant to determining whether City students are receiving an education that meets the constitutional standard *because norm-referenced tests do not measure student performance against an established standard of competence*. Tobias 10262:5-10263:19; PFOF ¶ 1541.

Norm-referenced scores are usually expressed in percentiles. Thus, if a student's score was higher than 50 percent of the scores in the norm-referenced group, that student would be in the 50th percentile. PFOF ¶ 1539. But this does not identify any particular skill or knowledge shown by that student. PFOF ¶ 1541. It merely states that, however great – or small – his knowledge may have been, he did better on that test than 50 percent of the norm group that took the test.

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[27] The SRP was set so low that the State required that all schools in New York have at least 90% of their students scoring at or above the SRP. Tobias 10160:10-16; Fruchter 14561:9-14; PFOF ¶ 1521. The State required that remedial instruction be provided to students who scored below the SRP. Px 1 at 4; Kadamus 1580:14-18.

The SED concluded, from the beginning of its testing program, that criterion-referenced tests were superior to norm-referenced tests for measuring student achievement. PFOF ¶ 1569. In particular, criterion-referenced tests are required for diagnostic tests seeking to identify students who have not acquired basic educational skills.

As its testing program grew, the SED began to administer another series of criterion-referenced tests, called Program Evaluation Tests. Px 1 at 4-5. These are tests in specific subject matters, such as science and social studies. Their purpose is to evaluate programs and schools, rather than individual students. *Id.*

2. Mid-1980s: The SED Creates Regents Competency Tests for Any Student That Does Not Take the Regents Examinations

In the mid-1980s, the SED added a set of examinations called the Regents Competency Tests ("RCTs"). Px 21 at 44. Traditionally, students who did not seek the Regents Diploma, and thus did not take the Regents Examinations, had not been required to pass any statewide examination before receiving a high school diploma. The SED thus did not have any independent information about student performance after the PEP tests. It therefore required that *all* students who wanted a high school diploma had to take either the Regents or the RCT examinations. PFOF ¶¶ 1587-88.

The RCTs were created for detecting serious deficiencies in student performance (the same purpose as the PEP tests), and the passing levels for the RCTs were set at a very low level. The RCT math examination – typically given in the eighth grade – tested sixth grade math skills, and the RCT reading examination – typically given in the eleventh grade – tested eighth grade reading skills. Px 312 at 5; Kadamus 19266:5-15; Walberg 17202:22-17203:5; PFOF ¶¶ 166-67, 1472.

The principal requirements for high school graduation, however, remained the course requirements, which required a good deal more knowledge than sixth grade math and eighth grade reading. But, if school systems were giving students passing grades in high school courses without teaching them high school skills, if schools were promoting students into the eleventh grade who could not read eighth grade materials, then the RCTs would allow the SED to detect that situation.

3. 1990-1999: A Decade of Information From the SED's Assessment and Accountability Program

The SED issues an annual report of the results of its systematic assessment program. And each year since 1990, the SED has reported that New York City's schools are failing to give their students a basic education. Px 1 at vi, 167; Px 3 at 167; Px 5 at vi, 11, 18-19, 50, 72; Px 7 at 305.

The PEP tests showed, every year, that large numbers of elementary school students could not read or do basic arithmetic: *More than one third* of the City's third graders and *over one quarter* of the City's sixth graders have historically scored below the SRP on the PEP reading tests. Px 2 at 5; Px 6 at 3; Px 10 at 3; PFOF ¶ 1518. The PEP test data is even worse for low-performing New York City school districts. Of those, *more than half* of all third and sixth graders historically scored below the SRP on the PEP reading tests. Px 2 at 110-11; Px 4 at 51; Px 6 at 51; Px 8 at 51; PFOF ¶ 1520.

Likewise, the PET tests showed that students were not learning basic science or social studies. The PET results show that New York City students *have never scored above the 16th percentile in social studies or the 25th percentile in science*. Px 767 at 8, 10, 12; Px 768 at 8, 10, 12; Px 770 at 8, 10, 12; Px 772 at 8, 10, 12; Px 774 at 8, 10, 12; Px 777 at 8, 10, 12; Px 779 at 8, 10, 12; PFOF ¶ 1533. And the RCT and Regents examinations showed that a great many City

students who managed to make it to high school were still unable to read at the eighth grade level or do sixth grade math. Nearly half of City high schoolers who took the mathematics RCT failed the exam, and nearly 30 percent of those who took the reading RCT failed it. Px 2 at 13; PFOF ¶ 1589. According to the State's own data, nearly 60 percent of New York City students failed the Regents English examination in 1999, Px 2516; PFOF ¶ 1591, almost half of City students failed the least challenging Regents mathematics examination, Px 1 at 37; PFOF ¶ 1594, and nearly 80 percent of City students – *four out of every five* – failed the Regents biology examination, Px 1 at 37; PFOF ¶ 1594.

4. 1998: The SED Aligns Its Tests With the Regents Learning Standards

In 1998, the SED moved to a new range of integrated tests, beginning in fourth grade and moving through the Regents examinations in high school, specifically intended to measure whether students have learned the skills and knowledge set forth in the Regents Learning Standards. PFOF ¶¶ 1496, 1511-13. As with all SED-administered tests, this new set of tests is criterion-referenced. Scores are based on how well students have mastered parts of the Learning Standards, not on a comparison with how well other students were doing.

Although the tests were new, results again demonstrated that New York City's students were not learning what students everywhere else in the state were being taught. Nearly *half* of all New York City fourth graders scored in the lowest of Poor levels on the new mathematics examination, and *over one-fifth* of the City's fourth graders scored in this level on the reading examination. PFOF ¶1525. This translates to over 16,000 City fourth graders alone that are deemed by the State to have "serious academic deficiencies" in reading. PFOF ¶ 1526.

5. The SURR Program Completes the SED's Assessment and Accountability System

In addition to its testing regime, the SED implemented the Schools Under Registration Review ("SURR") program in 1989. PFOF ¶¶ 1619-39. The SURR program was designed to identify the lowest performing schools in the State and provide assistance and guidance. Px 1 at 9. It never met that goal, because the Legislature failed to provide the extra funding needed to deliver that assistance. PFOF ¶ 1637.

But the SURR program provides a specific method for identifying low-performing schools based upon scores on State tests and dropout levels. Mills 1116:6-1117:10; Sanford 11404:17-11405:14; Fruchter 14539:12-14541:2. Combining this information, the SED looked for schools whose performance was clearly below minimum levels. These schools were notified that they were being placed on "Registration Review" and that if they did not improve, the SED would close them down.

Since the program began, *virtually all SURR schools have been in New York City*. Px 1 at 20; Px 2976 at 2; Px 3102B; Fruchter 14533:2-8, 14536:12-17, 14549:12-18, 14550:20-14551:6; PFOF ¶¶ 1619, 1627, 1629-30. A full 97 of the 105 schools on the most recent SURR list are City schools. Px 2641 at 1; Sanford 11370:10-18; PFOF ¶ 1630. Of the worst performing schools in New York State, *over 90 percent are located in New York City*.

In fact, New York City not only boasts the most SURR schools, but it also lays claim to the worst of them: *The few SURR schools outside the City are high schools that actually have higher test scores than the average New York City high school*. Px 1 at 178; Px 3 at 178; Fruchter 14551:13-18, 14553:24-14554:3; PFOF ¶ 1631. Moreover, hundreds of other City schools are only marginally outperforming the SURR schools and are at risk of being placed on the SURR list in the immediate future. Fruchter 14547:17-14548:7; PFOF ¶ 1632. Indeed, the

evidence at trial showed that there is little difference between a SURR school and the average New York City school. It is hardly surprising, therefore, that the Appellate Division entirely omitted the SURR evidence from its decision.

B. The Appellate Division's Inexplicable Reliance on Norm-Referenced Test Scores

Inexplicably, the Appellate Division rendered an opinion about the adequacy of New York City's schools without even mentioning the dismal test results of City students on the SED's tests, or the SURR program. Instead, the Appellate Division relied upon an average score on norm-referenced standardized tests created by McGraw-Hill, a commercial test publisher. *App. Div*. at 15-16. New York City no longer uses these tests because, like the State, the City public schools' Division of Assessment concluded in the late 1990s that the norm-referenced tests it had been giving were not useful. Spence 2455:8-20; Tobias 10318:2-5. Accordingly, the City moved entirely to criterion-referenced tests aligned with SED's new tests. PFOF ¶ 1569.

The Appellate Division either did not understand or ignored the many problems with these norm-referenced scores. There was extensive testimony concerning the problems with the scores the Appellate Division chose to rely upon. PFOF ¶¶ 1538-41, 1555. First, those scores are averages across the entire City school system and therefore fail to show the full range of individual student performance and mask the poor results in many city districts and schools, particularly those with at-risk students. Mehrens 18603:5-18605:5, 18607:3-18609:21. But even those citywide averages are norm-referenced scores, and thus do not reveal what the students actually learned. All they show is how students stacked up against another set of students, the norm group, which is a small group of students selected by the publisher of the test. ***Norm-referenced scores do not indicate whether a child meets the State's basic literacy standards.***

Publishers are increasingly offering criterion-referenced scoring as well as norm-referenced scoring. And in a devastating piece of evidence ignored by the Appellate Division, McGraw-Hill published criterion-referenced scores, as well as norm-referenced scores, for the very tests the Appellate Division found so compelling. Mehrens 18524:4-8; PFOF ¶¶ 1553-55. ***What McGraw-Hill's criterion-referenced scores showed was that the 50th percentile test score reflected skills and knowledge that were significantly below what educators believed students in those grades should know. Thus, even the tests relied upon by the Appellate Division showed that the City's students are not being given an adequate education.*** Mehrens 18525:6-21; Dx 19481A.

Even if there were any basis for using norm-reference tests, the Appellate Division erroneously compared student scores on norm-referenced tests administered by the City to those of "the nation as a whole, to the extent that such scores are indicative of the provision of the opportunity for a sound basic education." *App. Div.* at 16. There was no basis in the record to support this comparison. To the contrary, testimony from both sides established that such comparisons are improper. Both Defendants' and Plaintiffs' experts testified that they could not "equate" (or compare) tests from different cities because the various tests and the test-taking conditions are simply too different. Mehrens 18587:8-14, 18571:12-18575:4, 18585:9-18587:2; Jaeger 13256:3-18, 13261:10-13266:20, 13254:20-13255:6; PFOF ¶ 1571. Indeed, a task force of the National Academy of Sciences studied this precise question and concluded that it was not possible to equate test scores on different standardized tests. Jaeger 13255:11-20.

The Appellate Division's crediting of these national averages appears to have been the result of a misunderstanding of the test publisher's reference to scoring "at grade level" to describe norm-referenced results. PFOF ¶ 1541. Scoring "at grade level" does not mean that a

student has learned the information and acquired the skills that are appropriate for her grade level; it means only that she scored around the same level as the norm-referenced group at her grade level. Tobias 10260:9-24; 10262:5-10263:19. Thus, if the norm group was made up of third graders and a third grade student's test score was higher than 50 percent of the students in the third grade norm group, it would sometimes be said that this student had scored at "at grade level." But that did *not* mean that these scores reflected the skills and knowledge that educators believe a third grade student should know. *Id.* In order to know that, criterion-referenced scoring must be used.

Finally, there simply is no doubt that the SED's test results demonstrate that, no matter how well New York City public students fare on a national comparison, too many cannot read, too many cannot demonstrate minimal competence in reading, math, science and social studies, too many cannot meet the requirements for graduation and too many who do graduate are not prepared for even the most basic college courses.

C. The Appellate Division Ignored the New York City Cohort Report

In the mid-1980s, the Board of Education began a remarkable project to evaluate what ultimately happens to every student who enters high school in New York City. Tobias 10360:6-20. Known as the Cohort Report, this project has continued virtually without interruption since that time. The Cohort Reports track the progress of every single student in the school system from the time he enters the ninth grade until he completes his high school career, whether by graduation (even if it takes the full seven years that state law allows students to remain in high school), obtaining a GED certificate, or dropping out. Px 1251 at BOE 758975-77.

The Cohort Report shows that since 1986 ***only about 60 percent of each cohort will actually graduate from high school in New York City***.[28] Px 2418A; Px 2520. Approximately 30 percent will drop out of school, and the remaining 10 percent or so will obtain only a GED certificate. *Id.* Since 1986, over ***250,000*** students have entered the ninth grade in New York City but have not graduated. *Id*. There is no more systemic evidence of failure than this. The Appellate Division chose to ignore this evidence entirely and failed to even mention the Cohort Report in its opinion.

But the story told by the Cohort Reports is actually worse than this data suggests because the sheer size of the City schools hides the human scale of this tragedy. The entering ninth grade class can be more than 80,000 students. Even taking account of the declines based on students going to private schools, returning to their home countries, or moving to other cities, that still means that over 25,000 students from each ninth grade cohort will never get a high school diploma.

The Appellate Division's failure to consider the New York City Cohort Report data is yet another example of rejecting the expert decisions of the SED, as well as of the City. The SED has repeatedly commended the New York City dropout data as being the best available. And the SED has long recognized that simply reporting the percentage of students passing the RCT and Regents Examinations was misleading, since it did not take into account situations like New York City, where many students were never able to pass enough courses to get into eleventh or

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[28] The Appellate Division appears to have assumed that students who move or transfer out of the system to other schools are not properly accounted for in the Cohort Reports for purposes of calculating these graduation rates. *App. Div.* at 15. This assumption was wrong, since the record clearly indicated that all information about individual transfers and other interruptions or changes in educational circumstances are properly recorded. Px 1251 at BOE 758975-77.

twelfth grade. The Appellate Division, completely rejected that information, relying instead upon the data that the SED and the City Division of Assessment have repeatedly found to be much less reliable and much less informative, and, in fact, that they no longer use.

PART III

THE STATE MUST BEAR ULTIMATE RESPONSIBILITY FOR THE GROSS RESOURCE INADEQUACIES AND MASSIVE EDUCATIONAL FAILURE

Under the Education Article, the State is responsible for ensuring that ***all*** children have the opportunity to receive a sound basic education. When a school district fails over a long period of time to provide sufficient resources to create that opportunity and tolerates a long history of massive educational failure, the State must bear the ultimate responsibility. It must bear this responsibility whether the resource inadequacies arise because the district does not have sufficient funds to acquire the resources, or whether other conditions, including organizational, administrative or programmatic impediments, prevent the district from effectively deploying sufficient resources. In either case (or in the case of some combination of funding shortages and other impediments), students have suffered a constitutional wrong. The specific *remedy* may turn on the cause of the resource inadequacies (*e.g.,* increased funding *vs.* organizational reform or improved accountability) but under the express terms of the Education Article and this Court's prior jurisprudence, the responsibility for securing that remedy rests with the State.

In this case, the record proves that the New York City public school system has over a long period of time failed to provide sufficient resources to meet the needs of its students and that it has tolerated a long history of massive educational failure. The proof of these inadequacies and failures are sufficient to establish liability against the State.

The record also proves that the resource inadequacies arise directly from the fact that the State education finance system has failed for decades to ensure that the New York City public

school system has had sufficient funds available to provide adequate resources. While there may be other impediments to a sound basic education that the State must address, the record establishes that the State education finance system – which includes both direct State aid and local funding – has failed to align funding with need.

The record also proves that, apart from its constitutional duty, the State's responsibility for the resource inadequacies and education failures in New York City arises from the State's own actions. The State has assumed and exercised extensive control over virtually every aspect of education in New York City – including the organization and management of the schools, academic standards, graduation requirements and teacher qualifications. This control extends over virtually every aspect of school finance, including the source of the school system's funds and the City's taxing power. By failing to use this control to ensure that New York City students have the opportunity for a sound basic education, the State causes the educational harm suffered by these children.

Although the Appellate Division acknowledged that the "State . . . is indeed ultimately responsible for providing students with the opportunity for a sound basic education," *App. Div.* at 19, it absolved the State from any responsibility for the New York City public school system's failure to provide that opportunity. It did so by concluding, first, that the resource inadequacies and educational failures identified in preceding sections did not prove that students had been denied a sound basic education. The Appellate Division then concluded that even if there were inadequacies, the State did not bear responsibility because (a) it was the City's fault, and (b) in any event, more spending on educational resources for poor children will not make any difference.

The Appellate Division was wrong on both counts. First, blaming the City ignores the fundamental holding of both *Levittown* and *CFE I* 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." *CFE I*, at 315 (emphasis added); *Levittown*, 57 N.Y.2d at 47-48. While paying lip service to this principle, the Appellate Division refused to apply it to the facts of this case.

Moreover, the Appellate Division failed to understand the relevance and importance of the trial court's unchallenged findings concerning the State's control over the New York public school system and the workings of the State education financing system. Although the demonstrated failure to provide adequate resources alone is sufficient to establish liability, these findings show *how* it is that the State has failed to use its power over the operation and financing of the New York City system to ensure that students have an opportunity for a sound basic education. The illogical and irrational workings of the State education finance system directly link New York City's resource inadequacies to State action.

Second, the Appellate Division simply ignored the overwhelming evidence (including extensive admissions by the SED and Regents) that additional resources, including better teachers, smaller classes, decent facilities and extended time programs, can significantly improve educational achievement by at risk children, by flippantly suggesting that the money for these programs should be spent addressing larger social ills.

And, finally, the Appellate Division wrongly suggested that resources could simply be redeployed to meet students' needs, or that integrating certain students with disabilities into general education classrooms would magically yield "hundreds of millions of dollars, if not one billion dollars." *App. Div.* at 17. This claim has absolutely no basis in the record. Defendants themselves claimed that at most $335 million could be gained from efficiencies in special

education, and the Appellate Division's $1 billion estimate was spun from whole cloth. In truth, the evidence clearly established that providing students who have been in separate classrooms with the considerable support and related services they would need to succeed in general education classrooms – and to which they would have a legal right under federal and state statutes – would quickly eat up all, or almost all, of any purported "savings." *Trial Ct.* at 94-97; *App. Div.* at 35-36 (Saxe, J., dissenting).

I. Given the State's Constitutional Responsibility to Ensure the Availability of a Sound Basic Education for All Children, the Evidence Showing That New York City Schools Lack Adequate Resources Alone Establishes the State's Constitutional Liability

In both *Levittown* and *CFE I*, this Court held 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." *CFE I* at 315; *Levittown*, 57 N.Y.2d at 47-48. The Court explained the substantive parameters of this duty in *CFE I*: "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 [that make up a sound basic education], the State will have satisfied its constitutional obligation." *CFE I* at 316. The converse is equally true: ***If the resources made available under the present system are not adequate to provide students with the opportunity to obtain these essential skills, the State will not have met its constitutional obligation.***

Indeed, addressing similar constitutional mandates, other state supreme courts have held, as a matter of law, that a finding of a lack of adequate resources provided to one or more districts within their state is sufficient to establish the State's liability under an education adequacy clause. For example, the Supreme Court of Massachusetts explained:

> [T]he ultimate responsibility for educating the public belongs to the 'legislatures and magistrates.' If the mandate of the

> Constitution is not met, or if a statutory structure which worked at one time no longer works, the responsibility for the failure to educate falls squarely on the Commonwealth . . . They may delegate, but they may not abdicate, their constitutional duty.

McDuffy, 615 N.E.2d at 550. The Massachusetts court then went on to hold that this responsibility, coupled with a factual showing that the plaintiff districts suffered from widespread resource deficiencies such as "large classes; reductions in staff; inadequate teaching of basic subjects . . . ; neglected libraries; inability to attract and retain high quality teachers; . . . [and] lack of predictable funding," was sufficient to demonstrate that the Commonwealth "failed to fulfill its obligation" and thus to mandate reform of the state's financing system. *Id.* at 553-54.

The Ohio Supreme Court held that districts that are "plagued with deteriorating buildings, insufficient supplies, inadequate curricula and technology, and large student-teacher ratios, desperately lack the resources necessary to provide students with a minimally adequate education" made it "painfully obvious that the General Assembly, in structuring school financing, has failed in its constitutional obligation to ensure a thorough and efficient system." *DeRolph v. State*, 677 N.E.2d 733, 745 (Ohio 1997); *see also, e.g. Claremont v. Governor*, 749 A.2d 744, 754 (N.H. 2002) ("The State must guarantee sufficient funding to ensure that school districts can provide a constitutionally adequate education."); *Lake View Sch. Dist.*, 2002 Ark. Lexis 603, at *57-*58, *35-*43 (state constitution "imposes upon the State an absolute constitutional duty to educate [the state's] children," and evidence of systemic educational deficiencies was sufficient to establish that the State had failed to meet its constitutional obligation).

In addition to the express terms of the Education Article, the State's liability arises from its exercise of pervasive control over virtually every aspect of the public schools. As this Court

has often observed, every local government is an "instrumentality of the general government of the State, [and] it exercises powers of government which are delegated to it by the Legislature." *Brown v. Board of Trustees of Hamptonburg*, 303 N.Y. 484, 488 (1952). Under the Constitution, the State has broad authority to create and modify local governments and their functions, including their tax rates and debt capacity. *See* N.Y. Const. Art. III, § 1; Art. XVI, §1. This Court has explained:

> Under our form of State government, the exclusive power of taxation is lodged in the State Legislature . . . A corollary to this basic rule is that municipalities such as the City of New York have no inherent taxing power, but only that which is delegated by the State . . . Moreover, the delegations of State taxing power to a municipality must be made in express terms by enabling legislation.

Castle Oil Corp. v. City of New York, 89 N.Y.2d 334, 338-39 (1996); *see also* Px 2672 at 36-43; Px 2859 at 13-15; Rubenstein 11557:15-11558:19, 11561:24-11562:6; PFOF ¶¶ 1801-02 (all discussing city-state tax structure in detail).

This Court has specifically held in the context of school finance that the State can exercise its power over localities to ensure that they provide adequate support to education. Thus the Court held that a "maintenance of effort" provision requiring New York City to fund education at a specified level was constitutional because the State has ultimate responsibility for education and its funding:

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

Board of Educ. of City of New York v. City of New York, 41 N.Y.2d 535, 542-43 (1977) (emphasis added) (citations omitted).[29] As both lower courts properly recognized, ultimate responsibility for the proven inadequacy of the total resources available for students in New York City rests firmly with the State. *Trial Ct.* at 80-82; *App. Div.* at 19.

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

The State's control over what happens in the classroom is pervasive and includes education and graduation standards. The State determines what subjects must be taught, and it gives tests to determine if those subjects are being taught. The State can impose penalties for failure to meet State requirements, based on State-required testing. The State imposes a variety of other rules and regulations that control virtually every area of curriculum and operations. *See, e.g.*, N.Y. Educ. L. §§ 2590-j, 3020, 3020-a (teachers and personnel); PFOF ¶¶ 168-77 (curriculum and assessment); N.Y. Educ. L. § 4401 *et seq.* (special education); PFOF ¶ 1313 (the

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[29] Indeed, in a companion case to this suit, the City of New York attempted to mount a constitutional challenge to the State finance system on its own behalf. In that case, the State successfully argued that the City lacked the authority to do so because it was merely an agent of the State. This Court agreed. *City of New York v. State of New York*, 86 N.Y.2d 286, 289-90 (1995). The State cannot now turn around and argue that it lacks such control.

education of English Language Learners); PFOF ¶ 686 (facilities). Aside from the funding deficiencies, by the State's failure to use this control to ensure that New York City students have the opportunity for a sound basic education, the State causes the educational harm suffered by these children.

II. The State's Education Funding System Fails to Provide Sufficient Resources to New York City's Students

The Legislature has created a system of education funding that includes two components: (1) State funds provided by the Legislature to local school districts; and (2) local funds raised directly by school boards or local municipal governments. The trial court's order that the state education funding system must be reformed is supported by the substantial evidence demonstrating that the combination of state and local funds available to the New York City school district is insufficient. *Trial Ct.* at 82. Ultimately, the BOE has not had enough money because the Legislature precludes it from raising its own revenues but fails to ensure that the education funding generated by the State and the City is sufficient to provide a sound basic education.[30]

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[30] In *CFE I*, the Court observed that Plaintiffs need to establish a "correlation between funding and educational opportunity," and more precisely, "in the specific context of this case, plaintiffs [would] have to establish a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children." *CFE I* at 318. Although the lower courts termed this inquiry a "causation" discussion, the extent to which the denial of a sound basic education is specifically caused by deficiencies in the State funding system (as against misuse of available funds, lack of effective state oversight, or other factors that also invoke the State's constitutional liability), actually goes to the issue of remedy. Indeed, in *CFE I*, the Court suggested this distinction, indicating in response to certain concerns raised by Judge Levine in his concurrence and Judge Simons in his dissent that "a discussion of funding or reallocation" went to a "question of remedies" not properly before the Court on a motion to dismiss. *Id.* at 316 n.4. In any event, as shown below, whether termed as an element of establishing liability or rather as a relevant issue for determining an appropriate remedy, the evidence unquestionably demonstrates a causal relationship between funding and lack of educational opportunity.

A. The State Aid Distribution System Does Not Align Funding With Need

The State distributes education funding through a myriad of funding formulas, which are collectively referred to as the State aid distribution system. The trial court made detailed findings regarding the operation of the State aid distribution system. *Trial Ct.* at 82-90. On appeal below, the Defendants did not challenge these findings and the Appellate Division did not address the State aid distribution system at all. The uncontroverted evidence unquestionably supports the trial court's holding that the State aid distribution system fails to respond adequately to district need and that the seemingly rational formulas camouflage an agreement to give New York City a fixed percentage of State education aid without regard to actual need.[31] *Trial Ct.* at 83. As the trial court emphasized, the fact that allocations to New York City are largely the result of closed-door negotiation among certain political leaders rather than from the formulas that purport to justify them does not mean that the process is inherently unconstitutional. *Id*. If this process yielded adequate resources, it would meet the State's obligation under the Education Clause. Given the proven failure of the system to provide adequate resources, however, understanding the actual mechanics involved helps explain *how* it fails so completely to adequately meet district need.

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

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

"Frankenstein monster" of such Orwellian complexity that the State's Commissioner of Education admits that it is a "black box," whose operation even he cannot understand. Px 374 at 3; Px 377 at 31; Mills 1170:9-23; PFOF ¶¶ 1816-17. Indeed, after the trial, in his 2001 State of the State Address, Governor Pataki characterized the "incomprehensible school aid formula" as a "dinosaur" that should be discarded on the "ash heap of history." Governor George E. Pataki, State of the State Address, January 3, 2001, available at http://intranet.oasas.state.ny.us /AtWork/misc/sos01.pdf.

The current system includes more than a dozen different "computerized" formula-based aids that supposedly direct the distribution of approximately 95 percent of the $12.5 billion appropriated as State aid for education. *Trial Ct.* at 83; Px 377 at 31; Px 2567 at 3; Dx 17274; Dx 19740; Berne 11868:18-24. The remainder is distributed through categorical grant programs and hold harmless mechanisms. Dx 17274; Dx 19740. Most of the formulas include several components, such as a base amount, student count, weighting factors, and additional multipliers, that are combined together, through one or more mathematical calculations, to determine the amount of aid generated for each district. *See, e.g.,* Px 2557 at 47-48; Dx 17274. The written descriptions of the formulas require dozens of pages and multiple obtuse equations. *See id*.

Although the State has never undertaken a formal "costing out" study to systematically determine how much funding a given district needs to provide an adequate education, PFOF ¶¶ 1866-96, the formulas ostensibly recognize and respond to factors that are related to costs incurred by districts to provide an adequate education. For example:

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

- "Extraordinary Needs Aid" purports to "target additional funds to school districts to meet needs related to educating concentrations of extraordinary needs pupils." Reproduced Record as Appeal, Vol. V. at RA 520.

- "Limited English Proficiency Aid" ostensibly reflects a State policy that "districts are entitled to receive aid for conducting programs for pupils with limited English proficiency." Dx 17274 at 7.

The trial court's findings demonstrate that the system simply does not work. The distribution of State aid is not based on any determination of the actual needs of any particular district, or of whether the combined State and local contributions are sufficient to provide adequate resources to any particular district. *Trial Ct.* at 87. Indeed, in the case of New York City, they are not even based on the formulas – rather, State aid awards to the district are largely the result of an unwritten agreement among the Governor and the legislative leaders that the system is to be worked backward to allocate to New York City a fixed percentage of any increase in State educational aid. *Trial Ct.* at 87-88; Px 2662 at 8; Levy 7377:13-7378:6, 7396:23-7417:3, 11348:4-13; Berne 11785:11-11798:6, 11869:15-11871:21, 11880:12-11882:14; PFOF ¶¶ 1824-30. The percentage for New York City targeted under the "share agreement" was for many years 38.86 percent, and the State hit or came very close to this percentage in every annual increase from at least the late 1980s until the trial began.[32] *Trial Ct.* at 89; PFOF ¶¶ 1840-65. The State's own witness described this process as "three men in a room," who make decisions about funding allocations based on political negotiation rather than

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

the funding formulas on which they are ostensibly based. King 21950:2-21951:3; *see also* Px 75 at i (Comptroller's Statement); Px 374 at 2; Px 377 at 31.

Although largely irrelevant to the actual amount awarded to New York City, the complexity and opacity of the formulas facilitate the implementation of the "share agreement" because they permit the formulas to be subtly manipulated through the use of a sophisticated State aid computer modeling system. *Trial Ct.* at 88-89; Px 3820-Foster Dep. 78:16-80:2; Kadamus 1690:6-24; King 22006:11-23; PFOF ¶ 1831. From year to year, multipliers, weighting factors and other components are changed, eliminated or fine-tuned (sometimes by a few hundredths of a percent) to meet the share agreement target. Px 1147; Px 3820-Foster Dep. 77:20-78:12; PFOF ¶¶ 1831-39. As the trial court found, "the evidence at trial demonstrated clearly what the State Comptroller has found: 'the formulas are annually "worked backwards" until the politically negotiated "share" for the City schools is hit in the calculations'." *Trial Ct.* at 88; Px 2662 at 8.

The effects of the "share agreement" have directly contributed to the chronic resource deficiencies that impede learning in the New York City schools. The implementation of Extraordinary Needs Aid (ENA) provides one of the clearest examples of how the state budget process fails to align resources with need. ENA was added to the state education budget as a formula aid in the 1993-94 school year. It was explicitly intended to provide additional aid to districts with high numbers of at-risk children, as measured by free lunch status, in recognition of the fact that such children often need an expanded platform of services to master fundamental skills.

However, although New York City schools educate a majority of the state's at-risk children, and New York City has received a majority of ENA funding since its implementation,

New York City's share of *total* State aid has *risen less than one percent.* Px 2064 at 14. When ENA was phased in, other formulas were manipulated to maintain the City's share of annual increases in State aid at, or close to, the agreed-upon 38.86 percent. Despite its purported purpose, ENA provided no relief to New York City as it struggled to meet the needs of its at-risk students; with or without ENA, the amount of aid the district would receive was predetermined under the share deal.

The manipulation that determines New York City's share of increases in State aid is only part of the reason that such allocations fail to respond adequately to need. The formulas themselves, while seemingly rational, rely on base numbers and multipliers that are pulled from thin air rather than an assessment of actual costs. ***Thus, districts across the state, including but not limited to New York City, receive their state funding allocations based on formulas that fail to respond adequately to the needs they are intended to address***. Indeed, the State Budget Director admitted that the State has failed to undertake any analysis to determine whether (1) overall State aid or local spending is sufficient to address student needs, or (2) whether any of the purported purposes of the various formulas has ever been accomplished. King 22003:15-22006:10; PFOF ¶ 1933.

Class Size Reduction Aid provides a striking example of the misalignment between the stated purpose of funding streams and the actual size of awards. This aid was intended to implement a legislative initiative to reduce class sizes in early grades to no more than 20 students. PFOF ¶¶ 1878-79. However, it was distributed according to a complex formula that includes different multipliers for New York City, the other large urban school districts, and the rest of the state. Px 2567 at 61-62. At trial, the State offered no justification for these differences; nor did it provide any basis on which to conclude that the amount appropriated

would be sufficient to reduce class sizes in any particular district to the 20-student objective. PFOF ¶¶ 1878-79; King 22002:8-18. In fact, the evidence actually showed that the cost of reducing class sizes in New York City to the State objective would be substantially higher than the funds currently allocated for it. Px 2985 at 1; Px 3082B-Sweeting Stmt. ¶ 109; PFOF ¶ 652. Furthermore, many community school districts were so lacking in space that they could not use the full amount of class size reduction funds that were allocated because there were not sufficient additional classrooms available in the whole district. PFOF ¶ 802.

The combined-wealth ratio ("CWR"), which ostensibly adjusts for district wealth, actually punishes districts with a high cost of living because it "fail[s] to take into account regional costs," *Trial Ct.* at 85, which vary widely across New York State. Px 469A at 14; Px 534A at 23; Sobol 1039:16-1040:9; Berne 11947:14-11948:24; PFOF ¶ 1908. This failure is a fundamental defect in the CWR that has been acknowledged for years. Px 469A at 13-14; PFOF ¶¶ 1905-06. Indeed, the SED has itself quantified the differences in regional costs throughout New York State. Px 469A at 14; PFOF ¶ 1906. According to the SED's own figures, New York City's regional cost ratio is the highest in the state, which means that a dollar buys fewer educational resources in New York City than anywhere else in the state: A dollar of aid in Albany buys just 74 cents worth of educational resources in New York City, reflecting almost a 34 percent cost increase of resources in the City. Px 469A at 14; PFOF ¶¶ 294, 1907. Defendants' own expert agreed that, when distributing aid, a fair finance system should take regional costs into account. Guthrie 21219:13-21226:8.[33]

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[33] "Transition adjustments" further distort the actual application of the formulas. *Trial Ct.* at 84. These adjustments are used to increase or decrease the amount of aid that a district is "entitled" to according to the individual formulas by applying "caps" that set a ceiling on any increase of funds to a district and "hold harmless" provisions that set a floor on the amount of aid a district can lose. These provisions affect districts across the state. In

The State was well aware of the inadequacies of the State aid distribution system long before this case went to trial. As the trial court noted, "SED, the Regents, and numerous State-appointed blue ribbon commissions have repeatedly reported to the State Legislature [that] the State aid distribution system does not provide adequate funding to all districts." *Id*. at 82-83; *see also* PFOF ¶¶ 1911-26 (detailing reports and studies by SED, state officials, and commissions consistently documenting that the funding system is not aligned with student need).

B. The State-Imposed Local Funding Scheme Contributes To Resource Inadequacies

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

Pursuant to state law, all but five of the state's approximately 700 school districts are fiscally "independent" districts; the Legislature has granted local school boards in these districts the authority to levy property taxes to directly support education. Px 2027 at i-ii, 4. By contrast, the Legislature has dictated that the school districts in the state's five largest cities (New York City, Buffalo, Yonkers, Syracuse and Rochester) have no independent revenue generating authority. Px 2027 at i-ii, 4; Berne 11812:10-23. These "Big 5" school districts are considered

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1997-1998 SED determined that only 12.8 percent of districts in the state received the aid they would have been entitled to under the formulas in the absence of transition adjustments. *Id*. at 85. Although in recent years fewer aid categories have been subject to transition adjustments, the trial court found that they "continue to have a significant effect on yearly increases in State aid and permit the State to direct millions of dollars in resources without regard to its aid formulas." *Id*.

"dependent" districts because they must depend on the local municipal government to raise and appropriate the local share of their education funding. *Id*.

Most of the state's local school districts rely principally on property taxes to finance school budgets: The statewide average share of local spending provided by property taxes exceeds 79 percent, and is close to 90 percent in many districts. Px 2027 at I; Px 2984 at 2. Property tax revenues tend to be stable over time and provide a predictable revenue stream to districts. Rubenstein 11756:7-11. By contrast, only 37 percent of the municipal revenue pool from which New York City allocates funds for education is raised through property taxes. Px 2984 at 2; Px 3082B-Sweeting Stmt. ¶ 94. New York City relies instead on a variety of income, sales, business and other taxes. PFOF ¶¶ 1953-56.

The problem with this approach is that, unlike property tax, the income, sales, and business taxes on which New York City depends are extremely susceptible to business cycles and particularly dependent on the financial sector. Reflecting periodic swings in the City's economic fortune, the City's contribution to public education has fluctuated considerably since the City's extraordinary fiscal crises of the mid-1970s. Px 3179 at IV; PFOF ¶¶ 1956, 1975-81. Consequently, the BOE has been subject to what the SED has described as the "destructive impact" of economic cycles "which destroy the professional knowledge-building and skill accumulation of individual schools and of the system as a whole." *Id.* The BOE has been periodically required to make substantial cuts in programs, personnel and facilities as the result of City and State budget cuts. Px 1132 at 11; Dx 10695 at 7; Spence 2059:2-2060:15. And the considerable debt burden that the City has needed to take on during budget crises to fund the range of services on which its residents rely limits the BOE's ability to take on additional debt to fund its capital program. PFOF ¶¶ 1963-74

More than 20 years ago, the Legislature tried to mitigate the City's periodic swings in education funding by enacting a "maintenance of effort" law that requires New York City to maintain a certain amount of funding for the BOE, based on prior year funding amounts. This law, commonly known as the Stavisky-Goodman Act, N.Y. Educ. L. § 2576(5), has proven to be almost, if not entirely, ineffective both because it applies to all funds (local, State and federal) within the New York City budget and because it has never been invoked to justify or require an increase in local education funds. Berne 11817:22-11819:12; Kadamus 1680:14-1681:25; PFOF ¶ 2006. Indeed, when the SED determined in 1991 that the City had failed to comply with the law, the State failed to take any action. The Board of Regents has repeatedly called for reform of the maintenance of effort law. Px 444 at 26-27; Px 676 at GOV 020820; Kadamus 1681:14-25.[34]

Contrary to the Appellate Division's suggestion, *App. Div.* at 19, any failures to enforce effectively existing maintenance of effort provisions or to strengthen such provisions do not absolve the State of its constitutional obligation to ensure that adequate resources are provided to the City's students. Rather, they merely suggest that effective maintenance of efforts provisions might be an appropriate element of funding reform.

Placing ultimate responsibility on the State to ensure that districts have adequate funding to provide necessary resources does not mean that the State must pick up the tab for laggard districts. *See Trial Ct.* at 97. It does mean, however, that the State must be cognizant of the ability of districts to provide local funding and take steps to remedy resource deficiencies either by exercising its plenary power over local revenue creation or by ensuring that the State portion of aid is adequate to meet a district's legitimate needs.

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[34] The recent governance legislation, L. 2002, Ch. 91, ALS 91, shored up some of the loopholes in the maintenance of effort provisions, but still fails to protect against decreases in City education spending in years where overall City revenues decrease.

III. The Appellate Division Cannot Absolve the State by Shifting Blame to Poor Students or New York City's Special Education Programs

The Appellate Division attempted to excuse the State's failure to meet its constitutional responsibility to ensure all students the opportunity to obtain a sound basic education by blaming poor students for their academic failings and by claiming that it had uncovered substantial waste, particularly in New York City's special education programs. Neither of these excuses has any basis in fact. Even if the Defendants had been able to prove that the Board of Education misused funds, it would not absolve the State of its ultimate responsibility under the Education Article to ensure that resources are used effectively and students are actually provided with the opportunity to obtain the foundational skills of a sound basic education.

A. Money Matters: Additional Resources Used Well Improve Student Outcomes

The evidence unquestionably establishes that additional resources are required to remedy the gross resource deficiencies that have plagued the New York City school system for decades. There was extensive and largely uncontroverted evidence that educational resources, if properly deployed, "can have a significant and lasting effect on student performance." *Trial Ct.* at 75. The trial court thus appropriately held that there is a "causal link between funding and educational opportunity." *Id.*[35]

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[35] Having already found that the resources that New York City provides to its students are inadequate, the trial court asked whether the evidence showed "increased funding can provide New York City with better teachers, better school buildings, and better instrumentalities of learning." *Id.* at 68. In other words, the trial court was focusing on the question this court posed in *CFE I*: Is there a "correlation between funding and educational opportunity," such that an established resource deficiency is appropriately remedied by additional funding? *CFE I* at 318. It found that the answer is clearly "yes." The Appellate Division took the trial court's statement out of context in suggesting that the lower court had failed to properly determine whether the "current funding mechanism deprives students of the opportunity to obtain a sound basic education." *App. Div.* at 16.

The commonsense proposition that money matters was supported by extensive evidence documenting that increased funding used well can boost student achievement. *See id.* at 75-77. First, in addition to the evidence that additional funding could remedy the identified resource deficiencies, numerous SED and BOE witnesses with intimate knowledge of the school system offered persuasive proof that, with sufficient resources, virtually all students in the New York City school district, including those deemed at-risk, can master the fundamental skills of a sound basic education. PFOF ¶¶ 267-91. Second, evidence from nationally respected experts in educational research and practice identified specific programs that would improve the education of students and introduced sound statistical methods demonstrating significant improvement for at-risk students with relatively small expenditures. PFOF ¶¶ 1685-93.[36]

Indeed, the SED has long recognized that a district's resources affect its instructional quality. The 1997 655 Report cites a report also relied on by *Defendants'* expert which explains:

> [S]chool resources are systematically related to student achievement and . . . these relations are large enough to be educationally important. . . . [R]esource variables that attempt to describe the quality of teachers (teacher ability, teacher education, and teacher experience) show very strong relations with student achievement. . . . While many would have hoped that increasing resources would be positively related to achievement, we did not expect that the synthesis of data from a wide variety of studies over a three decade period would yield conclusions so uniform in direction and comparable in magnitude.

The Appellate Division, after posing the question, itself completely ignored the extensive record on the precise point that it identified as crucial.

[36] Defendants hired two experts, Dr. David Armor and Dr. Eric Hanushek, to construct statistical models purporting to show that money doesn't matter. PFOF ¶¶ 1694-1721. The trial court rejected this testimony for a variety of reasons. *See Trial Ct.* at 68-75 (reviewing each expert's approach in detail and identifying specific flaws which discredited their conclusions). The Appellate Division did not disturb the trial court's findings regarding this evidence.

Px 5 at 34 (quoting Greenwald, Hedges and Laine, The Effect of School Resources on Student Achievement, *Review of Educational Reseach* 66 (1996)); Podgursky 17733:10-17734:22; PFOF ¶ 1676.

Other state courts have consistently confirmed that money matters. As the Chief Judge of the Supreme Court of Arizona concluded:

> [L]ogic and experience also tell us that children have a better opportunity to learn biology and chemistry, and are more likely to do so, if provided with laboratory equipment for experiments and demonstrations; that children have a better opportunity to learn English literature if given access to books; that children have a better opportunity to learn computer science if they can use computers, and so on through the entire state-prescribed curriculum. . . . It seems apparent to me, however, that these are inarguable principles. If they are not, then we are wasting an abundance of our taxpayers' money in school districts that maintain libraries and buy textbooks, laboratory equipment,and computers.

Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 822 (Ariz. 1994) (Feldman, C.J., specially concurring); *see also, e.g., Lake View Sch. Dist.*, 2002 Ark. Lexis 603, at *67 ("We are convinced that motivated teachers, sufficient equipment to supplement instruction, and learning in facilities that are not crumbling or overcrowded, all combine to enhance educational performance . . . . All of that takes money."); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989) ("[T]he amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student," *Rose v. Counsel for Better Education*, 790 S.W.2d 186, 198 (Ky. 1989) (evidence "showed a definite correlation between the amount of money spent per child on education and the quality of the education received").

Without specifically addressing the trial court's thorough analysis of the extensive testimony and documentary evidence demonstrating that money matters, the Appellate Division

agreed that "there was evidence that certain 'time on task' programs, such as specialized reading courses, tutoring, and summer school, could help such 'at-risk' students." *App. Div.* at 16. But the Appellate Division blithely suggested that a more successful approach to increasing student learning would be "eliminating the socio-economic conditions facing certain students." *Id.* This observation, even if true (and even if it were possible to eliminate poverty and its attendant ills), is entirely irrelevant. The State has an obligation to ensure that its students, including at-risk students, have an opportunity to obtain a sound basic education. Indeed, it is unclear what import the Appellate Division thought its observation would have, since it correctly acknowledged in the same discussion that this "circumstance" does not "lessen[] the State's burden to educate such students." *App. Div.* at 16; *see also id*. at 33-34 (Saxe, J., dissenting) ("[The majority's] assertion, even if true, adds nothing to the analysis. It is the job of the schools to provide all students with the opportunity to obtain at least a basic education, and it is the responsibility of the State to provide enough funding for it to do so.").

B. The Record Does Not Support the State's Contention that New York City Currently Has Sufficient Resources for Its Students

On appeal below, the State contended that the relatively large size of New York City's education budget simply *must* mean that it has enough money for its 1.1 million students. This assertion was based largely on comparisons to national averages. It is correct that the BOE's per pupil expenditures are above the national average. The district's per-pupil spending, however, is *nearly $1,500 less* than the statewide public school average, Px 2795 at 20-21, and it is also less than that of many other northeastern urban school districts, including Boston, Newark, Hartford, Buffalo, and Pittsburgh. Murphy 16661:4-16665:6; Px 3382; Px 3478; PFOF ¶ 1765. 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. Px 1 at 79, 82; PFOF ¶¶ 2024-29.

Because gross comparisons do not account for differences in the cost of living or in the nature of the student population, the trial court properly found that the Defendants' comparisons of New York City's annual spending with that of other districts across the country are entirely meaningless. *Trial Ct.* at 90. Proper consideration of these factors demonstrates that it simply costs more to educate children in New York City than it does in almost any other place in the country. The Appellate Division's statement that a "cost of living index which factors in salaries of non-educators . . . is irrelevant to the cost of educating a student," *App. Div.* at 18, is patently ridiculous. A general cost of living index is properly considered in gauging the competitive labor market for attracting teachers. *See* Levin 12151:7-15; PFOF ¶ 437. More generally, students need school facilities, and therefore the cost of land and building materials, architecture and contracting services, and ongoing maintenance is relevant. Likewise, students need to eat, and therefore the cost of food and food preparation services is relevant. And students need to travel to and from school; accordingly the cost of providing transportation is relevant.

The Appellate Division also suggested that comparisons between the per capita amount spent in New York City and that spent in other parts of the State were an "impermissible equality, rather than adequacy, claim." *App. Div.* at 17. This misunderstands their use. Plaintiffs-Appellants do not contend that the amount of funds expended throughout the state must be equal. To the contrary, Plaintiffs consistently have asserted both that a determination of adequate funding should be adjusted for cost of living and should reflect the extent of student need and that, as is compelled by the holding in *Levittown*, districts may choose to fund themselves at a level above minimum adequacy. Rather, the comparison simply highlights that

even in terms of absolute dollars, New York City is trying to provide the educational resources its students need on less money than the state average. The fact that the costs of purchasing goods and services in New York City is higher than anywhere else in the state and that its student population has an extremely high percentage of students whose backgrounds suggest they are at-risk for academic failure demonstrate that the resource deficiency is all the more egregious.

Defendants expended considerable energy trying to uncover allegedly significant corruption, waste, or misuse of funds. They wholly failed to do so. It may be true, as the trial court suggested, that more efficient use of the BOE's current funding could yield some additional resources, *Trial Ct.* at 77, and Plaintiffs-Appellants certainly support development of an accountability system to ensure that both the State and City fulfill their obligations to the district's school children. As the trial court found, however, "[t]he evidence did not show that large sums were lost to corruption and fraud." *Id*. at 92.

The trial court also found that "Defendants presented little evidence concerning BOE's alleged wasteful spending on administration," and that in fact "BOE spends a smaller percentage of its budget on its central administration than the State-wide average." *Id*. at 93. The evidence showed that, in stark contrast to the State aid distribution system, the details of the New York City's public schools' finance system, including its budgeting and spending decisions, are unusually open to public scrutiny. Donohue 15544:10-25; PFOF ¶¶ 1749-63. With the exception of special education, the Appellate Division did not disturb any of the trial court's findings regarding the insubstantiality of alleged waste, corruption, or misallocation of funds. Indeed, the only area of supposed waste other than special education that the Appellate Division even mentioned was school construction, which, as it noted, is controlled by the School Construction Agency, an agency created and controlled by the State. *App. Div.* at 18.

C. There Is No Basis for the Appellate Division's Guesses Concerning Alleged Savings in Special Education

The parties agree, and both lower courts have found, that some students in New York City are misidentified as having a disability and that, at least historically, an inappropriately high percentage of students with disabilities were educated in segregated classrooms. PFOF ¶¶ 1240-64. Ironically, the principal cause of this over-referral is the chronic resource deficiency in general education that is the subject of this litigation. The Appellate Division's suggestion, however, that reform of the BOE's special education program could magically yield up to one billion dollars (a number wholly without *any* basis in the record) that could be redeployed to serve other district needs reveals a fundamentally flawed understanding of the record in the case, the State aid funding formula, the federal and State special education regulatory schemes (including the federal Individual with Disabilities Act ("IDEA"), 20 U.S.C. §§ 1401 *et seq.*), and the needs of students.

Under the IDEA and applicable state laws and regulations, if either a parent or teacher identifies a student as potentially having a disability, the district must evaluate the student, and, if it determines the child has a disability, design an "individual education plan" ("IEP") for the child. The IEP sets forth specific requirements for the child's education such as maximum class size and student-teacher ratio, and additional "related services," such as speech and language therapy, counseling, and occupational or physical therapy, to which the student then has an individual legal right. *Id.*; N.Y. Educ. L. § 4201, *et seq*.; Alter 8659:20-8660:9; PX 2166A-Goldstein Stmt. ¶ 20.

The record showed that approximately 140,000 students in New York City, or 13.2 percent of the total public school population, are receiving some form of special education services. Px 2161. Although the overall number of students in New York City identified as

having a disability is comparable with the proportion so classified in the rest of the state, a disproportionately high percentage of students with disabilities in New York City are enrolled in separate classes or in programs in special educational setting (58 percent compared to 44 percent). The evidence at trial established that this was in part due to provisions of the State aid formula that encouraged restrictive placements. *See Trial Ct.* at 95; Px 2554 at 69.

The deep-rooted resource deficiencies in general education further contributed to New York City's disproportionately high proportion of students in self-contained classrooms. *Trial Ct.* at 95. As a task force appointed by Mayor Guiliani explained in 1998:

> The roots of the current crisis in Special Education extend back [to] . . . the early 1970s [when] New York City's fiscal crisis stripped support services such as guidance, counseling, speech therapy, and remedial reading programs from general education. As a result, *Board of Education staff were increasingly forced to rely on Special Education as the only available remains of meeting students' special needs, a practice and perception which exists to this day*.

Px 2102 at 7 (emphasis added); *see also* Px 2177 at 18; Px 3153 at 23 (reports by SED, independent commission, and nonprofit similarly concluding that limitations in general education services results in over-referral to special education); Dx 15525 at 6.

The Appellate Division's assertion that "hundreds of millions, if not one billion dollars" could be generated by moving large numbers of students now in self-contained classrooms back into the mainstream has absolutely no evidentiary basis. The court's creative accounting apparently began with statement from Defendants' expert Dr. Reschly that if the national average of students in restrictive settings (25 percent) were applied to New York City, approximately 40,000 students in restrictive placements could be deemed in "excess," and that if these students were then placed in general education settings, the costs directly associated with maintaining separate classrooms would be reduced by approximately $335 million. This initial figure was of

dubious import since, as Dr. Reschly acknowledged upon cross-examination, the $335 million estimation did not take into account the loss in State funds that would result from the reallocation. Further calculations demonstrated that the "savings" retained in the district would be at most $105 to $185 million, depending on the assumptions made. Reschly 19232:25-19233:19; *Trial Ct.* at 96.

Second, and more important, mainstreaming does not erase many of the significant costs associated with educating students with special needs. Most students moving from self-contained to general education classrooms retain a right to whatever related services they were receiving, and many will have a legal right to obtain additional supports and adaptations to permit them to function effectively in an integrated classroom. 20 U.S.C. § 1412(a); 34 CFR §§ 300.550-556. Such services are often extremely expensive. *See, e.g.*, Rosa 12248:10-12250:9 (discussing high costs associated with team-teaching model adopted by district). As the trial court determined based on the record, the considerable cost of such additional services and modifications would reduce the potential savings to (at most) "tens of millions of dollars." *Trial Ct.* at 97.

The Appellate Division's suggestion that plaintiffs would have to prove that a speculative reclassification of students would not yield the speculative savings that the Appellate Division created out of thin air, *App. Div.* at 17, reflects a fundamental misunderstanding of the issue in this case. The record unquestionably establishes that the State has failed to meet its constitutional obligation. New York City's students, both disabled and nondisabled, do not have the resources they need to obtain the fundamental skills of a sound basic education. The district's over-referral to special education was a response to inappropriately large class sizes, inexperienced teachers, and an absence of supportive services for students at risk of academic

failure. These problems continue to plague the New York City school district. Without these additional services in place, inclusion will only pose further challenges for an already failing system.

PART IV

THE COURT SHOULD REQUIRE THE STATE TO TAKE APPROPRIATE ACTIONS TO ENSURE ALL STUDENTS THE OPPORTUNITY FOR A SOUND BASIC EDUCATION

In Part I of this brief, we asked this Court to declare that the Education Article requires the State to ensure that the public schools provide all students with the opportunity to obtain an adequate high school education, one that prepares them for competitive employment and to function as capable and productive civic participants. In Part II, we summarized the overwhelming weight of the evidence that proved that the New York City public school system has persistently failed to meet that standard, or any meaningful standard. In Part III, we demonstrated that the State must accept ultimate responsibility for that failure. Now, we turn to what the Court should do to remedy the constitutional wrong.

In some circumstances, the adoption of a clear constitutional standard and a direction to appropriate state actors to follow the standard might be sufficient. But the history of the State's failure to respond to prior calls for reform of its arcane educational funding system[37] requires

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[37] Twelve years ago, the Supreme Court, Nassau County, summarized the already long history of legislative inaction in responding to the deficiencies in New York State's education finance system:

> In *Levittown*, the defendants argued that the litigation had delayed legislative reform. Accepting this, the Court of Appeals deferred to the Legislature. . . . Shortly thereafter, the carefully researched recommendations of the Rubin Commission were discarded, the Salerno Commission was appointed and its recommendations were ignored. Similarly, the annual submissions by [the State Education

that the Court, at the very least, explicitly require the State to take affirmative action and set a firm time limit for the completion of that action.

In formulating a remedy for this case, the Court may consider the remedies that over 20 other state courts have implemented in similar cases in order to facilitate their state's fulfillment of their constitutional responsibilities. A number of these courts have included specific remedial guidelines in their orders. Given the extensive evidence here showing (a) the State's failure to fulfill its responsibility to provide all students with the opportunity for a sound basic education, and (b) specific deficiencies in the State education finance system, it is appropriate for this Court, like the trial court, to issue remedial guidelines.

The Court's order should not mandate any specific increase in funding for New York City or any other school district, nor should it specify the exact components of any new school funding and accountability systems. Instead it should set forth a few broad constitutional "parameters," each of which could be satisfied by any number of specific education finance reforms or accountability plans that the Legislature and the Governor might choose to adopt. Issuance of such remedial guidelines is consistent with this Court's past practices and, in essence, would initiate an appropriate legislative/judicial dialogue in which the judicial branch articulates the relevant constitutional parameters and entrusts to the legislative and executive

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> Commissioner and the Governor] to the Legislature regarding the urgent need for reform fall on deaf ears.

Reform Educ. Fin. Inequities Today v. Cuomo, 152 Misc. 2d 714, 721 (Sup. Ct. Nassau County 1991), *aff'd as modified*, 606 N.Y.S.2d 44 (2d Dep't 1993), *modified on other grounds*, 86 N.Y.2d 279 (1995); *see also* Berne 12007:2-17, 12009:21-12010:13 (specifics of history of Rubin Commission); Berne 12008:15-12010:13; Salerno 5690:4-5692:6; Px 534-A (specifics of history of Salerno Commission); Berne 12009:12-12010:13 (specifics of history of Moreland Commission).

branches the responsibility for crafting and implementing specific remedies that meet constitutional requirements.

The trial court adopted such an approach and the record fully supports this Court's adoption of the key guidelines proscribed by the trial court. The Court should also establish timelines for the initiation and implementation of the necessary reforms and direct the trial court to retain jurisdiction until an appropriate remedy is put into place.

Remedies issued by other state courts in recent years required the state to "'define an adequate education, determine the cost, fund it . . . and ensure its delivery through accountability.'" *Claremont Sch. Dist.*, 794 A.2d at 749.[38] In this case, the Court has expressly stated that it will define the constitutional conception of an adequate education. Consistent with

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[38] A Task Force of the National Conference of State Legislatures, after studying "the full gamut of school finance litigation during the past three decades," reached similar conclusions. Px 355 at 7-8 (hereinafter, "NCSL Report"). The NCSL Report suggested the following framework "for approaching and integrating adequacy as a cornerstone principle in developing a sound state school finance system," *id*. at 5-8:

> [a.] [P]rovide clear and measurable educational goals or objectives that are expected of students . . . .
>
> [b.] [I]dentify those conditions and tools that enable schools to provide every student a reasonable opportunity to achieve expected educational goals or objectives . . . .
>
> [c.] Ensure that sufficient funding is made available and used to establish and maintain those conditions and tools that have been identified as essential for schools to provide every student a reasonable opportunity to achieve the effective and educational goals or objectives . . . .
>
> [d.] [I]dentify and provide sufficient funding for [additional actions] that are necessary to support the establishment and maintenance in all schools of the conditions and tools that are identified as effective and essential to student learning . . . .
>
> [e.] [E]stablish a system of accountability.

the record of resource inadequacies and deficiencies in the operation of the state education finance system, the remedial order in this case, therefore, should set forth basic remedial guidelines that would direct the State to: (a) determine the actual costs of providing the resources necessary to offer students an opportunity for a sound basic education; (b) reform the current education finance system to ensure that the requisite resources are provided to all school districts; and (c) create a comprehensive accountability system that will ensure that funds are efficiently utilized to produce the conditions for teaching and learning necessary to enable schools to provide all students the opportunity for a sound basic education.

Obviously, as the trial court properly held, "any remedy will necessarily involve the entire state." *Trial Ct.* at 113. Application of the remedy on a statewide basis has been virtually axiomatic where a state court has invalidated a State education finance system. *See, e.g., Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) (state wide remedial order in case brought on behalf of three students in a single district); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (state wide remedial order issued in case brought by school district and taxpayer-parents and students in that district)*; Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (state wide remedial order in case brought by 68 school districts, and parents and students); *Roosevelt v. Bishop*, 877 P.2d 806 (Ariz. 1994) (state wide remedial order in case brought by four school districts and parents); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995) (state wide remedial order in case initially brought by four school districts, later joined by an additional district and the statewide teacher's union); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997) (state

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Id. at 10-18.

wide remedial order in case brought by five districts and certain administrators, parents and students).[39]

I. The Threshold Task: Determine the Actual Costs of Providing the Opportunity for a Sound Basic Education

The major shortcoming of the current State education finance system that causes that denial is its failure "to align funding with need." *Trial Ct.* at 83. Consistent with the experience of other state courts, the trial court determined that the "threshold" remedial task is "ascertaining, to the extent possible, the actual costs of providing a sound basic education in districts around the State." *Trial Ct.* at 115.[40] Such a costing-out study has never been undertaken in the State of New York, and the State, therefore, has always lacked an analytic basis for developing a fair and rational funding system. As the record makes clear, the State has ostensibly used the State aid system to provide funding for specific purposes, such as class size reduction or supporting programs for at-risk students, but sufficient funding often does not actually materialize because

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[39] In *Levittown v. Nyquist*, a case brought by 12 students, 27 districts and 4 intervenors, the trial court issued a judgment declaring invalid New York State's entire statewide finance system. 94 Misc. 2d 466 (S. Op. Ct. Nassau Co. 1978). The statewide remedial order was upheld by the Appellate Division, 443 N.Y.S.2d 843 (2d Dep't 1981). This Court reversed the trial court's liability finding, but it did not question the appropriateness of issuing a statewide remedy. 57 N.Y.2d 27 (1982).

[40] Although the Appellate Division majority did not reach the remedy issue, Justice Saxe, in his dissent, emphasized the importance of the trial court's call for a costing-out study:

> I would affirm the provision of the judgment which directs the State to determine the actual cost of providing City public schools with the programs they need in order to be able to give all their students the opportunity to obtain an education. Such costs would include the extended platform of programs needed by at-risk children, and the type of teacher development programs that assist new and inexperienced teachers develop the skills they need to successfully educate their students.

App. Div. at 36-37 (Saxe, J., dissenting).

there has been no effort and no agreed upon procedure for determining what each of these programs should actually cost. Similarly, the only way to determine precisely whether any cost savings could actually be realized by moving more special education students into mainstream settings is to cost-out what the supplementary programs and supports they will need in the main stream actually will cost.

Legislatures and state education departments in more than a dozen states have undertaken costing-out studies of this type in recent years. *See, e.g., Campbell County Sch. Dist.*, 907 P.2d at 1238, 1279 (directing that a "cost of education study and analysis must be conducted and the results must inform the creation of a new funding system"); *DeRolph v. State*, No. 22043, at 353-54 (Ohio Ct. Com. Pl. Perry Co. July 1, 1994) (directing State Superintendent of Public Instruction to "forthwith" prepare and present to the Legislature proposals for eliminating educational disparities, compliance with which relied primarily on a cost study); *Lake View Sch. Dist. v. Huckabee*, No. 92-5318 (Pulaski County Chancery Ct. May 25, 2001) (finding that a constitutionally acceptable funding system must be based on the actual cost of providing an adequate education and that "an adequacy [cost] study is necessary and must be conducted forthwith"); *see also* James W. Guthrie & Richard Rothstein, *Enabling Adequacy to Achieve Reality: Translating Adequacy Into State School Finance Distribution Arrangements* in *Equity and Adequacy in Education Finance* 209, 228-246 (Helen F. Ladd *et al*., eds., 1999) (detailed discussion of methodologies utilized in Wyoming costing-out study).

Accordingly, the Court should require as its first remedial guideline that ***the State ascertain, to the extent possible, the actual costs of the resources needed to provide the***

opportunity for a sound basic education[41] in all school districts in the state through an objective costing-out study.[42]

II. Ensure that Every School Has the Resources Necessary to Provide the Opportunity for a Sound Basic Education

Once an objective costing-out study has identified the amount of money needed to provide the opportunity for a sound basic education in each school district, the State should ensure that the State education finance system provides a realistic means for every district to secure such funds, including some combination of State and local funds. A broad guideline incorporating this principle would not necessarily affect the discretion of the legislative and executive branches to determine the actual formula or formulas for providing funding for public education, or their determination of the extent to which education appropriations should come from State or local revenue sources. Nor would it preclude the State from allowing local districts

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41 For example, it would be appropriate for a costing-out study to determine the actual costs of implementing the Regents Learning Standards in school districts around the state, since those standards reflect the Regents' current statewide minimum standard of educational quality and quantity.

42 Plaintiffs-Appellants, together with the New York State School Boards Association and 28 other statewide education, business and public policy organizations intend in March, 2003, to initiate an extensive state-wide costing-out study, with foundation funding support. This "New York Adequacy Study" will be led by a team of four national experts who have conducted similar studies in many other states. Although Plaintiffs-Appellants have been involved in organizing this study, the experts will be operating independently and will be solely responsible for its results. (Two of the four experts, in fact, testified on behalf of the State at the trial in this case.) The Governor has expressed interest in seeing the report these consultants issue. Greg Winter, "Decent Education, Figured in Dollars," *N.Y. Times*, Oct. 2, 2002, at B8.

Plaintiffs-Appellants believe that the New York Adequacy Study will provide the objective, accurate information needed for an actual cost data basis, but without an order from this Court, the State authorities need not accept the findings of this study, or conduct a costing-out study of their own.

to raise and spend additional funds beyond the constitutional minimum to provide additional services to their students.

This guideline would require the State to ensure that sufficient funding is available to provide a constitutionally adequate educational opportunity in every school. Moreover, the guideline would ensure that if the State chooses to maintain the status of New York City and the other four large cities in the state as fiscally dependent school districts, it must, through "maintenance of effort" laws or other means, ensure that the respective municipalities actually appropriate their anticipated share of educational funds so that the essential resources are, in fact, made available to the students in each locality. *See Trial Ct.* at 99.

In order to ensure that adequate funding is available in every district, the guideline should specify that variations in costs must be taken into account. The Legislature itself has in recent years added regional cost adjustments to some, but not to all, of its complex funding formulas. *See, e.g.,* N.Y. Educ. L. § 3602.6 (regional cost factor in building aid formula). To ensure that adequate funding is available for all children, the currently limited, inconsistent pattern of providing for cost variations should be extended to encompass the entire funding system. There are, of course, a variety of methods for calculating regional cost difference, and a range of opinion on which of the many available cost-of-living indices should be utilized for various purposes. A broad guideline does not in any way constrain legislative and executive discretion in making these choices.

Accordingly, as its second remedial guideline, the Court should 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.[43]

III. Establish an Accountability System that Will Ensure that Funds Are Used Efficiently to Create the Conditions and Tools Necessary to Provide All Students With the Opportunity For A Sound Basic Education

Reform of the State education finance system must be accompanied by creation of an effective accountability system, both to confirm that there is "no waste, no duplication, no mismanagement" and to ensure that resources are being utilized effectively in all schools to provide maximum benefit to students. *Rose,* 790 S.W.2d at 213.[44]

In implementing its Learning Standards and in responding to requirements of the federal No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002), the New York Board of Regents has already put into place some accountability measures that, among other things, provide information on student performance, require districts with schools performing below State standards to develop local assistance plans, and identify certain schools that are farthest from meeting the standards as "Schools Under Registration Review" ("SURR") schools, which

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[43] The guidelines set forth by the trial court in this regard required the State to:

> [a.] Ensur[e] that every school district has the resources necessary for providing the opportunity for a sound basic education.
>
> [b.] Tak[e] into account variations in local costs

Trial Ct. at 115.

[44] *See also, e.g., Claremont Sch. Dist.,* 794 A.2d at 752 (2002) ("[A]ccountability is an essential component of the state's duty to provide a constitutionally adequate education."); *DeRolph* 728 N.E.2d at 1018 ("[A]ccountability is an important component of a system that provides funds."); *Tennessee Small Sch. Systems v. McWherter,* 894 S.W.2d 734, 737 (Tenn. 1995) (describing revised statutory accountability system); *Edgewood Indep. Sch. Dist v. Meno,* 893 S.W.2d 450, 462 (Tex. 1995) (same); Px 355 at 17-18 (state education finance systems should establish an effective accountability system)

are then subject to more extensive corrective action. *See* 8 NYCRR § 100.2(p). The Legislature has also recently revamped the governance structure for the New York City public schools to lodge greater responsibility for school system operations in the Mayor. *See* 2002 N.Y. Laws ch. 91; N.Y. Educ. L. Art. 52-A.

Although some elements of an effective accountability system may, therefore, already be in place, the State should comprehensively reconsider accountability in light of the record of inadequacies developed in this case and the results of a costing-out study. A comprehensive accountability system should ensure that funds allocated are used efficiently by schools and school districts to create the conditions for teaching and learning that will, in fact, provide the opportunity for a sound basic education to all children. Such a system should include accurate data and reporting systems, State fiscal and educational oversight and the development of systems that "ensure that every school in every school district has the capacity to give every student a reasonable opportunity to succeed." Px 355 at 11. Creation of a climate for teaching and learning in each school may require methods to motivate reciprocal commitments by teachers, administrators, parents, students and other members of the each school community to hold themselves responsible for creating a climate conducive to teaching and learning in each school. *See* William S. Koski, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 Stan. L. & Pol'y Rev. 301, 303-06 (2001).

If schools and school districts are to be held accountable for results, they must be able to plan effectively and establish suitable conditions for productive teaching and learning. The current State education finance system impedes effective planning and learning. Unlike most states that have true funding formulas, New York's mélange of complex funding streams is re-adjusted every year, not in response to educational needs, but in response to competing political

pressures, and the actual amount of funding each district will receive is usually not known until months after the statutory deadline. School districts cannot undertake effective long-range educational planning and be held responsible for improvements in student achievement under these conditions.

The trial court found that the current State aid system is "based on an array of often conflicting formulas and grant categories that are understood by only a handful of people in State government. Even the State Commissioner of Education testified that he does not understand fully how the formulas interact." *Trial Ct.* at 83. To remedy this situation, which is pernicious to the functioning of a democracy and discourages the "civic engagement" of interested citizens, the trial court insisted that a reformed State finance system be as "transparent" as possible. If school administrators are to be held responsible for effectively utilizing resources and for educational results, State authorities should be held accountable for providing citizens information about the State education finance system in a form that they can easily comprehend.

Accordingly, the Court should require as its third remedial guideline that ***the State establish a comprehensive accountability system that will: 1) ensure that funds are efficiently utilized to produce the conditions for teaching and learning necessary to enable schools to provide all students with the opportunity for a sound basic education; 2) involve members of local school communities in taking responsibility for creating in their schools a climate conducive to effective teaching and learning; and 3) ensure that the State education finance system is as comprehensible to the public as possible and provides sustained, stable funding that will promote effective long-term planning by school districts.*** [45]

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[45] The trial court issued three broad guidelines that deal with accountability issues:

IV. Issuance of Remedial Guidelines Is Consistent With This Court's Prior Practices

Issuance of a set of guidelines to ensure that the State (1) determines the cost of a sound basic education, (2) reforms the funding system to ensure that all schools obtain essential resources, and (3) establishes a comprehensive accountability system essentially summarizes the nature of the "duty [the Education Article imposes] on the Legislature to ensure the availability of a sound basic education to all the children of the State." *CFE I*, at 315. This Court has itself articulated such constitutional parameters to guide the remedial process in analogous remedial situations.

In Matter of Lavette M., 35 N.Y.2d 136 (1974), a case involving the adequacy and effectiveness of treatment plans for children in need of supervision ("PINS" children), the Court articulated constitutional parameters to guide the remedial process that were analogous to the guidelines issued by the trial court in this case. There, this Court defined the proper judicial role in terms of "assur[ing] the presence of a bona fide treatment program." *Id.* at 152. To carry out this judicial role, the Court held that "the perimeters of the right to treatment may be defined," and then went on to articulate the following specific constitutional "perimeters": 1) treatment

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> [a.] Provid[e] sustained and stable funding in order to promote productive, long-term planning by schools and school districts.
>
> [b.] Provid[e] as much transparency as possible so that the public may understand how the State distributes school aid.
>
> [c.] Ensur[e] a system of accountability to measure whether the reforms implemented by the legislature actually provide the opportunity for a sound basic education and remedy the disparate impact of the current finance system.

Trial Ct. at 115.

standards must take account of "present knowledge"; 2) "failure to provide suitable and adequate treatment [may not] be justified by lack of staff or facilities"; and 3) "the right to treatment embraces a requirement of initial diagnosis and of periodic assessment . . . in order that individualized treatment may be revised as the diagnosis develops." *Id.* at 142-143.

Similarly, in *McCain v. Koch*, 70 N.Y.2d 109 (1987), this Court upheld an injunction issued on behalf of homeless families to enforce their right to minimally adequate housing. The remedial order this Court approved in that case was much more specific than the general guidelines the trial court issued here, encompassing such detailed criteria as "a bed for each family member, or a crib in the case of an infant, with a clean mattress and pillow and with clean and sufficient sheets and blankets" and "a sufficient number of clean towels." *Id* at 115; *see also Heard v. Cuomo*, 80 N.Y.2d 684, 691 (1993) (establishing guidelines for implementing statutory requirement to develop written service plans for the discharge of mentally ill patients who lack housing).

In contrast to the permissive language of the welfare and housing provisions involved in *Lavette M., McCain,* and *Heard*, the Constitution's command to provide all students with the opportunity for a sound basic education is a positive right. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1132 (1999). It is even more important, therefore, that appropriate guidelines be issued in this case in order to fully convey that the constitutional requirement to create an opportunity for a sound basic education for all children is mandatory and not merely "hortatory." *CFE I* at 315.

V. Issuance of Remedial Guidelines Is Consistent With The Successful Experience of Other State Courts

Over the past three decades, there has been a remarkable flowering of state court constitutionalism,[46] particularly in response to the constitutional challenges to state education finance systems that have been mounted in 44 states.

Extensive state court involvement in this area began shortly after the United States Supreme Court held in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), that education is not a fundamental interest under the federal constitution. The closing of the courthouse doors in the federal system – and the fact that many state constitutions contained specific provisions guaranteeing students substantive educational opportunities – thereafter led plaintiffs to lodge challenges in state courts to inequities and inadequacies that have been prevalent in the educational finance systems of almost all of the states.

As the trial court noted, commentators have tended to discuss the cases challenging state education finance systems in terms of three "waves," the latest of which began in 1989 and is marked by a de-emphasis on equal protection claims and a greater reliance on education clauses in state constitutions. *Trial Ct.* at 6-9. The shift from "fiscal equity" to "education adequacy" in recent years has resulted in an increasing number of court decisions invalidating state finance

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46 *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); *Symposium: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 959 (1985), Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 Vt. L. Rev. 49 (1988), Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147 (1993), Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York Court of Appeals'* Quest for Principled Decision-Making, 62 Brook. L. Rev. 1, n.4 (noting that between 1987 and 1996, there have been over 500 law review articles on state constitutionalism).

systems.[47] In fact, over the past five years, plaintiffs have prevailed in substantive decisions of the highest courts in education adequacy cases in ten states, while defendants have prevailed in only three.[48]

In the early years, the prevalent judicial approach among courts that had declared their existing state systems unconstitutional was to defer broadly to legislatures to develop new systems without providing any substantive guidelines or judicial oversight. Such blanket judicial deference in states like New Jersey led to contempt motions and extensive compliance litigation.[49] Other state courts, like that in *Pauley v. Bailey*, 324 S.E.2d 128 (W. Va. 1984), took

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47 *See generally* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 Vand. L. Rev. 101 (1995); Deborah A. Verstegen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education*, 24 J. Educ. Fin. 51, 67 (1998); Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm in Equity and Adequacy in Education Finance: Issues and Perspectives* 175, 188-89 (Helen F. Ladd et al. eds. 1999).

48 Specifically, since 1997, plaintiffs have prevailed in: *Lake View Sch. Dist.* 2002 Ark. LEXIS 603; *Tennessee Small Sch. Systems v. McWherter*, 2002 Tenn. LEXIS 425 (Tenn. Oct. 8, 2002); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *Idaho Schools for Equal Educational Opportunity v. Evans*, 976 P.2d 913 (Idaho 1998); *Hull v. Albrecht*, 960 P.2d 634 (Ariz. 1998); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Claremont Sch. Dist.*, 703 A.2d 1353; *DeRolph*, 677 N.E.2d 733. Defendants have prevailed only in: *Vincent v. Voight*, 614 N.W.2d 388 (Wisc. 2000); *Lewis E. v. Spagnolo* 710 N.E.2d 798 (Ill. 1999); and *Pennsylvania Assoc. of Rural and Small Schools v. Ridge*, 737 A.2d 246 (Pa. 1999). Moreover, in *Vincent*, the Wisconsin Supreme Court, while rejecting the plaintiffs' equity claim, held that the state constitution guarantees schoolchildren the right to "an equal opportunity for a sound basic education [which] will equip students for their roles as citizens and enable them to succeed economically and personally," and impliedly suggested that the plaintiffs present evidence on the adequacy issue in a future lawsuit. *Vincent v. Voight*, 614 N.W.2d at 396.

49 In New Jersey, legislative neglect of the state supreme court's deferential 1973 order in *Robinson v. Cahill* led to the issuance of a series of gradually more prescriptive follow-up orders by the court. *See Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Robinson v. Cahill*, 306 A.2d 65 (N.J. 1973); *Robinson v. Cahill*, 339 A.2d 193 (N.J. 1975); *Robinson*

an opposite tack: they set forth detailed prescriptions for the design of a new state education finance system, an approach that also failed to generate effective, timely follow-through by the legislative and executive branches.[50]

In recent years, in connection with the shift from equity to adequacy, many state courts have adopted a "middle ground" position that has proved effective in implementing remedies. In these adequacy cases, state courts have articulated a constitutional definition of an adequate education and then, like the trial court here, provided general guidelines – but not prescriptive mandates – to the legislative and executive branches on how the new education finance system should be structured. These constitutional definitions and guidelines have provided effective, judicially manageable tools for implementing remedies in these cases.

For example, in Kentucky, the Court defined specific goals for an "efficient" education and then set forth basic guidelines for implementing them. *Rose*, 790 S.W.2d at 212-13. Within 10 months of the issuance of the Supreme Court's final order, the Kentucky legislature enacted the sweeping Kentucky Education Reform Act, one of the most thorough educational reform

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v. Cahill, 351 A.2d 713 (N.J. 1975)*; Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976) (*Robinson VI)*. When a revised funding system which facially satisfied the court's orders proved inadequate in practice, plaintiffs filed *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985) (remand order), and the new system was declared unconstitutional in *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990). A partial remedial response by the state led to additional motions and decisions in *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994) (setting 1997 deadline) and *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997) and approval and enforcement of the state's proposed remedial programs, in *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998); *Abbott v. Burke*, 748 A.2d 82 (N.J. 2000). Recently, New Jersey's Governor James McGreevey formally withdrew the state's opposition to the court's remedial order and joined with the Abbott plaintiffs in a series of joint initiatives designed to promote effective implementation of the court-ordered reforms. Exec. Order No. 6 (Feb 19, 2002), *available at* http://www.state.nj.us/infobank/circular/com6.htm

[50] *See* J.L. Flanigan, *West Virginia's Financial Dilemma in the Real World*, 15 J. Educ. Fin. 229 (1989) (discussing West Virginia Legislature's failure to implement the Court's Master Plan).

statutes in the nation. *See* Ky. Rev. Stat. Ann. § 156.005 (1996); Jacob E. Adams, Jr., *School Finance Reform and Systemic School Change: Reconstituting Kentucky's Public Schools*, 18 J. Educ. Fin. 318, 331 (Spring 1993).

Similarly, in Wyoming, the Supreme Court issued a number of instructions to the legislature on how to ensure a constitutionally-acceptable education for all students in the state based on the factual findings at the trial. *Campbell County Sch. Dist.*, 907 P.2d at 1279. The legislature immediately responded by adopting a legislative work plan, delegating various responsibilities to six interim joint committees and retaining professional consultants to conduct an extensive costing-out study to "assure that adequate resources were distributed to provide a proper education for every Wyoming child." *Campbell County Sch. Dist. v. State*, Civil No. 129-59, at 3 (Wyo. Dist. Ct. 1st Jud'l Dist. Laramie County Dec. 31, 1997); *see also DeRolph v. State*, 677 N.E.2d at 747 (listing specific problems that the legislature must address in creating a new school financing system); *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997) (guidelines issued to legislature regarding new capital funding system).

Issuance of such constitutional guidelines by the courts in these cases represents a new "dialogic" approach to remedies in institutional reform litigations, which differentiates state constitutionalism from federal constitutionalism in important ways:

> The state courts engage in a dialogue . . . with the political branches almost to the point where they become partners in crafting a solution. That solution does not come from the court nor is it imposed by the court. Judicial decisions resemble a set of guidelines for the next, legislative step in the process rather than judgments designed to affect the rights and duties of a particular set of litigants. The judicial decree is not, as in the federal norm, the 'centerpiece' dictating who shall do what. The court does declare a duty but its order is essentially advice on how to . . . perform that duty.

George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on State Court School Finance Decisions*, 35 B.C. L. Rev. 543, 546 (1994), *see also* Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 Yale L.J. 1763, 1771-72 (1993) (discussing "dialogic" nature of interactions between courts, legislatures, agencies and other social processes); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1132, 1138 (1999) (arguing that presence of positive rights in state constitutions "requires a state court to share explicitly in public governance, engaging in the principled dialogue that commentators traditionally associate with the common law resolution of social and economic issues"); *cf.* Judith S. Kaye, *State Courts At the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 23 (1995) (noting that in regard to statutory interpretation, "the state legislative/ judicial relationship often takes the form of an open dialogue"); *Cohen v. State of New York*, 94 N.Y.2d 1, 14 (1999) ("The genius of the [separation of powers] system is synergy and not 'separation' in the common connotation of that latter word.")

VI. The Court Should Establish Appropriate Timelines

In order to avoid inordinate delay in implementing an effective remedy, the trial court established a process for "timely action to address the problems set forth in this opinion." *Trial Ct.* at 114. The trial court's timeline, if it had not been stayed by the automatic operation of CPLR § 5519, would have required implementation of the reforms needed to redress the constitutional violations within nine months; the trial court also ordered the parties to appear before the court after six months to describe the progress of these reforms. This approach is fully consistent with the precedents in other states. Almost all of the State courts that have invalidated

their state education finance systems have established specific timelines for compliance.[51] The overwhelming majority of the courts also retain jurisdiction in order to ensure that compliance is swiftly achieved.[52]

Although the trial court's order on its face called upon the defendants to "implement" the remedy within nine months, presumably this would have meant that the necessary costing-out study, and development of funding reforms and accountability systems, would have been undertaken in earnest during that period, and that the Defendants would have been prepared at the six-month hearing to offer a good-faith estimate of the additional time needed to complete implementation.

Plaintiffs-Appellants realize that completion of a thorough costing out study may require a year or more and that additional time must be provided for the Legislature and the Governor to analyze the results of the study, to align new funding reforms to the actual cost data and to develop a comprehensive accountability system to implement the new approach. Major structural changes in the education finance system, once adopted by the Legislature, may also

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51 *See, e.g., Claremont Sch. Dist.* 703 A.2d at 1360 (staying further proceedings "until the end of the upcoming legislative session"); *DeRolph*, 677 N.E.2d at 747 (staying the effect of its decision for 12 months); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1280 (Wyo. 1995) (ordering the legislature to achieve constitutional compliance by "not later than July 1, 1997"); *Edgewood Independent Sch. Dist. v. Kirby*, 777 S.W.2d 391, 399 (Tex. 1989) (modifying the lower court's judgment so as to stay the effect of its injunction until May 1, 1990, and stating that the "legislature must take immediate action"); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 688, 693 (Mont. 1989) (tightening the lower court's deadline from Oct.1, 1989, to July 1, 1989, for the legislature to "present an equitable system of school financing"); *Hull v. Albrecht*, 960 P.2d 634, 636 (Ariz. 1998) (extending trial court's June, 1998 deadline by 60 days).

52 *See, e.g., Brigham v. State*, 692 A.2d 384, 398 (Vt. 1997) (remanding to the trial court "so that jurisdiction may be retained until valid legislation is enacted and in effect"); *Campbell County Sch. Dist.* 907 P.2d at 1280; *Roosevelt v. Bishop*, 877 P.2d 806, 816 (Ariz. 1994); *Abbott v. Burke*, 643 A.2d at 576; *McDuffy*, 615 N.E.2d at 556; *Opinion of the Justices (School Financing)*, 712 A.2d 1080, 1084, 1088 (N.H. 1998).

require a reasonable phase-in period. Accordingly, this Court should adopt the remedial timelines set forth by the trial court, but clarify the specific implementation requirements, and the court should direct the trial court to retain jurisdiction until implementation has been completed.

Recognition that proper development of a permanent remedy to the constitutional deficiencies of New York State's current education finance system will take time to complete makes it all the more imperative that the Court issue an emphatic remedial order that will require the Defendants to initiate the necessary reform process at once. Although it may not be possible to immediately provide full relief, the Court should assure New York City's 1.1 million school children – and hundreds of thousands of similarly situated students elsewhere in the state – that their constitutional rights are not theoretical and that the opportunity for all of them to obtain a sound basic education ***will*** become a reality promptly.

PART V

PLAINTIFFS ESTABLISHED A CLEAR VIOLATION OF THE IMPLEMENTING REGULATIONS OF TITLE VI OF THE FEDERAL CIVIL RIGHTS ACT OF 1964 AND HAVE STANDING TO PURSUE THEIR CLAIM UNDER 42 U.S.C. § 1983

In addition to proving their Education Article claim, at trial Plaintiffs established that the State education finance system has a disparate racial impact on New York City's minority school children in contravention of the federal Department of Education's ("DOE") Title VI implementing regulations. Those regulations prohibit a recipient of federal financial assistance from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 34 C.F.R. 100.3[b][2]. Plaintiffs brought their disparate impact claim directly under Title VI itself, as well as under 42 U.S.C. § 1983. *See* Am. Compl. ¶ 84 (Reproduced Record on Appeal, Vol. I at 224).

The trial court below found that the evidence – largely uncontested by Defendants – clearly established that the State education finance system has a discriminatory effect on New

York City school children. The evidence showed that, although New York City educates three out of every four minority schoolchildren in New York State, the City receives substantially less finding per student, on average, than other districts. *Trial Ct.* at 102-04. At trial, Defendants themselves introduced evidence that between 1994 and 2000, New York City had "approximately 37% of the state's enrolled students and [] received a percentage of total State aid ranging from 33.98% to 35.65%." *Trial Ct.* at 104. As a result, seventy-three percent of all minority school children in New York State receive less State education aid on average than their non-minority counterparts.[53] As the trial court properly concluded, "[t]his is evidence of disparate impact." *Trial Ct.* at 104.

In April 2001, after the trial court had issued its decision and judgment, the U.S. Supreme Court held in *Alexander v. Sandoval*, 532 U.S. 275 (2001), that no private right of action exists under section 602 of Title VI, the provision under which the DOE regulations are promulgated. *Id*. at 293. The Appellate Division below did not address the merits of Plaintiffs' Title VI claim at all and instead addressed only whether Plaintiffs had standing under Section 1983 to enforce the DOE Title VI implementing regulations. *App. Div*. at 19-22. Ignoring clear guidance from the dissent in *Sandoval* and applicable case law, the Appellate Division held that the Title VI implementing regulations do not give rise to an enforceable right and dismissed Plaintiffs' Title VI claim. *Id*. at 22.

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[53] Although both sides presented complex statistical analyses in support of their positions on Plaintiffs' federal Title VI claim, it was ultimately this intuitive, straightforward and virtually unchallenged evidence of disparate racial impact that the trial court emphasized in its findings: "(1) 73% of the state's minority public school students are enrolled in New York City's public schools, (2) minority students make up approximately 84% of New York City's public school enrollment, and (3) New York City receives less funding per capita, on average, than districts in the rest of the state." *Trial Ct.* at 102.

The Appellate Division's opinion explicitly relies on the *Sandoval* opinion to support its conclusion that Plaintiffs lack standing under Section 1983, despite the fact that Section 1983 was not addressed by the *Sandoval* majority at all.[54] Indeed, as Justice Stevens pointed out in his dissenting opinion in Sandoval, "[*l*]*itigants who in the future which to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief.*" *Sandoval*, 523 U.S. at 300 (Stevens, J., dissenting) (emphasis added). Although the Supreme Court has recently reconsidered a plaintiff's standing rights under Section 1983 in light of *Sandoval* and denied standing to plaintiffs seeking to enforce a claim under the Federal Educational Rights and Privacy Act, *see Gonzaga University v. Doe*, 536 U.S. 273 (2002), at least one Circuit Court of Appeals has subsequently held that "[d]isparate impact claims may still be brought against state officials for prospective injunctive relief through an action under 42 U.S.C. § 1983 to enforce section 602 regulations." *Robinson v. State of Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002). Accordingly, Plaintiffs may still enforce the DOE Title VI implementing regulations through 42 U.S.C. § 1983.

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[54] The *Sandoval* case itself concerned the viability of a direct cause of action to enforce Title VI implementing regulations and did not involve any claim under Section 1983. *See Sandoval*, 523 U.S. at 278.

CONCLUSION

Plaintiff-Appellants respectfully request that the Court reverse the Order of the Appellate Division First Department and issue an Order which:

1. Declares that Article XI, § 1 of the New York State Constitution requires the State to ensure that the public schools provide all students the opportunity to obtain an adequate high school education, one that prepares them for competitive employment and to function as capable and productive civic participants, and that the State must assure that the following essential resources be provided:

    A. Sufficient numbers of qualified teachers, principals and other personnel.

    B. Appropriate class sizes.

    C. Adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum.

    D. Sufficient and up-to-date books, supplies, libraries, educational technology and laboratories.

    E. Suitable curriculum, including an expanded platform of programs to help at-risk students by giving them "more time on task."

    F. Adequate resources for students with extraordinary needs.

    G. A safe, orderly environment.

2. Declares that the state education finance system violates Article XI, § 1 of the New York State Constitution, and the regulations of Title VI of the Federal Civil Rights Act of 1964.

3. Directs the State to promptly take such action as may be necessary to provide all students with the opportunity to obtain a sound basic education in accordance with the following guidelines:

    A. Ascertain, to the extent possible, the actual costs of the resources needed to provide the opportunity for a sound basic education in all school districts in the state through a thorough objective costing-out study.

    B. 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.

    C. Establish a comprehensive accountability system that will 1) ensure that funds are efficiently utilized to produce the conditions for teaching and learning necessary to enable schools to provide all students the opportunity

for a sound basic education; 2) involve members of local school communities in taking responsibility for creating in their schools a climate conducive to effective teaching and learning; 3) ensure that the state education finance system is as comprehensible to the public as possible and provides sustained, stable funding that will promote effective long-term planning by school districts.

4. Orders the State within six months to initiate the studies and activities required by the remedial guidelines and directs the trial court to establish appropriate time lines for full implementation of the reforms needed to redress the constitutional violations herein and to retain jurisdiction over this matter until they have been corrected.

Dated: New York, New York
January 31, 2003

Respectfully submitted,

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