To Be Argued By:
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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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

New York Constitution

New York Statutes

Other Authorities

PRELIMINARY STATEMENT

In 1995, this Court held out the promise that the parents and children of New York State could look to the courts for relief when a public school system fails for decades to provide adequate resources and the State tolerates a long history of educational failure. The Court said in *CFE I* that Plaintiffs' allegations of gross resource inadequacies and educational failure in the New York City public school system, if proven, would constitute a constitutional violation. The Court cited Plaintiffs' specific allegations that the City's students had been denied the opportunity to:

> speak, listen, read, and write clearly and effectively in English, perform basic mathematical calculations, be knowledgeable about political, economic and social institutions and procedures in this country and abroad or to acquire the skills, knowledge, understanding and attitudes necessary to participate in democratic self-government.

Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307, 308 (1995) ("*CFE I*").

The trial record proves beyond any doubt that this opportunity has been denied to the City's students for many years, resulting in massive educational failure. And the trial record proves beyond any doubt that the educational resources available in the New York City public school system have long been grossly inadequate. Indeed, Defendants' refusal to confront much of the record, their resort to new "evidence" outside of the record, and their recognition that recent attempts at reform were prompted by academic failure, not success, only confirm that there is no basis in the factual record properly before this Court to challenge the trial court's 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." *Campaign for Fiscal Equity v. State of New York*, 187 Misc. 2d 1, 4 (Sup. Ct. New York County

2001) ("*Trial Ct.*"). Having proved a long-standing constitutional harm, Plaintiffs rightly look to this Court to fulfill the promise of *CFE I*.

But this case is not just about ensuring that future generations of New York City children will not suffer the same dismal outcomes of the last decades. For, in addition to permitting Plaintiffs' specific claims concerning the New York City school system to go forward, the Court in *CFE I* recognized that adjudicating these claims would require the "constitutional concept and mandate of a sound basic education" to be "fully evaluated and resolved" after "the development of a factual record." *CFE I* at 317. Thus, the Court began a process of profound importance to the entire state, for the articulation of a clear constitutional standard will give notice to the Legislature, the Executive and the public of the scope of the responsibility embraced by the command of the Education Article to "provide for the maintenance and support of a system of free common schools, where ***all*** the children of this state may be ***educated***." N.Y. Const. art. XI, § 1 (the "Education Article") (emphasis added). Indeed, the public's deep interest and concern about the constitutional standard is reflected in the numerous *amicus curiae* briefs addressed to this issue submitted on behalf of virtually all of New York State's local school boards and hundreds of business, education and civic organizations from across the state.

The trial court, responding to the Court's direction, developed an extensive trial record addressing the constitutional standard. That record established what common sense suggested: students must have the opportunity to acquire a meaningful high school diploma in order to be adequately prepared for the demands of citizenship and the modern economy. Defendants' claim that a high school education is somehow aspirational and far above what constitutes "minimally adequate" preparation for citizenship is indefensible and can only be understood as a cynical attempt to avoid liability: Defendants know that the New York City school system has failed for

decades to provide the opportunity for vast numbers of its students to graduate from high school. Indeed, Defendants' attempt to demonize the recently implemented Regents Learning Standards and related graduation requirements is merely an attempt to distract the Court from this truth. Forty percent of the City's students have consistently failed to graduate even under the much lower standard that preceded the new requirements.

The record, of course, includes extensive evidence that a high school diploma is the minimal credential necessary to compete for more than menial labor, for higher education, and to capably discharge the duties of citizenship. There is nothing in the record that supports a lesser standard and no witness called on behalf of Defendants claimed that anything less than a high school standard would be sufficient.

Certainly there was no evidence to support the Appellate Division's eighth grade standard, which Defendants did not even propose in their appeal of the trial court's decision and which the defendant Governor has publicly denounced. On this appeal, Defendants had the opportunity to tell this Court what every State official who has been publicly quoted has said about the Appellate Division's standard: It is simply wrong.

But Defendants refused to even acknowledge that this Court had initiated a standard-setting process in *CFE I* and they refused to offer any standard for the Court's consideration. Instead, and incredibly, Defendants attempt to cut short the constitutional and factual inquiry begun by *CFE I,* claiming that the high school standard proposed by Plaintiffs is too high, and insisting that the Court therefore has no further authority because the Court "does not sit as a roving commission of constitutional inquiry." Defendants-Respondents' Opposition Brief ("Def. Br.") at 71. We are at a loss to understand the meaning of this claim, or its logical or jurisprudential basis.

Defendants' failure to offer a constitutional standard of their own and their apparent reluctance to embrace fully even an eighth grade education as a constitutional minimum reflects their implicit recognition that the conditions of learning that have persisted in the New York City public school system for years would fail to satisfy *any* meaningful standard. The uncontroverted evidence established that the New York City public school system has failed for decades to teach vast numbers of its students to read. The tests approved by the Board of Regents and administered by the State Education Department ("SED") have long shown that one-third of New York City's elementary school children are functionally illiterate – they do not have even the most basic literacy skills. Neither Defendants' distortion of national "averages" nor their purposeful confusion of norm scoring and criterion scoring can obscure this fact: one third of the City's children cannot read. This fact alone – not acknowledged anywhere in Defendants' 187-page opposition brief – puts the lie to Defendants' fundamental factual premise that "the success of City students on statewide and national tests demonstrates that most of them . . . obtain a sound basic education." Indeed, the only "evidence" Defendants offer to support this conclusion are test results that have been rejected by the State Education Department and the City Board of Education ("BOE") precisely because the results do not provide any indication of whether a child can actually read.

As Defendants know, the New York City system cannot even pass constitutional muster under the eighth grade "standard" adopted by the Appellate Division. Tens of thousands of New York City students are not obtaining the skills and knowledge expected of middle school students: More than one third of the City's middle school students cannot meet the SED's basic literacy standard, a majority of ninth graders fail multiple courses in their freshman year in high school and they begin dropping out of the system in massive numbers by tenth grade. Indeed,

most of the students who dropped out of the City system never even took the low-level tests – the RCTs – that the Regents formerly administered to all students in the eleventh grade and that Defendants now cite as evidence of academic success.

Given the systemic evidence of sustained educational failure from elementary school through high school, Defendants' insistence that New York City's students receive a constitutionally sound education is ludicrous. A school system that cannot teach one third of its students to read, that cannot teach vast numbers of its students the basic competencies of middle school social studies and science, that cannot teach 40 percent of its students what they need to know to graduate from high school and that cannot teach most of its graduates what they need to know to undertake entry-level community college courses, is not providing its students with the opportunity to acquire the fundamental skills necessary for productive civic participation.

Defendants blame circumstances beyond the control of the schools for this massive educational failure. Many New York City students do come to school from poor homes, many were foreign-born and some may hear a language other than English spoken at home. But the evidence proves that children are not doomed to illiteracy by these circumstances. As the Board of Regents recognizes and as Defendants' experts admitted at trial, virtually all of New York City's students can learn to read and do mathematics and meet the requirements for high school graduation if they are provided with sufficient resources.

The trial record makes clear that illiteracy and its related academic failures are rampant not because of social circumstances, but because the New York City public school system failed for many years to provide sufficient resources to its students. The inadequacies are systemic and long-standing: one third of elementary teachers initially failed their basic certification test, nearly one half of high school math and science teachers initially failed their subject area tests, nearly

490 of 640 elementary schools lacked functioning libraries even in the late 1990s, one third of the high schools lacked functioning science laboratories, and hundreds of buildings lacked adequate heat, plumbing and electricity.

It may be that some children, particularly those from more fortunate socio-economic circumstances, can achieve academic success despite these inadequacies. But the record is clear that subjecting hundreds of thousands of New York City children to a resource-starved system over many years has deprived them of the opportunity to obtain a sound basic education.

Faced with abysmal student outcomes and gross resource inadequacies, Defendants claim that they bear no responsibility because plenty of money gets spent in New York City and it must be wasted if the resources are not adequate. The record, however, shows that the New York City Board of Education cannot afford to hire enough competent teachers, to buy sufficient numbers of up-to-date textbooks, to maintain laboratories and libraries in all of the City's schools, to provide the curriculum and support services necessary to address the needs of at-risk children and to maintain its buildings. The record also shows that Defendants failed to prove any significant amount of waste or mismanagement, which is not surprising given that New York City's per-pupil expenditures are well below the state average, while its students are among the state's neediest and its costs are significantly higher than elsewhere.

Nor is it surprising that there is unmet need given the operation of the state education finance system. Defendants dismiss in a footnote but have no answer to the extensive and uncontroverted evidence that the State education finance system makes no attempt and has no method to either (1) determine district need, or (2) ensure that a sufficient combination of State and local funds are provided to local districts. Indeed, the distribution of State aid is a camouflaged sham never intended to align funding with need.

Moreover, even if Defendants had shown that significant efficiencies or other reforms would free enough funds to purchase sufficient resources, the State would nonetheless bear ultimate responsibility for the failure to align funding with need. Apart from this Court's recognition of the State's ultimate constitutional responsibility to ensure adequacy, every aspect of the New York City's education governance system and education finance system is, in fact, controlled by the State. The State clearly has the authority and the responsibility to ensure both that New York City has sufficient funds and that the resources acquired with those funds are providing the opportunity for students to obtain a sound basic education.

The fundamental objective of Defendants' opposition brief is to have this Court reverse the course it set in *CFE I* and to effectively abdicate any responsibility to ensure that the schools provide a meaningful education. Defendants make the usual claims of those who seek to limit the vindication of constitutional rights, sounding false warnings about judicial activism and the usurpation of taxing and spending authority.

There is nothing radical about what we are asking this Court do. We ask that the Court consider the vast evidence of academic failure and resources inadequacies in the record and declare that a school system that for decades has not been able to teach children to read and that has tolerated the other massive academic failures found in the New York City public school system is not providing an opportunity to obtain a sound basic education. We ask that the Court set a clear constitutional standard and declare that the students of this state are entitled to have the opportunity to obtain a high school degree, leaving the Board of Regents and local districts with the responsibility for determining how to provide that opportunity. And we ask this Court to issue appropriate remedial guidelines so that the Legislature and Executive will take prompt action to remedy the constitutional harm that we have proven.

Thus, it is not Plaintiffs, but Defendants that seek to upset the constitutional balance by denying this Court's authority to correct a constitutional wrong. Under our system of government, the courts serve as the protectors of constitutional rights. When elected and appointed officials fail to secure a constitutional right, it is the responsibility of the courts to call those officials to their duty.

The people of New York long ago elevated education to a positive constitutional right, thus requiring this Court to ensure that the Legislature and the Executive secure that right. As the record in this case makes clear, the Legislature and the Executive have been on notice for decades that the New York City public school system was failing to educate its students. It is time for this Court to call them to their duty to ensure that the schools of this state provide all children with the opportunity to obtain a sound basic education. We have asked for nothing more than this and the children of this state are entitled to nothing less.

ARGUMENT

POINT I

DEFENDANTS SEEK TO INVOKE AN IMPROPER STANDARD OF REVIEW AND TO SUBMIT "EVIDENCE" OUTSIDE THE RECORD IN ORDER TO FORESTALL THIS COURT'S PROPER REVIEW OF THE WEIGHT OF THE EVIDENCE

At the beginning of their brief, Defendants claim that test results prove that most New York City children are achieving academic success. At the end of their brief, Defendants claim that massive educational failure is inevitable in New York City, because most of the City's children cannot overcome the circumstances of poverty that prevent them from learning. Both of these inconsistent claims are wrong, as we show in the following sections. But the juxtaposition of these conflicting claims here reveals much about Defendants' complete disregard for the trial record. For Defendants, this case is not about facts. To the contrary, Defendants know that the

record does not support the Appellate Division's decision and it seeks at the very outset to keep this Court from weighing the evidence.

Defendants urge a standard of review that ignores the clear language of the CPLR and this Court's well-established rules of jurisprudence. CPLR § 5501(b) expressly permits this Court to review the Appellate Division's factual findings in any case, such as this one, where the Appellate Division in "reversing or modifying a final . . . judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered." *See* Plaintiffs-Appellants' Opening Brief ("Opening Br.") at 16. This Court has consistently recognized and exercised this authority for decades. *See, e.g., Loughry v. Lincoln First Bank*, 67 N.Y.2d 369, 380 (1986) (reviewing Appellate Division's factual findings under CPLR § 5501(b) to determine which court's "findings more nearly comports [*sic*] with the weight of the evidence"); *Suria v. Shiffman*, 67 N.Y.2d 87, 97 (1986) (holding that the Appellate Division's "contrary finding" on a factual issue enables the Court to "determine which of the findings more nearly comports with the weight of the evidence" under CPLR § 5501(b)); *In re Ray A. M.*, 37 N.Y.2d 619, 623 (1975) ("The Appellate Division and the Family Court have disagreed in their findings of fact and in the appropriate exercise of discretion. This court has, therefore, the power to review the facts and the exercise of discretion.") (citing CPLR § 5501(b)); *Electrolux Corp. v. Val-Worth, Inc.*, 6 N.Y.2d 556, 563 (1959) ("When the Appellate Division reverses specific findings of fact and makes new findings, as in this case, it becomes our duty to determine which findings are supported by the weight of the credible evidence.").

There simply is no legitimate basis to argue that the Appellate Division did not reverse or modify nearly all of the trial court's principal findings of fact. Def. Br. at 41. In fact, the Appellate Division expressly said that it had reversed the trial court's opinion "on the law *and*

the facts." *Campaign for Fiscal Equity v. State of New York*, 295 A.D.2d 1, 22 (1st Dep't 2002) (emphasis added) ("*App. Div*."). This clear statement is required by CPLR § 5712, which provides that if the Appellate Division's determination "is stated to be upon the facts, *or upon the law and the facts*, the order shall also specify the findings of fact which are reversed or modified, *and set forth any new findings of fact made by the appellate division . . . .*" CPLR § 5712(c)(1) (emphases added).

To cite but one example, the trial court made a factual determination that New York City teachers are "inadequate" and unable "to meet the difficult challenges presented in the New York City public schools" by nearly any measure, *Trial Ct*. at 24-25, while the Appellate Division reversed this finding and instead found that the evidence "[did] not establish that the City's teachers are inadequate." *App. Div*. at 13. The trial court referred to voluminous evidence of universally recognized measures of teacher quality, including lack of certification, failure rates on initial certification exams, quality of undergraduate institution, experience, turnover rates, and professional development. *Trial Ct*. at 25-31. In stark contrast, the Appellate Division referred to a single piece of evidence – the U/S rating system – that the trial court found to be wholly unreliable as a measure of teacher quality. *App. Div*. at 13-14; *Trial Ct*. at 31-32. Pursuant to CPLR § 5501(b), this Court clearly has the authority and the responsibility to determine which finding is supported by the weight of the evidence. *See also, e.g., App. Div*. at 8-10 versus *Trial Ct*. at 12-18 (factual basis for sound basic education standard); *App. Div*. at 10-11 versus *Trial Ct*. at 39-46, 49-56 (facilities and class size); *App. Div*. at 11-12 versus *Trial Ct*. at 56-60 (instrumentalities of learning); *App. Div*. at 16 versus *Trial Ct*. at 68-91 (factual basis for causal link); *App. Div*. at 17 versus *Trial Ct*. at 92-97 (waste and abuse). Under these circumstances, there can be no doubt that this Court has ample authority under CPLR § 5501(b) to determine

"which findings are supported by the weight of the credible evidence." *Electrolux Corp.*, 6 N.Y.2d at 563.

Obviously aware that the Court fully intends to review the record,[1] Defendants hope to avoid the inevitable conclusion that the record provides no support for the Appellate Division's decision by citing numerous materials outside of the record. In some instances, Defendants base an entire factual argument on "evidence" that was never submitted to the trial court. *See, e.g*, Def. Br. at 64 (job skills), 76 n.11 (test scores), 95 (teacher certification), 100 (enrollment), 122 n.22 (Catholic schools), 138 (reforms). These materials consist largely of newspaper articles and press releases from Mayor Bloomberg's and Chancellor Klein's offices.

There is no excuse for this last-minute effort to supplement the record. The seven-month trial of this case came at the end of almost five years of discovery. At trial, there were no limits on the number of witnesses the parties were permitted to present, or on the number of exhibits the parties were permitted to introduce into evidence. Defendants therefore had every opportunity to present their case at trial, and their resort now to voluminous materials outside of the trial record only serves as confirmation that their claims lack any foundation in that record. Defendants' attempt to sway this Court with these improper materials should not be permitted. *See, e.g., Acme Bus Corp. v. Board of Educ.*, 91 N.Y.2d 51, 56 n.* (1997) (noting "the general rule that this Court will not consider factual material dehors the record"); *Kane v. State Comm'n*

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[1] The State attempts to impugn Plaintiffs for including in their opening brief citations to the Proposed Findings of Fact and Conclusion of Law ("PFOF") that were submitted to the trial court at the conclusion of the trial. Def. Br. at 8 n.1. As Plaintiffs made clear in their opening brief, those citations were included for the Court's convenience. Plaintiffs' Proposed Findings of Fact is over 1,100 pages long and includes ***nearly 5,000 citations*** to the record and is a comprehensive discussion of the evidence in this case. Including all of the citations found in each PFOF would have substantially increased the length of the Plaintiffs' briefs. The PFOF citations provide an easy reference for the Court to examine

on Judicial Conduct, 49 N.Y.2d 888, 888 (1980) (striking materials not before Judicial Commission when it made its original determination).

Even if this Court had not already made clear that this case is to be decided on the trial record, *CFE I* at 317, the principles underlying the rules of evidence make that clear enough. Assuming, *arguendo*, that Defendants could have overcome the multiple layers of hearsay that many of their references contain, offered a competent sponsoring witness, and had been permitted to introduce this material at trial, Plaintiffs would been afforded the opportunity to test the validity of this evidence through cross examination.

If this new "evidence" had been presented at trial, Plaintiffs, of course, would also have been permitted the opportunity to rebut it with their own proof and to present an accurate picture to the court. For example, on page 95 of their brief, Defendants cite an August 23, 2002 Daily News article entitled "Certified Teacher Ranks Soar to 97%" as evidence that Plaintiffs' argument that the City suffers from high rates of uncertified teachers "is in essence moot, for the City has begun filling all vacancies with certified teachers." The most recently available official statistics published by the City's Department of Education indicate, however, that the overall percentage of uncertified teachers in New York City community school districts is actually 18 percent, ***significantly higher than it was during the trial of this case,*** with uncertified teacher rates in several districts reaching a full 30 percent. *See* New York City Department of Education Statistical Summaries, *available at* http://www.nycenet.edu/stats/teacher/. As this example makes clear, good reason exists for prohibiting the introduction of materials outside the record to prove matters of disputed fact. There is usually another side to the story.

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much of the underlying record. Defendants, on the other hand, can find little support in

POINT II

THE EDUCATION ARTICLE DOES NOT PERMIT THE STATE TO PROVIDE STUDENTS LESS THAN THE OPPORTUNITY FOR AN ADEQUATE HIGH SCHOOL EDUCATION

Over the past three decades, state courts in 44 states have considered challenges to their State education finance systems, with the majority upholding the plaintiffs' claims. Many of these courts have closely considered the purposes of public education under their state constitutions' education clauses.[2] No other court, however, has instituted the thorough and analytically rigorous process this Court established in *CFE I* by setting forth a template based on its preliminary consideration of the issues and directing the trial court to prepare a detailed record for the Court to consider further before finally resolving the issues.

The trial court fully followed this Court's directive. In the course of an exhaustive seven-month trial, the parties submitted evidence from the leading education policymakers in the state, business leaders, academic experts, and local educators about the specific skills that students need for a sound basic education and about the fundamental resources that school districts must have to provide them with a reasonable opportunity to develop those skills. The trial court is, in fact, apparently the only court in the United States that has built a substantive record regarding the types of skills students need to be capable voters, jurors, and productive workers. Although it ignored much of that record, the Appellate Division at least acknowledged and responded to this Court's innovative deliberative process by accepting some of the trial court's proposed

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the record for most of their claims.

[2] *See, e.g., DeRolph v. State of Ohio*, 78 Ohio St. 3d 193, 201-03, 677 N.E.2d 733, 740-41 (Ohio 1997) (analyzing purposes of an education clause written in 1851); *McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516, 523-28 (Mass. 1993) (analyzing purposes of an education clause written in 1790); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 205-06 (Ky. 1989) (analyzing purposes of an education clause written in 1891).

modifications to the original template,[3] and, on certain other issues, offering different modifications of its own.

Astoundingly, however, Defendants' brief totally ignores the deliberative process this Court prescribed. They essentially ignore the modifications of the template proposed by each of the lower courts, and they present no specific standard of their own. Instead, they assume that the literal words of the original template are an unalterable final standard, and set forth a series of irrelevant citations to *Levittown v. Nyquist,* 57 N.Y.2d 27 (1982), which do not speak to the adequacy issues that this Court first raised in *CFE I*. They also present a variety of disconnected comments on "minimum education," suggesting alternatively and inconsistently that the standard be equated with the eighth grade-level reading and math levels advocated by the Appellate Division, Def. Br. at 85-86, and sixth grade-level reading and comprehension skills, *id*. at 69, and then they go so far as to claim that a school system could pass muster if it did not "deprive students of any education at all." *Id*. at 45; *see also id.* at 96.

The Opportunity For An Adequate High School Education. The standard that Plaintiffs have proposed, in response to the Court's directive and based on the record, is that a sound basic education be defined in terms of an ***opportunity to obtain an adequate high school education, one that prepares students for competitive employment and to function as capable and productive civic participants***. *See* Opening Br. at 22-25. In essence, the evidence has confirmed what common sense would suggest: In the 21st century, the basic literacy, calculating and verbal skills necessary to function as "capable" civic participants are high school level skills.

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[3] Specifically, the Appellate Division agreed that the term "employment" (though not "sustained competitive employment") should be added to the template, that "skills" and "civic responsibilities" should be defined broadly, and that the trial court's seven-part reformulation of the essential resources needed to provide the opportunity for a sound

Indeed, currently, just under 80 percent of all adults in New York State are high school graduates, Def. Br. at 66,[4] and the high school diploma is the "*lingua franca* of our society educationally," Sobol 1088:17-21, without which it is almost impossible to get a decent job, attend college, or function effectively as a civic participant. Governor Pataki has explicitly acknowledged that today all students are entitled to the opportunity for a "*good* high school education," *see* Opening Br. at 18, and Defendants themselves, despite the suggestions elsewhere in their brief that a sound basic education should be equated with eighth grade-level functioning or lower, also admit at one point that they do not suggest that "a system that failed to provide a traditional K-through-12 system would be adequate or acceptable." Def. Br. at 53 n.8. Indeed, on the basis of this admission alone, the Appellate Division's decision should be overturned.

Nowhere in Defendants' lengthy brief do they challenge directly the standard that Plaintiffs have proposed, or the extensive evidence that demonstrated that high school-level skills are necessary to function productively as a civic participant in the 21st century. Knowing that for decades the New York City school system has failed to provide the opportunity for vast numbers of its students to graduate from high school, they avoid the core issue. Instead Defendants launch strawman attacks on the Regents' Learning Standards, based on the misleading and false premise that Plaintiffs have taken the position that "the constitutional standard [is] coextensive with the Regents Learning Standards." Def. Br. at 2. These attacks are premised on the untenable assumption that the standards that the Regents have adopted as the

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basic education was an appropriate restatement and enhancement of the original list of essentials set forth by this Court. *App. Div*. at 8-10.

[4] The proportion of adults with high school diplomas is likely to accelerate even further in the near future. *See* Robert Putnam, *Bowling Alone* 186 (2000) (noting that in 1960, 41 percent of American adults had graduated from high school, and that by 1998 that figure had risen to 82 percent.).

public policy of the State of New York – with the endorsement of the Governor and the Legislature – are unreasonable and "aspirational."[5]

Since the Regents, as the constitutionally designated education policy authorities in the State of New York, have recently undertaken an exhaustive analysis of the specific skills students need to function productively as civic participants, *see* Opening Br. at 25-27, Plaintiffs, like the trial court, have referred to the rigorous process the Regents undertook to develop their Learning Standards as an authoritative source for answering the specific questions posed by this Court's template. Plaintiffs have never, however, asked the trial court or this Court to equate the Regents Learning Standards with the constitutional concept of "sound basic education," or to allow regulations of a State agency *per se* to define the constitutional standard.

Potentially, the State could adopt a wide range of standards that could meet constitutional requirements, if those standards, effectively implemented, would prepare students for competitive employment and to function as capable and productive civic participants. Currently, the State has adopted high school graduation requirements that are based largely on the Regents Learning Standards, and the record in this case has shown that students who meet these requirements are adequately prepared for competitive employment and to function as capable and productive civic participants.

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[5] Defendants also repeatedly attempt to demonize the Regents' Learning Standards by labeling them "world class," a term of their making, not of the Regents. In fact, although they misleadingly attribute this phrase to Commissioner Mills, Def. Br. at 60-61, on cross examination the Commissioner refused to accept Defendants' terminology. Mills 1248:6-24. The Commissioner and the Regents have also rejected Defendants' attempt to label the Standards as "aspirational"; they repeatedly emphasized in their testimony that the standards represent the critical minimum skills that students need to be effective citizens and productive workers. Mills 1132:7-24, 1146:22-1147:9; Hayden 1300:5-24, 1301:17-25; Kadamus 1566:4-13, 1714:20-1715:13; Px 1032 at 1.

If the Governor and the Legislature truly believe that any aspects of the current high school graduation requirements are unreasonable or "aspirational," and beyond the level of constitutionally requisite foundational skills, they should publicly say so and exercise their legislative authority under Education Law § 207 to prevail upon the Regents to modify them. But so long as these requirements remain in place, the State should not be heard to disclaim their constitutional responsibility to provide students the basic resources they need in order to have a reasonable opportunity to meet them.

Although purporting to discredit only the Regents Learning Standards, the Defendants are actually advancing a much more pernicious position: The State can articulate mandatory high school graduation standards, promise the federal government that all students in the state can and will meet these standards, assure all students that if they apply themselves they can master the standards, penalize schools whose students do not make acceptable progress in terms of the standards, and impose the draconian sanction of denial of a high school diploma on students who do not meet the standards – but then say that it is "aspirational" to expect the State to provide the basic resources that students need in order to actually have a reasonable opportunity to meet the standards.

The constitutional issue in this case does not require this Court to endorse the Regents Learning Standards or to pinpoint some minimum grade level for reading, calculating or verbal skills, as the Appellate Division did. The broad phrases in Plaintiffs' proposed standard, "adequate high school education," "competitive employment," and "capable and productive civic participants," are typical and appropriate constitutional concepts for defining an important substantive right. The Court need do no more than adopt these substantive constitutional

concepts, and hold that the evidence in the record shows that New York State's current high school graduation requirements meet them.

Competitive Employment. With regard to the specific term "competitive employment," Defendants' brief presents no evidence, analysis or legal authority that would seriously challenge the trial court's conclusion that the record and the legal precedents warrant an explicit reference to this phrase in the final definition of sound basic education. Having failed to put any evidence into the trial record on this issue, Defendants now cite for the first time an article on occupational employment trends which purportedly shows that most of the future jobs will be "low-level." Def. Br. at 64-65. Aside from the impropriety of using an article of this type in lieu of real evidence, the article, in fact, says no such thing.

Defendants distort the article's conclusions by omitting its key finding that "growth rates are projected to be faster, on average, for occupations generally requiring a postsecondary award (a vocational certificate or . . . an associate or higher degree) than for occupations requiring less education or training." Daniel E. Hecker, *Occupational Employment Projections to 2010,* Monthly Labor Review 57 (Nov. 2001), *available at* http://www.bls.gov/opub/mlr/2001/11/art4full.pdf. Thus, Defendants' purported new post-trial evidence is fully consistent with the conclusions of the witnesses who *did* testify that analytic reasoning and communication skills at least at a high school level will be needed for the rapidly growing new job areas, as well as for the upgrading of skills increasingly being required in existing job categories. *See* Opening Br. at 27-30.

The brief *amicus curiae* submitted by the Partnership for New York City, Inc., the major organization that represents the New York City business community (the "Partnership Br."), tellingly summarizes the bottom line reality on the employment issue. After emphasizing the

results of its recent survey, which found that 75 percent of employers believe students from New York City lack the basic skills they need to succeed in the world of work, Px 2128; Partnership Br. at 9-10, the Partnership concludes that "[t]o maintain and deepen the talent pool that makes New York City a global capital of commerce, public schools must prepare students for higher education and the high-level jobs." Partnership Br. at 3.

It is important that the final constitutional standard adopted by the Court specify preparation for *competitive* employment and not accept the Appellate Division's limited reference to "employment." Given the fact that all of the other state courts that explicitly include employment in their constitutional definition tie it to "competitiveness," *see* cases cited in Opening Br. at 28 n.6, omission of that term would imply endorsement of the Appellate Division's concept of preparation for low-level employment, which has no basis in the record or in any meaningful concept of sound basic education. Moreover, it is clear that the drafters of the Education Article wanted graduates of the State's schools to have competitive skills, since their stated intent was for New York's schools to promote the "material prosperity of the State of New York." 5 *Revised Record at Constitutional Convention of 1894*, at 694.

Preparation for Civic Engagement. Defendants now acknowledge that the "readability analyses" upon which the Appellate Division primarily relied for their finding that sixth to eighth grade-level reading skills would prepare students to be capable voters and jurors included only vocabulary and sentence length criteria, Def. Br. at 69, and did not even purport to measure the analytic and comprehension skills actually needed to be a capable voter. *See* Opening Br. at 35-38. However, they again distort the trial court's findings on the voter/juror capacity issue by attributing to that court a holding that citizens must have "sophisticated knowledge of complex issues such as global warming, DNA evidence, and statistical analyses," Def. Br. at 30, while

ignoring the Appellate Division's affirmation of the trial court's actual findings on this point. *See App. Div*. at 7 ("Contrary to the State's assertions, the IAS court did not rule that high school graduates must actually be experts in those various specialized fields, but only that they be able to understand such matters (by listening and reading), to communicate thoughts to fellow jurors, and to reach decisions. This is a reasonable formulation . . . .").

Defendants' argument that Plaintiffs would brand any students who ultimately do not obtain a high school diploma as "unfit to exercise . . . basic civic responsibilities," Def. Br. at 66, is both misleading and contradicts this Court's purpose in seeking to clarify the constitutional standard. This case certainly is not about stigmatizing students who have been denied or failed to obtain a sound basic education. On the contrary, the aim of the Education Article is to establish a system of public schools that will provide a level of educational opportunity that promotes the welfare of both individuals and society as a whole. Although not all individuals may take advantage of the opportunities provided, the major purpose of the Education Article, as this Court has made clear, is to ensure an education system that will result in as many citizens as possible functioning *productively* as civic participants.

In attempting to defend the Appellate Division's eighth grade standard, Defendants claim that the Education Article was meant to constitutionalize the education system as it existed in 1894, Def. Br. at 44, and that the original common school system in effect during the 19th century included only K-8 schools. *Id.* at 53 n.8. But clearly, by reformulating in *CFE I* the constitutional mandate from the literal 1894 language of "establishing a system of free common schools" to providing "the opportunity for a sound basic education," this Court recognized that constitutional standards must evolve. The deliberative process the Court initiated in *CFE I* sought to articulate the constitutional parameters of an education, which not only is "basic," but

also *sound*, in relation to the actual needs of civic participants in a 21st century society. The record, the precedents of all the other state courts which have spoken to this issue, *see* Opening Br. at 43 n.14, as well as the unanimous view of the hundreds of school boards, business groups, civic organizations, and policymakers who submitted extensive *amicus* briefs in this proceeding, resoundingly support the conclusion that today, a sound high school education, and not what was available in the little red schoolhouses of the 19th century, is the hallmark of an education that is minimally adequate.

POINT III

THE EVIDENCE PRESENTED AT TRIAL UNQUESTIONABLY DEMONSTRATED THAT HUNDREDS OF THOUSANDS OF NEW YORK CITY STUDENTS ARE BEING DENIED AN OPPORTUNITY FOR A SOUND BASIC EDUCATION

Defendants' adequacy analysis suffers from the very same three fundamental errors that pervade the Appellate Division's decision. Both Defendants' brief and the Appellate Division's decision: (1) mistakenly assume that the socioeconomic conditions of many of the City's poor children and minority students provide an excuse for failure, rather than evidence of educational need; (2) ignore the cumulative and collective effect of resource inadequacies over time by assuming that each educational resource at issue can be examined individually and in a vacuum; and (3) substitute unfounded inferences and misrepresentation of isolated facts for the hard, comprehensive evidence presented to the trial court. *See* Opening Br. at 56-64.

I. Defendants Ignore Appropriate Measures of Assessment Showing Massive Educational Failure and Rely On the Distorted Results of Discredited Tests

Defendants tell this Court that it need not reach the issue of resource inadequacies because certain test results prove that New York City students are receiving an adequate education. *See* Def. Br. at 73. This is an argument that Defendants should be embarrassed to sponsor because it not only rests on a deliberate misrepresentation of fact, but is also directly

contradicted by the official assessments of the Board of Regents, which are reported every year to the Legislature without objection.

Incredibly, Defendants completely ignore those assessments, as well as other systemic evidence of educational failure. The only results that Defendants mention are elementary school test scores that have been rejected by the State's and the City's education officials because the scores fail to provide any useful information about what students have actually learned. And Defendants distort the results of the Regents Competency Tests, the low-level examinations formerly administered to all the students in the eleventh grade, which are being eliminated because they do not provide an adequate measure of whether students have acquired high school-level skills and knowledge.

A. Defendants Disregarded Most of the Relevant Testing Data

As described at length in Plaintiffs' opening brief, the State Education Department each year subjects New York City students to a battery of examinations designed to test their ability to read, write, and perform basic arithmetic. *See* Opening Br. at 95-99. The results of these regular and reliable assessments (which have been administered over the last several decades) demonstrate unequivocally that the City public school system fails to provide students with the opportunity for a sound basic education. Indeed, the Regents have acknowledged in[6] their annual report to the Legislature that "[t]he fact that so many children are not learning attests to the failure of one or more domains to provide essential services and experiences." Px 1 at 3.

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[6] As in Plaintiffs' opening brief, citations to the trial transcript are denoted by a reference to the specific and line numbers of the transcript preceded by the name of the testifying witness, *e.g.*, 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 17204 at 3.

Defendants cannot dispute these results, so they simply pretend that most of the results do not exist:

- **Pupil Evaluation Program Tests:** 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 State Reference Point – defined by the State as "a minimum level of competency for a given grade" – on the Pupil Evaluation Program reading tests. Px 1 at 4, 132; Px 2 at 5; Px 6 at 3; Px 10 at 3; *see also* Kadamus 1580:9-13; Evans-Tranumm 1374:14-18; PFOF ¶ 1518. The evidence at trial established that students who score below the State Reference Point are ***functionally illiterate*** and require remedial instruction. Px 2900-Young Stmt. ¶ 41; Px 1 at 4; Kadamus 1580:14-18; PFOF ¶ 1519.

- **The Terra Nova Examinations:** The results of the State's new Terra Nova examinations indicate that nearly half of the City's fourth graders cannot achieve a passing grade in reading and over 16,000 have "serious academic deficiencies" in mathematics. PFOF ¶¶ 1515, 1525-30.

- **The Program Evaluation Tests:** These tests are designed to "evaluate the effectiveness of instructional programs in elementary science, elementary social studies and middle-school social studies," and to identify instructional programs that require remediation. Px 1 at 4; *see also* Kadamus 1577:22-24; Tobias 10218:21-10219:2. New York City students have consistently scored in the bottom quartile on these assessments, demonstrating that the City's science and social studies programs are entirely ineffective. 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.

- **The SURR Program:** The State implemented the Schools Under Registration Review ("SURR") Program in order to identify the "very worst schools" in New York State and to provide them with extra help and support. Only those schools that are "farthest from State performance standards" and "determined to be most in need of improvement" are designated as SURR. Px 1 at 9; Mills 1169:19-21; Fruchter 14539:12-20; Px 3102B. Since the SURR 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. In other words, the State itself has concluded for years that over 90 percent of the worst performing schools in New York State are located in New York City.

Defendants also ignore other evidence of failure, including, most significantly, the CUNY Report, which included extensive documentation and examination of the academic deficiencies of New York City public high school graduates who attend the various colleges of

the City University of New York. The Report, which was prepared by a task force of business, education and political leaders, Schmidt 10933:15-18; Px 2638A; PFOF ¶ 148, concluded that:

> [M]any of CUNY's problems are directly attributable to the failure of the [New York City public school system] and its students to achieve minimal standards of literacy and mathematical understanding before leaving high school. Most of CUNY's students come directly from the City's public schools. Three-quarters of them need remediation, and half need it in more than one basic skill.

Px 311 at 18; PFOF ¶¶ 1613-14. Notably, Defendants refuse even to mention the CUNY Report in their brief, even though the defendant Governor appointed the task force chairman, Professor Benno Schmidt, to be Vice Chairman of CUNY shortly after the release of the Report. PFOF ¶¶ 148-49; Px 311 at 107, 109.

Instead, Defendants cannot deny New York City's staggeringly high school dropout rates: Forty percent of each ninth grade class – 25,000 students each year – leave the New York City school system without obtaining a high school diploma.[7] Px 2481A; Px 2482A; Px 2519; Px 2520; PFOF ¶¶ 1469, 1598, 1605. Between 1986 and 1999, over ***250,000*** students entered the ninth grade in New York City but failed to graduate. Px 2505A; PFOF ¶ 1605. (The dropout rate for the rest of the state is just 3.5 percent. Px 1151; Px 2854; Px 3107A; PFOF ¶ 1589.)

Defendants claim that the Court should ignore this devastating evidence of failure by suggesting (apparently in all seriousness) that many of the dropouts might have been born outside of the United States, or came to New York City only for high school, and that the

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[7] Defendants claim that only 30 percent of each ninth grade class rather than 40 percent leave the City's schools without obtaining a high school diploma. Def. Br. at 88. Defendants' figure is inaccurate because it equates a GED diploma with a high school diploma. There was abundant evidence at trial that a GED diploma is not the equivalent of a high school diploma. PFOF ¶¶ 1607-10.

command of the Education Article to educate "all" of the state's children does not apply to the foreign born or the newly arrived. Def. Br. at 88.

Apart from its questionable premise, Defendants' argument has no basis in fact. Contrary to Defendants' efforts to portray the New York City ninth grade class as largely foreign-born and foreign-educated, only one out every eleven City students – or less than 10 percent of the student population – is a recent immigrant. Px 1 at 16. Moreover, the massive educational failure in elementary and middle schools demonstrates that students are not prepared for high school even if they spend their preparatory years in New York City public schools.

B. Defendants Improperly Rely Upon Norm-Referenced Scores

Defendants' principal response to the City students' abysmal academic performance at the elementary and middle school level is to point to the results of a testing methodology – norm referencing – that has been ***rejected*** by the Board of Regents, the State Education Department and the Board of Education. Mills 1140:22-1142:12; Spence 2455:8-20; Tobias 10318:2-5; PFOF ¶ 1569. This fact alone should be sufficient to preclude Defendants from relying on these results to prove anything about student performance.

While criterion-referenced scoring assesses what a student has actually learned, norm-referenced scoring simply measures how a student did in comparison to a group of students who took the same test, or a similar test (the "norm group"). Tobias 10191:13-10192:24; Jaeger 13218:23-13219:25, 13221:9-24; Mehrens 18559: 6-18560:6; PFOF ¶¶ 1509, 3679. Norm-referenced scoring does not evaluate what a student has actually learned, or whether a student is learning what is appropriate for his or her grade level. Tobias 10262:5-10263:19; PFOF ¶ 1541.

The meaning of a norm-referenced score is entirely dependent on the quality of the norm group used by the publisher of the test. As explained by Defendants' expert Dr. Murphy, a 50th percentile score on a norm-referenced reading test would reflect a very low level of performance

if the norm group had poor reading skills. Murphy 17418:12-17419:3; PFOF ¶ 1558. Norm-referenced scores are also problematic because they can be inflated for a variety of reasons, such as student experience with a test, teachers teaching to the test, changes in the circumstances under which the tests are given, changing the type of test given, and differences in the way the tests are scored. Jaeger 13261:10-13265:4, 13266:21-13270:19; Mehrens 18566:18-25, 18576:24-18578:16; PFOF ¶ 1478.

In short, norm-referenced scores cannot be used to determine whether a student has learned basic skills. This principle was dramatically illustrated by Defendants' expert, Dr. Mehrens. He compared criterion-referenced scores and norm-referenced scores for the McGraw Hill Terra Nova 5th grade reading test, and demonstrated that a 50th percentile norm-referenced score reflects skills and knowledge that are ***significantly below*** what educators considered "proficient" in reading for that grade level. Mehrens 18525:6-21; Dx 19481A.

Moreover, there is no basis for Defendants' exaggerated claims regarding norm-referenced scoring. Norm-referenced scoring does not compare student performance to the aggregate performance of students around the country. Tobias 10249:20-10251:33; PFOF ¶ 1543. It would be impossible for any norm-referenced score to reflect a "national average" since *none* of the publishers' tests are given around the country. Tobias 10249:4-19, 10252:14-19; PFOF ¶ 1543. Indeed, Defendants' own expert testified that it is improper to compare norm-referenced test results from different cities because the tests used and the test-taking conditions are simply too different. Mehrens 18587:8-14, 18571:12-18575:4, 18585:9-18587:2; PFOF ¶ 1571; *see also generally* Jaeger 13255:11-20.

There is no rational basis for relying on the discarded norm-based scoring rather than the Terra Nova criterion-referenced tests that have been carefully developed by the SED. The Terra

Nova examinations are scored on a four-point scale. Levels 1 and 2 are below passing, and mean that the student needs substantial help, while Levels 3 and 4 are passing and above. Px 875B at 6-7. These levels were set by a process called "benchmarking," which brings together experts in education from all across the state, including teachers and academics. They review each potential question and determine the questions that would require students to have met the Learning Standards for their grade in order to get the answer right. These "benchmarks" are then used to set the passing score and to create the four levels. Tobias 10192:7-10198:3; Jaeger 13414:13-13415:15.

Unlike the norm-referenced tests, the criterion-referenced scoring used by New York State is thus the product of the consensus of educators in New York State about what students should be learning in order to meet the Learning Standards. The norm-referenced scores Defendants rely upon, by contrast, have absolutely no basis in curriculum studies, community expectations, or even teacher experience. They simply reflect what a particular group of students, on a particular day, were able to do on a particular test without any reference to what these students should know.

In short, there is no basis to ignore the extensive evidence of academic failure demonstrated by New York State's own testing system. The tests administered by this system show that large numbers of New York City students have failed to master basic literacy, math, social studies and science skills. And the predictive value of these tests is confirmed by the City's staggering dropout rates and dismal college remediation rates. While the norm-referenced scoring results may show that some students somewhere else may also lack basic skills, the results clearly do not prove academic success.

C. Defendants Distort the RCTs

Just as Defendants rely on the results of a discredited testing methodology to claim that the City's elementary and middle school students are receiving adequate educational opportunities, Defendants point to the results of Regents Competency Tests ("RCTs") that the SED has almost completed ***phasing out*** as the basis for their argument that the City's high school students have the opportunity to obtain a sound basic education. Def. Br. at 85 n.14.

The RCTs were designed to identify low-performing high school students, not to assess whether students were meeting satisfactory achievement standards. Px 312 at 5; Kadamus 19266:5-15; Walberg 17202:22-17203:5; PFOF ¶¶ 166-67, 1472. For this reason, the RCTs test reading comprehension at an eighth grade level, Px 312 at 5; PFOF ¶ 1588, and math comprehension at a sixth grade level. Kadamus 1579:6-10. The evidence was clear that the RCTs do not test the basic skills necessary to function as a productive civic participant, and that is why the Regents, after an exhaustive review, determined to replace the RCTs. Jaeger 13452:11-13455:13, 13456:25-13460:25; Px 2547A; Px 2548A; Px 2549A; Px 2551; PFOF ¶ 203.

Despite the well-documented limitations of the RCTs, Defendants place great emphasis on the high percentage of the City's eleventh graders who "demonstrated competency" by passing either the RCTs or the Regents examination. Def. Br. at 86. Defendants' reliance on eleventh grade statistics is fundamentally misplaced because ***thousands*** of the City's students have already dropped out of high school by the eleventh grade, Kadamus 1611:21-1613:22; Fruchter 14686:23-14687:22; Px 2376; PFOF ¶ 1586, and thousands of others have failed to progress to the eleventh grade on time. For example, of the approximately 54,000 students who began ninth grade in New York City in the fall of 1996 and were still enrolled in June of 1999, less than 29,000 had moved on to the eleventh grade two years later. Px 2376; Tobias 10347:18-

10350:22. As a result, the City's eleventh grade class is only a small fraction of the City's ninth grade class. In June of 1998, for example, there were approximately 94,000 students in the City's ninth grade class but only 39,000 in the City's eleventh grade class. Kadamus 1611:21-1613:22; Px 1 at 95, Table 3.13.

The results of the RCTs – when considered in light of the low-level skills measured by the tests and the nature of the students who took the tests – only confirm the City's failure to educate its high school students: Approximately half of the students who took the RCT in math and approximately one third of the students who took the RCT in reading failed, Px 2 at 13; PFOF ¶ 1589, demonstrating that a substantial percentage of the City's high school students have not mastered even middle school-level basic skills.

In short, the RCT results show what all of the SED's other assessment tools show: massive educational failure in the New York City public school system.

II. Defendants Ignore Most of the Evidence Showing Resource Inadequacies and Selectively Distort Other Evidence

Defendants' alternatively ignore and mischaracterize the record as well as the trial court's carefully considered findings concerning the adequacy of resources. The proof presented at trial consisted of overwhelming evidence of educational inadequacy in each of the relevant input areas identified by this Court in *CFE I*. *See* Opening Br. at 65-91. This factual record included uncontested findings by the State itself in official publications as well as comprehensive statistical evidence and the testimony of the State and City employees charged with day-to-day responsibility for the City school system. When measured against this exhaustive evidence, the contorted views of New York City education inputs embraced by Defendants and the Appellate Division must be rejected.

A. The Record Before the Trial Court Established the Inadequacy of New York City's Teaching Force

Defendants' own experts agreed with Plaintiffs' experts and numerous State and City education officials that the quality of a school system's teaching force could be reliably assessed through (1) direct observation, (2) teacher certification rates, and (3) analysis of test scores achieved by teachers on their certification exams. The record includes extensive evidence concerning each of these factors, as well as other evidence relevant to teacher quality. Incredibly, Defendants simply ignore most of this evidence and instead rest their entire argument about teacher quality on evaluation forms that no expert accepted as credible evidence of quality and that were thoroughly discredited by witnesses with actual knowledge of how the forms are completed.

As a threshold matter, Defendants' claims about teacher quality are inconsistent with the findings of the State officials charged with evaluating the State's teaching force. The Regents and the SED have catalogued and confirmed the inadequacies of the New York City teaching force in the annual 655 Reports and in separate reports, including the report of the 1998 Regents Task Force on Teaching. *See, e.g.,* Garner 3471:23-3472:18; Px 2 at 3, 66. Defendants do not address these findings.

Defendants also fail to address the reports of current and former New York City school superintendents, who were collectively responsible for the supervision of more than a third of the City's schools, concerning the quality of the teaching force. These reports, based on years of direct observation, the results of tests administered to teachers by the superintendents, and student outcomes, are alone sufficient to support a finding of systemic inadequacy. *See, e.g.*, Px 2900-Young Stmt. ¶ 74; Cashin 321:17-322:10; Coppin 664:15-19; DeStefano 5290:19-5291:2; Darling-Hammond 6410:12-6411:20; PFOF ¶¶ 346-49. Moreover, Defendants' only expert with

any actual managerial experience in a public school district undertook direct observation in his assessment of the New York City teaching force and found that his evaluation standards actually had to be lowered to account for the inadequacies he observed. Murphy 17439:12-17441:12; PFOF ¶ 348.

As the following summary shows, the observations of inadequacy by State and City education officials are consistent with the statistical measures.

State Certification. The evidence presented at trial, and all but ignored by the Appellate Division and Defendants, demonstrated beyond question that teacher certification is directly related to teacher quality and student performance, and that absent proper certification, a teacher simply is not adequately prepared to teach. *See, e.g.*, Cashin 324:21-325:10; Sobol 1062:7-1063:4; Weingarten 2687:14-2688:25; Garner 3473:15-3474:10; Darling-Hammond 6352:15-6355:4, 6404:7-21, 6418:14-6419:12; Sanford 11382:16-11383:18; Podgursky 17584:9-17585:23; PFOF ¶ 329.

For many years, a disproportionately high percentage of New York City teachers have lacked State-required certification. For example, evidence found credible by the trial court showed that the percentage of teachers lacking certification in New York City schools between the 1991-92 school year and the 1999-2000 school year fluctuated between 11.4 percent and 17.0 percent, compared with an average of 3.3 percent elsewhere in the state. *Trial Ct.* at 26; PFOF ¶¶ 320-29, 353-57. By October 1999, the total number of uncertified teachers in the New York City school system had risen to over 10,000 individuals, almost 13 percent of the teaching force. Px 1222. In glossing over these statistics, Defendants assert that it is constitutionally acceptable to deny between 110,000 and 170,000 New York City students each year the opportunity to be taught by a teacher who actually holds the minimum credential evidencing an ability to teach.

The teacher certification rates are even more appalling for New York City's math and science teachers. In 1999, 59,500 City students were taught high school biology by an uncertified biology teacher; 19,000 City students were taught high school chemistry by an uncertified chemistry teacher; and 54,375 City students were taught high school mathematics by an uncertified math teacher. Px 1205; PFOF ¶ 365. Uncertified rates are also particularly high for children with special needs. As of October 1, 1999, 25 percent of teachers of the severely and profoundly retarded in District 75 (the City's Special Education District) were uncertified, Erber 7579:24-7580:8, as were 20 percent of the City's bilingual teachers. Px 2855A-Lee Stmt. ¶ 127; DeStefano 5476:19-5477:19.

Obviously troubled by the actual evidence placed before the trial court on teacher certification, Defendants improperly seek to direct this Court to a newspaper clipping from the August 23, 2002 edition of the New York Daily News. Def. Br. at 95. Even placing aside the fact that such a clipping cannot properly be before this Court, Defendants' reference is grossly misleading. The article in question was written before the start of the school year, when, as the evidence at trial established, certification percentages of new hires are always at their highest. Cohen 3637:25-3638:11. As the year actually progresses, attrition takes over. Certification percentages of new hires then drop significantly until almost no new teachers have certification. It is at these times that the BOE will hire just about anyone willing to teach a needed class.[8]

Moreover, had Defendants bothered to describe to this Court the entire New York Daily News article, they would have acknowledged that any increase in certified teachers was,

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[8] Howard Tames, the Director of the Division of Human Resources for the Board of Education, gave the example of a school in need of a mathematics teacher that was unable to locate anyone with any credits in college math, and therefore, to staff its open mathematics position, might turn to an individual who, as a student, had simply done well in high school math. Tames 3100:19-3101:11.

according to the article, a direct result of significant increases in teacher salaries – conclusive evidence that money matters and that additional funds will improve educational opportunity. Finally, if Defendants had not been so selective in their choice of a newspaper article, their brief might also have referred to other recent stories that discuss the quality of New York City teachers in a somewhat different light. *See, e.g.*, Yilu Zhao, *Many Teachers Keep Failing Test For Certification*, New York Times, April 29, 2002, at Sec. B (discussing 3,000 New York City teachers who have never taken a certification test, 3,000 other teachers who have taken the tests and failed and more than 200 current New York City teachers who have each failed the test at least 10 times). Moreover, the BOE's own website reports that as recently as June, 2002, the uncertified rate in New York City climbed to as high as 18 percent for the City's community school districts. *See* New York City Department of Education Statistical Summaries, *available at* http://www.nycenet.edu/stats/teacher/.

Performance on Certification Examinations. The statistics concerning performance on teacher certification exams are appalling, which explains why Defendants fail to mention these test results anywhere in their brief. These statistics provide irrefutable proof of inadequacy.

Experts and education officials called by both Plaintiffs and Defendants agreed that teacher performance on tests of general knowledge and literacy is a good indicator of the quality of the teaching force, teacher effectiveness, and, ultimately, student performance. *See, e.g.*, Sobol 1061:17-25; Weingarten 2744:9-2745:9; Garner 3464:8-3465:2, 3467:19-3468:4; Ferguson 5915:2-11, 5973:21-5974:21; Young 12869:22-12870:4, 12870:18-12872:2; Walberg 17239:4-18; Podgursky 17584:9-17585:23, 17632:5-18, 17641:18-17642:4.

Widespread failure on these tests within a population of teachers indicates a lack of teacher quality. Mills 1191:22-1193:4; Darling-Hammond 6419:13-6420:22. The certification

scores of New York City teachers demonstrates that many City teachers repeatedly fail teacher certification examinations. *Trial Ct.* at 28-29; PFOF ¶¶ 373-81. ***Fully 31.1 percent of City teachers who had taken the LAST test (the SED's standard certification examination) failed it at least once. Only 4.7 percent of the teachers in the rest of the state failed it once.***[9] Px 1482 at 18, 85; Lankford 3924:11-3925:6.

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

Experience. Because of significant turnover in New York City, too many City teachers are inexperienced. With a turnover rate of 14 percent per year, nearly 15 percent of the City's teachers had only two years of experience or less. Px 1482 at 12, 74; Lankford 3910:20-3911:13; PFOF ¶ 368. One district had over 20 percent turnover each year. Px 2332A-Rosa Stmt. ¶¶ 60-62; PFOF ¶ 372. Fifty percent of New York City teachers quit within six years of being hired. Px 1196 at 1. As the trial court properly found: "The large number of inexperienced teachers – who, like uncertified teachers, are disproportionately assigned to the schools with the greatest number of at-risk students – makes it more difficult for New York City public schools to meet the needs of its students." *Trial Ct.* at 29; Px 1482 at 12, 72-73, 134-35; Px 2332A, Rosa Stmt. ¶¶ 60-62; Lankford 3985:3-3987:24, 3999:19-4000:15; PFOF ¶¶ 368-72.

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[9] The average score on the test for first-time takers was 236.3 for New York City teachers (passing is 220), while the average score on the test for those teaching in the rest of the state was 261.6. Px 1482 at 18, 94.

Teacher Statistics are Indicative of the Overall Poor Quality of New York City Teachers. In an effort to distract this Court from the abysmal characteristics of many New York City teachers, Defendants suggest that the statistical analysis presented by Plaintiffs is irrelevant because this is an adequacy and not an equity case, and that, therefore, comparisons with the rest of the state are irrelevant. Def. Br. at 92. But if other districts can staff their classrooms with certified teachers, then having a certified teacher in a classroom is a meaningful (and realistic) requirement for New York City. In any event, the statistics for New York City are so objectively awful that comparisons are not even necessary to demonstrate inadequacy. No teaching force can possibly be considered adequate when tens of thousands of its members have been unable to acquire minimal state certification, PFOF ¶¶ 353-67, fail the most basic teacher examinations, PFOF ¶¶ 373-79, do not know their subject areas, PFOF ¶¶ 347, 377, and quit before they gain the experience necessary to properly instruct their students, PFOF ¶¶ 368-72.[10]

1. Defendants Seek to Substitute Discredited Systems of Review and Conjecture For the Hard Facts Considered by the Trial Court

Defendants' effort to wish away the weight of the evidence concerning the quality of New York City's teaching force is further compounded by the following crucial errors:

The PASS Review Process Has No Probative Value.[11] Amazingly, Defendants now embrace the PASS Review process, a process so untrustworthy that even the Appellate Division

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[10] Defendants go out of their way to champion statistics related to degrees earned by New York City teachers (the only statistical category considered at trial in which New York City teacher characteristics were at all similar to statistics of teachers elsewhere in the state), but ignore the fact that their own expert dismissed the suggestion that such a factor was substantially related to teacher quality. Podgursky 17645:24-17646:13.

[11] Because they had been rejected by ***both*** the Appellate Division and the trial court, Plaintiffs did not address PASS reports in their opening brief. This section is a summary discussion of the inadequacies of the PASS process. A complete discussion of the PASS reports can be found at PFOF ¶¶ 1642-61.

found it to be of no value in assessing the status of the school system. *App. Div*. at 16. The only witness who attempted to rely on the PASS reports was a defense expert who knew nothing about how the reports are prepared and who relied on a PASS report to praise a school identified by the SED through the SURR process as one of the worst in the state!

Simply put, the PASS survey was created by the Board of Education to give failing schools some framework to guide their attempts to keep from being shut down as educational failures. Px 2379 at 3-4. The PASS surveys arose from the SED requirement that poor-performing schools, including SURR schools, prepare Comprehensive Education Plans ("CEPs"). These plans must show how the schools will address their various problems. Px 2461 at 4; PFOF ¶ 1643. The actual PASS survey is completed by a group made up of school administrators, teachers, parents, and perhaps an outside observer. Tobias 10132:11-24; PFOF ¶ 1648. The completed survey is then used to help the schools create a CEP. Tobias 10119:14-10120:10; PFOF ¶ 1644. The evidence submitted at trial established that school administrators, fearful that the PASS scores would be used to evaluate their own performance, have used the PASS process to try to maximize scores rather than accurately assess school progress. Px 2379 at 14; Tobias 10137:15-10138:12, 10141:3-8; Fruchter 14579:14-14580:2; PFOF ¶¶ 1645, 1648.

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

summarized in a report prepared and submitted to the American Educational Research Association by the Board of Education's Director of Assessment Robert Tobias:

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

Px 2379 at 14; PFOF ¶¶ 1650-56.

The only witness who relied on the PASS reports as a measure of school quality was a defense expert, Dr. Christine Rossell, who had nothing to do with the creation of the PASS reports or any evaluation of the PASS reports. Rossell 16912:15-16913:20; PFOF ¶ 1663. To take just one example, Dr. Rossell claimed on the basis of a PASS review that Intermediate School 193 was an "exemplary" school, a shining example of what a school should be. But Dr. Rossell had never been to IS 59 and was not aware that IS 59 was being shut down by the State as a complete educational failure. Rossell 16926:25-16928:19. In fact, ***all*** of the PASS reports reviewed by Dr. Rossell came from SURR schools. Rossell 16741:11-19, 16925:16-16926:18. And yet Dr. Rossell offered her expert opinion that these schools were just a few improvements away from being exemplary schools, among the finest in the country. Both the trial court and the Appellate Division had every reason to reject this unfounded speculation.

The U/S Evaluation System Has Been Thoroughly Discredited as a Method of Evaluating Teacher Adequacy. As discussed in detail in Plaintiffs' opening brief at pages 69-72 as well as at PFOF ¶¶ 395-400, administrators have no incentive and numerous disincentives to give deficient teachers an unsatisfactory rating primarily because the system cannot recruit satisfactory replacements. The evidence offered on this issue was hardly, as Defendants claim, "anecdotal" or of "little merit." Def. Br. at 93. In fact, there was no evidence in support of the validity of the U/S system as a useful measure of teacher quality; to the contrary, every witness

who discussed the U/S system denied its validity for that purpose. Indeed, the conclusion that the U/S system is of no value in assessing the City's teaching force was even supported by Defendants' own expert, who has written and testified at trial that provisions of union contracts generally create significant disincentives for principals to document professional malfeasance. Podgursky 17651:17-17652:4.

Moreover, even if the integrity of the U/S evaluation system had not been thoroughly discredited, it cannot overcome the substantial weight of all of the other evidence concerning teacher quality. The State pretends that none of that evidence exists, but a fair reading of the record, weighing all of the evidence, supports the trial court's conclusion that "the quality of New York City's public teachers – in the aggregate – is inadequate." *Trial Ct.* at 25.

New York City Teachers Are Not Given the Support They Need to Teach Effectively. In one sentence, Defendants attempt to wipe away the trial court's findings of the abysmal lack of professional development available to New York City teachers. Def. Br. at 95-96. In fact, witnesses proffered by ***both*** Plaintiffs and Defendants emphasized the tremendous impact that professional development has on teacher quality and effectiveness. *Trial Ct.* at 30-31; Px 7 at 52; Px 1043 at 31; Px 1233 at 20; Px 1870 at 10-11; PFOF ¶¶ 510-15. The evidence also establishes that New York City has failed to provide sufficient high quality professional development to its teachers for many years. *Trial Ct.* at 31; Px 2900-Young Stmt. ¶¶ 85-86, 88-92; Cashin 340:16-342:14, 379:13-16, 543:13-544:7; Chin 4968:14-4969:5, 4972:7-10, DeStefano 5442:13-5444:20; Fink 7761:9-22, 7773:25-7775:3, 7775:20-7776:6, 7858:15-7859:7, 7865:25-7866:4; PFOF ¶¶ 538-57. Defendants did not address any of this evidence.

2. Defendants' Charge of Substantial Inefficiencies Associated With the New York City Teaching Force is Unfounded

While a careful examination of any large organization is bound to uncover certain inefficiencies, Defendants' claims of waste associated with the New York City teaching force are unfounded:[12]

Insufficient Salaries and Poor Working Conditions, Not Ineffective Recruitment, Account for the Poor Quality Of New York City's New Hires. Throughout the time period leading up to the trial of this action, as the 1998 655 Report established, New York City competed "for teachers with suburban districts whose average teacher salary exceeds the City's by 36 percent." Px 1 at vi; PFOF 426-40. This salary differential, along with relatively difficult working conditions in the New York City schools, including large class sizes, a high percentage of at-risk students, deteriorating facilities, and safety concerns, as well as the lack of opportunity for meaningful professional development, is responsible for New York City's inability to effectively recruit qualified teachers. PFOF ¶¶ 441-45. Defendants' effort to shift the focus to allegedly ineffective recruiting efforts fails in the face of the overwhelming economic evidence and ignores the fact that the evidence shows that City recruitment efforts have improved dramatically since at least 1996. Spence 2208:9-15, Px 3179 at VII-VIII; PFOF ¶¶ 453-69.

New York City Teachers Carry a Substantial Workload. Throughout the trial of this action and now again in their submission to this Court, Defendants rhetorically asked whether the Board of Education could solve its class size, extended day, and other teacher resource issues by simply compelling its teachers to work a longer day or to spend a greater portion of their day

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[12] Some of Defendants' arguments on this issue amount to little more than complete speculation without any factual support. For example, Defendants cite statistics concerning paraprofessionals on page 134 of their brief without offering any evidence concerning why a school might or might not have a certain number of paraprofessionals.

teaching classes rather than preparing for class or taking advantage of professional development opportunities. Of course, Defendants fail to offer any proof that the BOE could convince its noncompetitively paid teachers to increase their hours if they were not offered additional wages. Defendants' only support for their argument is a non-representative survey of 16 school districts offered by their expert Dr. Podgursky. *See* PFOF ¶¶ 471-75. While this survey did examine districts with longer school days, Dr. Podgursky failed to uncover a single school district in which teachers were required to teach more than the 25 classes allocated to the typical New York City teacher. Podgursky 17785:14-17791:15. Computed as a measure of the number of classes and number of students in these classes (New York City classes are significantly larger than those in the districts selected by Dr. Podgursky), it is uncontested that as of the time of trial New York City teachers had as high or higher a workload than any other group of teachers in the state. Podgursky 17787:25-17789:13, 17792:3-10.

New York City's Policies Regarding Teacher Allocation Among Schools Are Not the Reason Needy Schools Lack Qualified Teachers. Defendants' criticism of a policy that in part allows teachers to decide where within the City they wish to teach, Def. Br. at 133, ignores the fact that there is no practical alternative to a system that allows teachers some level of control over where they will work. Put simply, the evidence established that if an experienced teacher is not permitted to teach where he or she wishes to teach, the teacher will quit rather than take a job he or she does not want. Lankford 4027:11-4030:16; Tames 3374:10-16. Plaintiffs' expert Dr. Lankford explained: "If you tell [a teacher] you are going to be stuck in this job you don't like, people will say I will look for other alternatives and they will actually leave." Lankford 4030:3-6.

B. Defendants Do Not Even Contest the Factual Finding that the New York City School Administrators Are Inadequate

Defendants, like the Appellate Division, fail to even contest the trial court's findings with respect to the inadequacy of New York City's administrators. Thus, left unchallenged by Defendants is the conclusion that 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." *Trial Ct.* at 35.

C. Systemic Evidence Establishes the Inadequacy of New York City's School Facilities

Defendants' claim that there is only anecdotal evidence of the gross inadequacies in New York City's school facilities can only have been asserted without any attempt to understand the actual trial record. The evidence of systemic facility inadequacies, caused by a chronic shortage of funds, is extensively documented in more than 125 pages, with 721 record citations, in Plaintiffs' Proposed Findings of Fact. PFOF ¶¶ 677-934. This record of failure leaves no doubt that the problems with New York City's school buildings are long standing, massive, and injurious to the educational process. The record includes extensive evidence that dozens of buildings and many hundreds of classrooms even lack "enough light, space, heat and air."[13] *CFE I* at 317.

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[13] Amazingly, Defendants attempt to write the facilities aspect of a sound basic education out of this Court's decision in *CFE I* by claiming, based on the discredited testimony of one of their experts, that the conditions of a school's facilities somehow do not affect the quality of the education offered to the students within the school. Def. Br. at 97-98. As the trial court found, and the Appellate Division did not contest, the conclusion from these analyses that "facility repair needs do not cause performance differences among students" is of "limited probative value." *Trial Ct.* at 47.

The systemic evidence of facility inadequacies includes: (1) testimony from BOE witnesses with systemwide responsibility for school facilities; (2) a physical survey of ***every*** school building in the system by professional engineers; (3) the testimony of ten superintendents about the conditions suffered by approximately 323,000 students (representing nearly one-third of all New York City public school children); (4) photographs and statistical summaries of dilapidated school facilities that superintendents testified were representative of conditions throughout their districts; (5) documents promulgated by the BOE and the SED; and (6) findings of the Legislature and numerous commissions and boards appointed to investigate the condition of the City's schools. PFOF ¶¶ 715-53.

Defendants dismiss all of this evidence in just four pages, claiming that a recent building condition survey proves that the City's facilities are "in good repair" and that "evidence" not in the record proves that overcrowding is not a serious problem. Def. Br. at 96-100. In light of the massive evidence of inadequacy that *is* in the record, Defendants' failure to seriously confront this issue demonstrates that the weight of the evidence supports the trial court's findings that the City's facilities have suffered from "a history of neglect" and are in "parlous physical shape." *Trial Ct.* at 39.

Indeed, apart from Defendants' failure to seriously challenge the findings of the trial court, its conclusions concerning facilities should be given particular deference given the nature of the evidence. For example, there was substantial evidence from numerous witnesses concerning the condition of building facilities, and many of these witnesses supported their testimony with pictures of overcrowded and dilapidated school facilities, as well as detailed descriptions of the inadequacies found throughout the system. *See, e.g.,* Px 1002 (bathroom used as storage closet); Px 1643 (library converted to classroom); Px 1646 (gymnasium used as

cafeteria); Px 1649 (class in auditorium); Px 1650 (speech class in stairwell); Px 2017 (class held in hallway); Px 2019 (photograph of students sitting in doorway due to overcrowding); *see also* Zardoya 6960:15-16; DeStefano 5336:7-5337:3; Zedalis 4350:3-25; Levy 7105:8-7107:4; Coppin 636:9-637:17; PFOF ¶¶ 715-53. The trial court was in a unique position to assess the credibility of these witnesses and the cumulative effect of their testimony. *See K.I.D.E. Assoc., Ltd. v. Garage Estates Co.*, 280 A.D.2d 251, 253 (1st Dep't 2001); *see also 300 E. 34th St. Co. v. Habeeb*, 248 A.D.2d 50, 55 (1st Dep't 1997) ("Although an appellate court enjoys a power to review the record as broad as that of a trial court, 'due regard must be given to the decision of the Trial Judge who was in a position to assess the evidence and the credibility of witnesses."') (citations omitted). Collectively, this testimony provides irrefutable evidence of systemic failure.

1. The Building Condition Assessment Survey Demonstrates that New York City Public Schools Need Repairs, Not that They are Adequate

Far from proving the adequacy of the City's facilities, the Building Condition Assessment Survey (the "BCAS")[14] actually demonstrates that New York City's public school buildings are in significant need of repair. *Trial Ct.* at 43; Px 1483; *see also* Zedalis 4407:15-4409:13. The BCAS documents substantial structural deficiencies throughout the City's schools. For example, 231 school buildings must have their exteriors completely overhauled because

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[14] From late-1997 to mid-1998, outside engineers and architects conducted visual surveys of building components identified by the BOE. Zedalis 4393:3-4395:9. Each component was given a numerical rating: 1 (good), 2 (good to fair), 3 (fair), 4 (fair to poor) or 5 (poor). Components rated 3, for example, may need repair or simply maintenance. Zedalis 4402:2-10, 4418:12-4419:18; Px 1504 at 5. A component in "poor" condition "cannot continue to perform its original function without repairs or is in such a condition that its failure is imminent." *Trial Ct.* at 42 n.26; Px 90 at STBE 0105082; *see also* Zedalis 4401:20-25. The outside engineers also assigned purpose of action and urgency of action ratings to specific deficiencies. The most serious ratings are "life safety," for deficiencies that threaten the safety of students, staff and passersby, and "structural," for deficiencies that affect the building's structural integrity. *Trial Ct.* at 43; Zedalis 4402:11-20, 4406:4-4407:14; Px 90 at STBE 0105083-0105085.

three out of four critical exterior components (roofs, parapets, windows, and exterior masonry) received ratings of 3 or below with a structural or life safety deficiency. Nearly 800 schools will require exterior masonry work within ten years of their evaluation, 758 schools will need roof repairs, 424 will need parapet repairs and 288 will need window repairs. Zedalis 4452:11-4454:7; Px 108A at II-6; Px 1532; PFOF ¶ 732.

There is nothing in the BCAS that supports Defendants' claim that facilities are adequate. The testimony of the BOE officials responsible for the BCAS testified at length concerning the *inadequacies* catalogued in the report. Only Defendants' purported expert, Robert O'Toole, attempted to interpret the BCAS as evidence of adequacy. Mr. O'Toole, whose experience with school buildings was limited to facilities in Tucson, Arizona, presented a superficial and flawed analysis that was thoroughly discredited at trial, and the trial court properly dismissed Mr. O'Toole's analyses as unpersuasive. *Trial Ct.* at 44.

In short, Mr. O'Toole concocted a system of comparing average scores for various unidentified building components listed in the BCAS to support his conclusions about necessary repairs and their costs. O'Toole 18804:7-14; Dx 19706. As the trial court found, Mr. O'Toole used inaccurate cost figures in calculating the cost of repairs. *Trial Ct.* at 45; Spence 2328:12-22, 4251:16-4252:24; Zedalis 4871:17-4872:19; O'Toole 19751:13-24.

The most significant flaw in Mr. O'Toole's methodology was that he simply provided average scores across two-thirds of the school system for individual building components, without identifying which components he considered or which schools were involved. Thus, pursuant to Mr. O'Toole's analysis, a flagpole rating was given as much weight in his scoring as the rating for a roof on the verge of collapse. Dx 19706; O'Toole 18804:7-14. Similarly, he ignored the purpose and urgency of "action ratings" that demonstrated the critical nature of

certain deficiencies. *Trial Ct.* at 44. Mr. O'Toole also could not reconcile his conclusions on the BCAS with his opinion that the BOE's failure to spend sufficient funds on facilities ***prevented*** the buildings from achieving a "state of good repair." O'Toole 18746:3-18747:4, 19805:8-18. Mr. O'Toole's testimony therefore provides no basis to dispute the trial court's finding that hundreds of public school buildings have serious structural deficiencies. *Trial Ct.* at 43; *see also* Px 108A at II-5, II-9; PFOF ¶ 733.

The State also relies on Mr. O'Toole's testimony in suggesting that $5.8 billion would have been sufficient to cover the costs of keeping New York City school facilities in a state of good repair and that the BOE improperly failed to spend its entire capital budget to cover these costs. Def. Br. at 135. The record establishes, however, that $5.8 billion would have been insufficient. For example, in 1989, the BOE identified "state of good repair" needs totaling approximately $6.4 billion by the year 2000, Px 190 at 44, a figure that Mr. O'Toole admitted was not sufficient to meet actual need or to provide educational essentials. O'Toole 18707:5-18708:18, 18726:2-12; 19844:6-10; PFOF ¶ 902. More fundamentally, using the entire capital budget for repairs was simply not possible. The BOE necessarily divided its funds between much-needed capital repairs and equally essential new construction and renovations.

2. The Evidence Demonstrates that New York City Schools are Severely Overcrowded and Defendants' Estimates Regarding Current and Future Enrollment are Grossly Distorted

There is substantial evidence of pervasive, long-standing overcrowding and its detrimental consequences, including evidence that that almost 60 percent of all elementary schools and 67 percent of high schools are overcrowded. *See, e.g.*, Px 25 at 1-2; Px 3082B-Sweeting Stmt. ¶ 106; O'Toole 19784:18-19785:21. Defendants' only response is to suggest that high absenteeism rates might alleviate the crush in some classrooms and that the overcrowding may go away at some point in the future. Def. Br. at 99.

As a threshold matter, if the schools provided adequate resources, attendance would likely improve to levels found elsewhere in the state. In any event, an average attendance of 90 percent, for example, does not mean that only 90 percent of the enrolled children ever attend school. It only means there is a 10 percent average absentee rate; on any given day many more than 90 percent of the enrolled children might attend school. Thus, the BOE has to have facilities capable of serving its enrolled population; there must be a seat for every child. Zedalis 6903:20-6904:11; *see also* Lee 12715:9-21. Moreover, whatever the attendance rates, the record showed that dozens of schools are severely overcrowded every day, forcing classes to be conducted in every available open space, including gyms, storage rooms, bathrooms, hallways, auditoriums, portable classrooms and buses.

The record also fails to support Defendants' contention that a decline in enrollment may alleviate overcrowding. Def. Br. at 99-100; s*ee also* Opening Br. at 76-77. The Grier Partnership, which developed enrollment projections for the BOE, projects that enrollment will not drop below 1998 figures until 2005. Dx 17124 at 2. Relying on a flawed data analysis not part of the record, however, Defendants argue that this projected decline "may . . . be underestimated." Def. Br. at 100.[15] In fact, there is already reason to believe that the Grier

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[15] Defendants cite two websites, containing information not in the record, as suggesting that enrollment has decreased since trial. Def. Br. at 100. This data cannot properly be compared to the Grier data because, among numerous other reasons, the Grier Partnership projected enrollment in a carefully tailored manner, looking at elementary and middle schools apart from high schools, and excluding, for example, pre-kindergarten from its analysis. The data relied upon by Defendants, in contrast, includes pre-kindergarten enrollment. *See* "Mayor's Management Report: Preliminary Fiscal 2003" at 24, *available at* http://www.nyc.gov/html/ops/pdf/2003_mmr/0203_mmr.pdf. Indeed, were one really to go outside of the trial record, as Defendants wish, recent data indicates that New York City's overall population has steadily increased since before the time of trial. *See* "Summary of Vital Statistics 2000: The City of New York" at 4, *available at* http://www.nyc.gov/html/doh/pdf/vs/2000sum.pdf (indicating a year 2000 population rate of 8,008,278, an increase from 7,937,000 in 1999 and 7,866,000 in 1998); *see also* 2000

later-year projections for decreases in enrollment will prove to be too low. The Grier projections included demographic and fertility data only through 1997. Dx 17124 at 3. 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 10, and that overall population in the City jumped substantially in 1998. Dx 17124 at 8. Thus, even if Defendants are correct that enrollment has decreased slightly for the 2000, 2001, and 2002 school years, Def. Br. at 99-100, credible evidence presented at trial demonstrates that, because birth rates rose in 1998, Dx 17124 at 13, and the overall population grew substantially in 1998, Dx 17124 at 8, first-grade enrollments are likely to increase as these 1998 babies reach their sixth birthdays.[16]

3. Defendants Failed to Prove Any Significant Waste in the BOE's Facilities Programs

The trial court found Defendants' allegations of waste to be unsupported by the record, and laid ultimate blame for any waste on the State. *Trial Ct.* at 94. The Appellate Division did not disturb this finding. *App. Div*. at 18. Moreover, the Appellate Division, like the trial court, found that, to extent that there was evidence of fraud or waste in school construction, "such work is now mostly controlled by the State School Construction Authority, rather than the BOE, and thus the State bears responsibility." *Id.*; *see also Trial Ct*. at 94. There is therefore no basis to disturb the consistent findings of the trial court and the Appellate Division on this issue.

In any event, Defendants' claim that new schools constitute "monuments," Def. Br. at 135, is unsupported by the record. Defendants rely solely on the testimony of their expert Mr.

Census Summary, *available at* http://www.ci.nyc.ny.us/html/dcp/html/census/pop2000.html ("Between 1990 and 2000, the city's enumerated population grew by 685,714 persons or 9.4 percent over the 1990 count of 7,322,564.").

[16] There is a "quite regular and predictable" historical relationship between population and births and enrollments that demonstrates that first grade enrollments generally follow births by six years. Dx 17124 at 8.

O'Toole, who claimed that he observed unnecessary expensive construction at the City's public schools. But Mr. O'Toole's statements were based on visits to only three schools that apparently were not randomly selected. O'Toole 19865:11-19866:23. Furthermore, Mr. O'Toole failed entirely to estimate the actual additional cost of the features he deemed too expensive. In fact, the record demonstrates that insufficient funds and extreme overcrowding have forced the BOE not only to forego luxuries in the schools, but also to create schools lacking basic necessities such as gymnasiums and auditoriums, saving money to build desperately needed seats. Zedalis 4526:11-4527:3, 4528:21-4529:15.[17]

D. The Size of New York City's Classes Interferes With the Provision of the Opportunity For a Sound Basic Education

Although ignored by Defendants in their brief, the evidence at trial established that, for an opportunity for a sound basic education to be provided to a population that includes a significant number of at-risk children, classes must be small enough for these children to receive the attention they need to succeed. Ensuring proper class size requires staffing schools with adequate teachers and providing them with adequate classroom space. As discussed above, New York City satisfies neither of these requirements.

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[17] Defendants' effort to place blame for shortfalls in the school construction budget on the director of the BOE's Division of School Facilities, Patricia Zedalis, through information not part of the record is nothing short of reprehensible. Def. Br. at 135. Indeed, according to the very source cited by Defendants, the State's School Construction Authority "had a good deal of responsibility for the construction budget shortfall through changes it requested in plans for specific buildings." Edward Wyatt, *Chancellor Seeks to Shift Control in School-Building,* N.Y. Times, Aug. 8, 2001 at A1 (noting that "[t]he trustees of the School Construction Authority have known about the growing shortfall for two years"). The same article suggests that Harold Levy was "trying to make Ms. Zedalis a scapegoat for [school construction] problems." *Id.; see also* Carol Gresser, *Memo to the Mayor: Keep Harold Levy,* Newsday, Jan. 23, 2003 (noting that Mr. Levy "stumbled badly" when he "blamed and fired the well-respected director of school facilities, Pataricia Zedalis" for the cost overruns in school construction).

1. Reducing Class Size Increases Educational Opportunity for All Students and Particularly for At-Risk Students

The evidence at trial concerning the academic advantages of small classes was simply overwhelming. City superintendents, SED officials and experts for both sides all emphasized that appropriate class size is particularly important to at-risk students. These same witnesses further emphasized that while class size reductions benefit all students, children at risk of academic failure benefit the most from properly sized classes. *See, e.g.,* Cashin 315:22-316:11; Sobol 1072:22-1073:25; Evans-Tranumn 1395:25-1396:17; Hanushek 15971:20-15972:4, 16039:11-18; Finn 7965:7-7968:24; Walberg 17254:4-8; PFOF ¶¶ 603-19, 621.

Although Defendants would like to pretend otherwise, part of the mass of evidence supporting small classes was the Tennessee STAR study, a comprehensive controlled experiment that Plaintiffs' and Defendants' experts agreed is the only one of its kind and has advantages enjoyed by no other study. Finn 7973:14-7974:7, 8024:8-8025:3, 8371:11-24; Grissmer 9456:2-9457:8; Levin 12217:23-12218:9; Hanushek 15976:8-21; Guthrie 21208:18-23. As discussed in detail in Plaintiffs' Proposed Findings of Fact, the results of the STAR experiment provide consistent and clear evidence that reducing class sizes to under 20 students can have strong and positive effects on student achievement. PFOF ¶¶ 605-16.

Although STAR is the most reliable study available on the effects of class size reduction, it is not the only one. Indeed, the record establishes that the very California class size reduction study cited by Defendants in their brief to discredit the proven benefits of class size reduction, *see* Def. Br. at 103, actually established the benefits of class size reduction. Finn 8077:23-8078:6. The evidence established that participating California students experienced some increased academic achievement resulting from decreased class size, despite the fact that class size reduction was accomplished in California under far from ideal conditions that included a

lack of adequate space for the new classes and thousands of uncertified teachers hired to implement the program. Finn 8079:6-8080:22. In fact, as Dr. Finn testified, had the California study been properly performed, with adequate space and qualified educators, academic improvements would have been even greater. *Id*. Similarly unsupportive of Defendants' argument is the Glass and Smith "meta-study" cited in their brief. Def. Br. at 103. Although Glass and Smith indicated that small academic achievement seems to accompany class size reduction from 30 to 20 students, they indicated that there is greater academic benefits as class size is reduced to below 20 students. *See* Finn 8370:4-16. This is the very same effect that was confirmed by the Tennessee STAR study.

2. Averages Emphasized By Defendants Underestimate The Actual Number Of Students In Very Large New York City Public School Classrooms

It is beyond dispute that in every grade and every district, New York City regular education classes exceed the levels recommended by educators and experts. *Trial Ct.* at 53; PFOF ¶ 628. Neither Defendants nor the Appellate Division have challenged or could challenge this assertion. Thus, as discussed in Plaintiffs' opening brief, more than 340,000 children in kindergarten through eighth grade are in classes of 28 or more. Px 2107A; Px 2107B; Px 2107C. In grades K-6, 4,282 students were in classes of 35 or more, 20,895 were in classes of 33 or more and 68,325 were in classes of 31 or more. Px 2164.[18]

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[18] Defendants' argument that Catholic schools provide adequate education in classes larger than state averages fails because, as discussed *infra* at 64-66, the characteristics of Catholic schools provide no useful comparison to the City's public school student population.

3. The New York City Board of Education Allocates Its Teachers Efficiently

Contrary to Defendants' suggestions, Def. Br. at 100-01, the BOE cannot solve its class size problems through mere reallocation of its existing teaching staff. As a preliminary matter, class size is not only a function of insufficient teachers, but also stems from a lack of space. It is impossible to effectively reduce class size if, as in the New York City school system, there is inadequate space in which to house new, yet smaller, classes.

Second, there is no support in the record for Defendants' suggestion that inefficiency is proven through the mere fact that New York City's pupil-teacher ratio is smaller than its class sizes. As the evidence established, pupil-teacher ratios, if computed properly, offer information regarding the total number of pupils and "teachers" in a school district, including "Title I teachers; special education teachers; remedial teachers; librarians; the principal, if the principal does any teaching; music and art teachers who don't have classes of their own"; and other professionals essential to the educational mission. Finn 8086:20-8087:19. Because these ratios tend to include "all of the adults in that setting who have any contact [whatso]ever with children," it is not uncommon to find a school district with relatively low pupil-teacher ratios but large class sizes. Finn 8086:20-8087:11, 8087:20-8088:2, 8359:7-19; PFOF ¶ 657. New York City counts all of these professionals as "teachers," although many other districts do not.

Moreover, given the needs of its at-risk students and of its inexperienced and poorly prepared teaching force, New York City must employ a significant number of teachers and other professionals who are not assigned to a specific classroom. New York City community school districts typically employ: (1) teachers who are assigned to remedial programs to address rampant illiteracy, (2) staff developers assigned to train and mentor the vast number of new and uncertified teachers who enter the system each year, (3) special education teachers and related

service providers, who are required by State law to meet the needs of students with disabilities, and (4) other professionals, such as attendance teachers, language coordinators, and health coordinators to address the needs of the New York City student population. *See, e.g.*, Zardoya 7005:10-17; Px 2051; PFOF ¶¶ 658-9.

E. New York City Schools Do Not Provide the Essentials of Learning

Defendants ignore the substantial evidence submitted to the trial court that demonstrates that New York City schools lack certain basic instrumentalities of learning that are essential to the provision of a sound basic education:

The City Lacks Both Libraries And Laboratories. Defendants' brief ignores the fact that of the 640 elementary schools in New York City, 490 schools and their 375,000 students suffer each year from a "devastating lack of library support." Px 27 at 29; PFOF ¶ 965. Moreover, New York City's middle and high school libraries are in "significant and often worse disrepair." Px 3083–Lief Stmt. ¶ 31; PFOF ¶ 965. In the few City schools that actually have libraries stocked with books, the number of books falls far short of the recommended standard. While the American Library Association has concluded that an elementary library collection should contain at least twenty books per student, Lief 15002:5-16; PFOF ¶ 962, New York City schools have only nine books per elementary school student. Px 1 at 81; Px 3 at 81; Px 5 at 78; Px 7 at 74; Px 3083-Lief Stmt. ¶ 30; PFOF ¶ 962. The cause of these deficiencies is unquestionably lack of funding: As explained by the Regents in their 1998-99 Budget Request, "[t]he appropriation for Library Materials Aid has remained at $4 per pupil for several years despite higher costs for books, and the move to higher academic standards." Px 518A at 24; *see also* Px 1169 at 51.

Similarly ignored is the City's gross deficiencies in the laboratory access it provides for its students. Thus, Defendants in no way contest the fact that 31 New York City high schools

lack science laboratories entirely. Px 1533; Zedalis 4750:3-4751:20, 4752:13-4754:2. Nor do (or could) Defendants challenge the fact that most districts have no working science labs in any of their elementary or middle schools. Px 2050; Px 2332A-Rosa Stmt. ¶ 112; Px 2900-Young Stmt. ¶ 54; Cashin 308:23-310:6; Doran 4688:15-4689:19; DeStefano 5338:8-5339:11; Zardoya 6976:7-15, 7337:12-15; Young 12826:7-16, 12864:3-12865:4; PFOF ¶¶ 846-48.

New York City Students are Denied Access to Appropriate Information Technology. Contrary to Defendants' claim, the State's own documents acknowledge that "[s]tudents in New York City . . . had very limited access to the latest instructional technology." Px 1 at 80-81; PFOF ¶ 1001. Defendants' arguments on this issue are extraordinarily disingenuous. For example, Defendants contend that the student-to-computer ratio in New York City is ten to one, approximately the same as the national average. Def. Br. at 105. Yet the very exhibit Defendants cite in support of this assertion demonstrates that at least 20,000 of the 100,000 computers available to City students are obsolete, Px 1592 at 8a, and that an additional 14,500 computers cannot connect to the Internet, typically cannot run on any Windows platform, and do not run current software. Px 1592 at 8a; Taylor 6200:10-6201:16; PFOF ¶ 1003. In fact, "outdated computers are more the rule than the exception" in the City's schools. Coppin 652:9-17; Px 2855A-Lee Stmt. ¶ 137; PFOF ¶1007. When these unquestionably obsolete models are subtracted, the student-to-computer ratio rises to nearly fifteen to one. Taylor 6202:9-6204:2.

The State Barely Allocates Enough Funds To New York City To Enable It To Buy One Textbook Per Student Per Year. Defendants claim that the Board of Education has had "enough money not only to provide students with current textbooks, but also to buy an additional set of four textbooks per student." Def. Br. at 104. Simple math, however, demonstrates that this claim is wrong. For the 1999-2000 school year, the State provided textbook funding of just

$46.87 per student pursuant to the New York State Textbook Law ("NYSTL"). Px 1169 at 51. This amount was an increase over earlier years, when the per-student textbook allocation ranged from $35 per student (1995-96) to $41 per student (1998-99). Px 1658 at 51; Px 1169 at 51; Px 2193 at 61; Dx 13272 at PCFE 003491; PFOF ¶ 950. Because the average cost of many textbooks is approximately $45, the NYSTL allocation pays, at most, for ***one textbook per student per year***. Px 2332A-Rosa Stmt. ¶ 101; Px 1469 at 42-43; PFOF ¶ 951.[19]

It Is Undisputed that New York City Students Lack Access To Basic Classroom Supplies. Defendants do not even bother to dispute in their brief the fact that the City schools suffer from a chronic shortage of the most basic classroom supplies, such as chalk, markers, copier paper, and classroom furniture. There is therefore no challenge before this Court to the trial court's finding that "New York City public schools have in the last two decades suffered from inadequate classroom supplies and equipment." *Trial Ct.* at 57-58.

F. New York City Schools Lack Adequate Programs For the At-Risk Students that They Serve

New York City schools lack the curricular resources to serve their significant population of at-risk children. As demonstrated below, Defendants' contentions concerning the status of programs for at-risk children in the City schools are contradicted by the trial record:

- Defendants claim that programs for at-risk students are nothing but one item on a lengthy "wish-list" for a "world class" education, Def. Br. at 107, while ignoring the fact that Defendants'own experts and representatives testified that programs for at-

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[19] In recognition of this dire textbook crisis, the City Council at the time of trial allocated some funds to help the City's public schools meet their students' basic textbook needs. PFOF ¶ 959. The City Council is under no obligation to continue to supplement the inadequate NYSTL allocation. PFOF ¶ 959. As the trial court correctly concluded, there is "no structural funding mechanism that gives any assurance that the recent spike in textbook funding will continue." *Trial Ct.* at 57. The only way to ensure that the City schools will have enough textbook funding in the years to come is to increase substantially the NYSTL allocation • the amount that the ***State*** is legally obligated to provide the City to cover the cost of instructional materials.

risk students are ***critical*** components of a sound basic education. Rossell 16905:21-24; Walberg 17258:9-17259:22; *see also* Mills 1275:9-19; Px 519 at 11; PFOF ¶¶ 1075-76, 1085, 1201.

- While Defendants contend that "hundreds of thousands of students participated in summer school . . . and other extended time programs," Def. Br. at 106, the reality is that, because of funding issues, ***less than one-third*** of City students who needed summer school were able to attend in 1999. Casey 10005:24-10006:25; Px 2192 at 2; PFOF ¶ 1210.

- Defendants point out that 40 percent of first through third graders were able to participate in some component of the Project Read program, Def. Br. at 106, but fail to mention the fact that only eight percent were able to participate in a comprehensive Project Read program consisting of both the Intensive School-Day Program and the After-School Program. Rosa 1116:22-1117:3; Px 2172 at 7; Px 2176 at BOE 775927; PFOF ¶ 1130. Defendants also fail to note that (1) in 1998-99, more than 100,000 students who were eligible for the Intensive School-Day component of Project Read were unable to enroll in the program. Casey 10019:2-7; Px 2194-Casey Stmt. ¶ 57; Px 2172 at 7; Px 2176 at BOE 775927; PFOF ¶ 1127, (2) that same year, more than half of the students who were eligible for the After-School Program component of Project Read were unable to enroll in the program, Px 1658 at 77; Px 2194-Casey Stmt. ¶ 60; PFOF ¶ 1129, and (3) Reading Recovery was provided to less than twenty percent of eligible first grade students due to inadequate funds. Ashdown 21278:18-23; PFOF ¶ 1154, 1165.

- There is absolutely no support for Defendants' suggestion that no child is "turned away from [prekindergarten]." Def. Br. at 106. As explained by William Casey, Chief Executive for Program Development and Dissemination for the New York City Board of Education, the Board of Education has historically been unable to provide enough prekindergarten to meet the demand due to a lack of funds. Px 2194-Casey Stmt. ¶ 29; PFOF ¶ 1091.

In short, the record shows significant inadequacies in programs necessary to provide at-risk students with the opportunity to learn to read and to otherwise acquire a sound basic education.

POINT IV

THE STATE IS ULTIMATELY RESPONSIBLE FOR THE MASSIVE DEFICIENCIES OF THE CITY'S EDUCATION SYSTEM AND DEFENDANTS' PERNICIOUS CLAIM THAT AT-RISK CHILDREN CANNOT LEARN MUST BE REJECTED

The evidence summarized in the preceding sections proves that the New York City public school system failed to provide the opportunity for vast numbers of children to obtain a sound

basic education. This failure violates the Education Article, which charges the ***Legislature*** with ultimate responsibility to ensure that all of the state's children are educated. Ordinarily, proof of a constitutional wrong entitles the victim to a remedy, but the State disclaims its constitutional responsibility in this case, saying that the failure to provide the opportunity for a sound basic education to more than one million of the state's school children is not its fault.

Defendants' causation argument is built solely upon unfounded inference and blame-shifting, not fact. Defendants want this Court to *infer* that sufficient money is provided to New York City simply because the amount of money spent is "high," either in an absolute sense or in comparison to other cities or states. And they want this Court to infer that recent increases in funding (now apparently threatened by substantial budget cuts) have cured all of the resource inadequacies. Defendants make no effort to confront the actual reality of New York City's education finances because, in contrast to the State's inferences, the facts show that for decades the need for resources has been significantly greater than the money that has been made available. But more fundamentally, the State's duty is not satisfied simply because it has allocated a certain amount of funds.

Defendants also say that the City is to blame for any resource inadequacies because it either failed to make sure that money was spent wisely or because it failed to provide sufficient local funds. Having successfully urged this Court to dismiss the City and the Board of Education from this lawsuit many years ago on the ground that the State had ultimate responsibility for education in New York City, Defendants should be estopped from even making this argument. *See City of New York v. State of New York*, 86 N.Y.2d 286 (1995). In any event, the State has the authority and the constitutional responsibility to cure any deficiencies attributable to local government.

Finally, Defendants blame the students, claiming that their purported experts have mathematical studies proving that there is no correlation between student outcomes and resources, and that the poor performance of New York City children can be fully explained by socioeconomic factors. The substantial methodological and factual failings of these studies were detailed in the trial court's findings, which were not disturbed by the Appellate Division.

Defendants' pernicious claim that at-risk students cannot achieve academic success because of their socioeconomic conditions is contrary to the official education policy of New York State, adopted by the Regents and endorsed by the Legislature. It is also directly contradicted by the substantial evidence that virtually *all* children can meet the State's academic standards, if they are provided with adequate resources.

I. The State Must Bear Ultimate Responsibility for the Systemic Failure of the New York City Public School System to Provide Its Students With the Opportunity For a Sound Basic Education

If this Court agrees that the evidence of gross resource inadequacies and massive educational failure proves that New York City students have been denied an opportunity to obtain a sound basic education, then Plaintiffs are entitled to relief because (a) the State bears ultimate responsibility for the systemic failure of the New York City school system as a matter of well-settled constitutional law, and (b) the resource inadequacies and the State education finance system are directly linked.

A. The Education Article Places Ultimate Responsibility on the State

There simply is no doubt that, as this Court has expressly held, "the Education Article imposes a duty on the Legislature to ensure the availability of a sound basic education to all of the children of the State." *CFE I* at 315; *Levittown*, 57 N.Y.2d at 47-48. Thus, when a public school system fails over a long period of time to provide a sound basic education, the State surely cannot avoid responsibility for that failure. The State is the ultimate guarantor of the

rights secured by the Education Article, and, particularly in the face of systemic failure, the State must be held accountable.

The Legislature itself has long recognized the State's ultimate responsibility for the adequacy of education provided in the New York City schools. In the midst of the severe New York City budget crisis in the 1970s that forced drastic cuts in education spending, the Legislature passed what ultimately was an ineffective "maintenance of effort" law intended to require New York City to support education with a certain minimum of local funds. In supporting this law, the Education Committee of the State Assembly determined that:

> [T]he New York City school system was bearing a disproportionate share of the budget reductions necessitated by the city's financial plight, ***that education, not inherently a municipal service but a State responsibility, was suffering from the fact that it was funded through the municipal budget,*** and that the city's school system needed guaranteed support in the municipal budgetary process, which could be provided by State legislation requiring a minimum appropriation for the system within the city's budget.

Bd. of Educ. v. City of New York, 41 N.Y.2d 535, 536-37 (1977) (emphasis added). This Court ultimately upheld the maintenance of effort law, noting that "***education is a State concern***." *Id.* at 542-43 (emphasis added).[20]

Defendants now assert that principles of local control preclude the Court from holding the State liable for the systemic failures in New York City. But the cases cited by Defendants

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[20] As the Supreme Court of Massachusetts explained in response to a similar attempt by that State to avoid responsibility for a district's failure to provide sufficient resources to their students, "[the legislatures and magistrates of the Commonwealth] may delegate, but they may not abdicate, their constitutional duty." *McDuffy*, 415 Mass. at 611, 615 N.E.2d at 550; s*ee also, e.g., Rose*, 790 S.W.2d at 216 ("[T]he ***sole responsibility*** for providing the system of common schools lies with the General Assembly. If they choose to delegate any of this duty to institutions such as the local boards of education, the General Assembly must provide a mechanism to assure that ultimate control remains with the General Assembly, and assure that those local school districts also exercise the delegated duties in an efficient manner.") (emphasis in original).

have nothing to do with the complete failure of local school and municipal officials to provide the opportunity for a sound basic education. Where local control has failed – or local officials need additional funds or changes in State governance laws or regulations – the State must accept its Education Article responsibilities to ensure the availability of a sound basic education.

Thus, Defendants fail to understand the nature of the constitutional mandate when they suggest that the State's constitutional responsibility is fulfilled merely because it has provided a certain amount of State education funds to New York City, or because the total of all funds spent on education in New York City is above some threshold level. The State's liability must turn on whether the system is providing the opportunity for a sound basic education, not simply whether some specific amount of dollars is being spent.

Indeed, even assuming, *arguendo,* that the State has provided a school district with substantial funds, but students are not receiving a sound basic education, the State must be held ultimately accountable. As a matter of fiscal responsibility, in addition to its Education Article responsibilities, the State cannot simply blame the Board of Education and the City government if State funds are being wasted. It makes no sense as a matter of public policy that the State could satisfy its constitutional duty simply by spending money, for it would then have an incentive for waste and no incentive to actually ensure that the constitutional right had been secured.

B. There Is A Direct Link Between Gross Resource Inadequacies in the New York City Public School System and the State Education Finance System

For the reasons explained above and in our opening brief, the systemic failure of the New York City public system to provide a sound basic education gives rise to the State's constitutional liability, and the inquiry concerning the specific link between resource inadequacies and the State education finance system is more properly an issue of remedy. *See*

Opening Br. at 112 n.30. In any event, there is no question that there is a causal link between resource inadequacies and the state funding system.

First, the record fully supports the conclusions of the Regents and the State Education Department that the quality and quantity of educational resources available to students, particularly those at risk, have a direct, positive effect on their achievement. To obtain these resources, the Board of Education must spend significant sums, including the costs of hiring a sufficient number of qualified teachers, restoring and maintaining facilities (including laboratories and libraries), reducing class size, and providing sufficient programs and services to meet the needs of at-risk students.

Second, for many years, the BOE has spent all of its allotted funds[21] and has been unable to procure all of the resources it needs to ensure that its students have the opportunity to obtain a sound basic education.

Third, there is no evidence of substantial waste or inefficiency from which the BOE could realize enough savings to obtain all of the necessary resources.

Fourth, as described at length in Plaintiffs' opening brief, the State education finance system has no mechanism to determine district need and to ensure that a district is provided with sufficient funds to meet that need. The State aid component of the education finance system purports to address particular needs, such as class size reduction or providing programs for at-risk children, but, in fact, the State makes no effort to actually determine the costs of meeting these needs and the distribution of State aid is driven by a regional shares deal. The New York

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[21] The small surplus the BOE generates is evidence of good fiscal management; the BOE cannot run a deficit. As the BOE's Chief Financial Officer testified, the surplus does not mean that the BOE had met all of its resource needs, and, in fact, the surplus is always earmarked for essential programs in the following fiscal year. Wolkoff 18280:17-18285:6; Px 2666 at 31, 33; PFOF ¶¶ 2000-01.

City Board of Education had no control over the City's contribution, and there is no State mechanism to ensure that the local contribution is sufficient.

Fifth, as part of the State education finance system, the State exercises pervasive control over every aspect of the City's education finances, decreeing what taxes the City can levy and how it should spend that money.

In sum, this case fundamentally is about a lack of resources, and resources cost money. Either the State education finance system – which includes both State and local expenditures – has provided insufficient funds to the New York City Board of Education (as the record proves), or it has failed to ensure that the funds provided are spent effectively. In either event, there is a causal link between the constitutional harm and the State education finance system.

C. Abstract Spending Data Provides No Basis to Infer that the State Has Met Its Responsibility

Defendants ask this Court to infer that, because the New York City school system purportedly spends a relatively high amount per pupil both in terms of absolute dollars and when compared to national averages, the State *must* be meeting its constitutional obligation. Def. Br. at 113. There is no conceptual or factual basis for the Court to draw this inference.

First, as described above, the State simply cannot meet its constitutional responsibility by claiming that it has met some abstract spending threshold, whether a national average or an absolute dollar amount. Indeed, the Court implicitly rejected this argument eight years ago in sustaining Plaintiffs' Complaint. *Cf. CFE I* at 337-38 (Simons, J., dissenting).

Second, there is no evidence in the record that any particular amount of spending, either total spending, or State spending alone (including the particular amount provided to New York City) is sufficient to discharge the State's constitutional obligation. This is no surprise, since the State education finance mechanism provides no mechanism to make such a determination, and

the State has never undertaken an appropriate "costing out" study. Although the Defendants imply that amounts spent in other states provide a relevant benchmark, they offer no evidence concerning the adequacy of the education provided in any other state; indeed, State education finance systems in more than 20 states have been found to be constitutionally infirm.

Third, Defendants' suggestion that recent increases must surely have solved any resource deficiencies is factually wrong, and, in any event, is a matter that should be addressed in any remedial proceeding. The record is clear that in the decade leading up to the trial, the Board of Education's expenditures remained constant, when adjusted for inflation, despite increases in the late 1990s. PFOF ¶¶ 2018-23. Moreover, Defendants did not even attempt to show that the increased funding was sufficient to remedy any particular inadequacy. And it is clear that these funding increases were the fortuitous result of unprecedented budget surpluses rather than any structural reform intended to ensure that adequate resources are provided to New York City schools on a sustained basis.

Fourth, there is substantial factual evidence that rebuts the Defendants' inferences. The BOE spends less per pupil than almost all other major East Coast cities. *See, e.g.,* Murphy 16661:4-16665:23; Px 3382; Px 3478. It spends almost $1,500 less than the state average. Px 469A at 28-29; Px 2795 at 20-21. And it does so even though it has an exceptionally high percentage of at-risk students and faces higher costs than other state districts. In fact, New York City is one of the only two major cities in the United States that spends less than its state average. Normally, urban district spending is higher precisely because of high costs and greater student needs. Berne 11935:18-11939:8; Px 2775; Px 2779.

1. A Fair Comparison Must Consider Cost of Living Factors

The evidence at trial established what is already common knowledge: New York City has the highest cost of living in the state by far and one of the highest in the country. According

to an index compiled by the American Federation of Teachers ("AFT") and the federal government ("the AFT index") that the State's own expert deemed "authoritative," New York has the highest cost of living of 100 large cities studied. Podgursky 17809:19-17811:4, 17821:10-19. Moreover, New York City has the highest regional cost factor in the state, Mills 1168:24-1169:2; Px 469A at 14; PFOF ¶ 294, making purchasing power in New York City just 74 percent of that in Albany. Px 469A at 14, 17; PFOF ¶ 294. Defendants suggest that Plaintiffs should be faulted for "failing to establish that such higher costs adversely affect the BOE's ability to deliver educational services to the City's students," Def. Br. at 118, but there is no question that districts in high-cost regions simply have less buying power than other districts. Berne 11945:16-11946:9. Defendants' own expert also agreed that a fair finance system should take regional costs into account, particularly in high-cost metropolitan regions. Guthrie 21219:13-21226:8. [22]

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[22] Defendants suggest that even after correcting for cost of living, New York City's per-pupil expenditures remain relatively high. Def. Br. 118-19. First, this is not surprising given the considerable needs of the City's students. But more importantly, Defendants' expert, Dr. Hanushek, upon whom Defendants rely for this claim, primarily used an index that clearly failed to capture the reality of costs in New York City. Although he referenced the AFT cost of living index, Hanushek 15641:12-18, he ultimately relied upon an index that grouped all cities within New York State together. Hanushek 16026:20-16027:4; 16034:3-17. Thus, under the index used by Dr. Hanushek, Rochester, Buffalo, Syracuse, and New York City all received the same cost of living cost indicator, and were ranked lower than all cities in Connecticut and New Jersey. Hanushek 16027:16-16028:16.

Defendants also attempt to discredit a 1999 SED cost of living index ranking New York City as the state's highest cost region on the ground that it failed to include salaries of educators. Def. Br. at 119; *see also App. Div.* at 18. The SED index intentionally excluded salaries of educators in accordance with a recognized method of analysis designed to capture what the costs of education would be if the education market were competitive. Px 469A at 19.

2. A Fair Comparison Must Consider Student Needs

New York City has an extraordinarily high concentration of students with special needs. Seventy-three percent of New York City's kindergarten through sixth grade students are eligible to participate in free lunch programs, compared with five percent of the K-6 population in the rest of the state. Spence 2035:21-2036:5; Px 1 at vi; Px 466 at 5; *see also* Dx 19601, and 80 percent of the state's ELL students attend school in New York City. Kadamus 1609:23-1610:13; PFOF ¶¶ 14, 31, 258, 1305. The evidence establishes conclusively that with additional resources, these students can master the fundamental skills of a sound basic education. But, of course, such additional resources cost money. As the Regents have concluded:

> [U]rban schools tend to have more needs that are commensurate with the greater concentrations of school-aged children, diversity of student needs, decreased availability of credentialed professionals, insufficient technological and material resources, inadequate facilities, and community high-risk factors which can amplify problems confronted by any school.

Px 1027 at BOR 02221. A cross-district comparison of per pupil expenditures that fails to account for the nature of a district's student population is fundamentally flawed. Yet Defendants completely ignore this basic fact in their simplistic reliance on national averages.

D. The Evidence Regarding New York City Catholic Schools Provides No Basis to Infer that The State Has Met Its Responsibility

Notwithstanding their claims to the contrary before this Court, Defendants failed to submit credible evidence that established that the Catholic and public school systems are comparable in any way relevant to this litigation. Defendants presented outdated and incomplete evidence, and failed to produce even readily available documentation to confirm their claims.

First, the evidence indisputably established that public and Catholic schools in New York City serve drastically different populations. The Catholic schools enroll far fewer students in poverty, LEP students, and minority students, and students in need of special education.

Defendants' sole fact witness on issues related to the Catholic schools conceded that the Diocese's own records, together with the corresponding 655 Report, demonstrate the following stark statistical differences between the Catholic schools' enrollment and the students in the New York City public schools:

	Free Lunch	**LEP**	**Minority**
New York City	Between 70 and 90 % in most districts	16.3 %	84.2 %
Diocese	9.2%	4%	56.1%

Source: Px 2 at 24; Px 3694 at 1-2.

See also Puglisi 19399:24-19405:6, 19418:21-19419:16; Px 3694.

Second, Defendants failed to present any credible evidence that demonstrates that the cost of educating students in the Catholic schools is substantially lower than in the City's public schools. As noted in Plaintiffs' opening brief, Dr. Walberg's testimony on this issue must be disregarded for the simple reason that Dr. Walberg conceded that he did not know who from the Catholic schools' central office had given him the data, what position this person held, or even what part of the office the person worked in. Walberg 17225:22-17226:11. Defendants' claims to the contrary in their brief notwithstanding, Dr. Walberg did not obtain any documentation or other information indicating how the Archdiocese allocated its costs or kept its books. Walberg 17228:12-20.

What Defendants' evidence did establish is that there are substantial, fundamental differences between the Catholic schools and the public schools that render comparisons between them meaningless. In their brief, Defendants do not dispute that the Diocese faces entirely different salary pressures than the City's public schools because teachers are attracted to Diocese schools primarily by the opportunity to teach in a religious environment, not by salary

considerations. Puglisi 19406:22-19407:6. In addition, almost 90 percent of the principals in the Diocese are religious, and thus cost far less than a lay salaried principal. Puglisi 19408:3-25. Defendants also do not dispute that Catholic schools benefit from substantial free services that 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.

The Catholic schools also differ from the City public schools in their ability to exclude students who are disruptive or who are difficult to teach. As Dr. Henry Levin of Teachers College at Columbia University observed, the Catholic schools reserve the right to reject disruptive students, students with disabilities, and students whose parents do not provide the required level of participation. Levin 12147:15-21. Indeed, Monsignor Puglisi admitted one of many "great differences" between the Diocese schools and the City's public schools is that only the latter must "take anyone who comes." Puglisi 19425:20-19426:6.[23]

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[23] Apparently aware that was the only evidence in the record that purports to systematically correlate the inputs available to the results obtained by Catholic schools was a 15-year-old report, which no witness substantiated or updated, Dx 19009 at NYS 032481. Defendants seek to present a purported up-to-date report for the first time through their brief to this Court. Def. Br. at 121 n.22. Had Defendants introduced this study at trial, they would have had to note that the study acknowledges (1) that the Catholic schools serve almost no special education students (and in any event only those with mild learning disabilities or handicapping conditions), (2) the Catholic schools have, as a percentage, more whites and fewer African Americans and Hispanics than do the public schools, (3) the public schools serve a higher percentage of poor students, (4) the Catholic schools receive subsidies from their supporting parishes or private benefactors, and (5) the Catholic schools receive additional funds from the public sector for transportation, lunch and certain remedial services. Raymond Domanico, *Catholic Schools in New York City* (March 2001), at 4-5, 8A, 9, 20B, *available at* http://nyu.edu/wagner/education/pecs/CathSchools-Report.rtf.

II. Defendants Cannot Blame the Board of Education or the City

As discussed in the preceding section, Defendants' attempt to shift blame for systemic failure to the City of New York and the Board of Education is precluded by the Education Article. And it is inconsistent with Defendants' successful effort to prevent the City and local community school districts ("CSDs") from participating in this case. In granting Defendants' motion to dismiss the City and the CSDs, the Court explained that:

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

City of New York v. State of New York, 86 N.Y.2d at 289-90. The State cannot have it both ways, claiming that it bears the constitutional responsibility for education in order to deny the City standing in a related case, while blaming the City in this action for any constitutional fault.

In any event, apart these legal infirmities, Defendants' attempt to shift blame has no basis in fact.

A. Defendants Again Failed to Show Any Significant Waste

Having failed to convince either of the lower courts that any significant amounts of funding were being misspent through fraud and waste, Defendants resort to arguing that Plaintiffs bear the burden of affirmatively showing an ***absence*** of fraud and waste. Def. Br. at 137-38. Plaintiffs do not bear this burden, but, in any event, the overwhelming weight of the evidence established that there was ***not*** significant fraud, corruption, or waste.

Despite Defendants' repeated criticism that Plaintiffs have relied on anecdotal evidence, Defendants attempt to rely on reports issued by Edward Stancik's Special Commission of Investigation (the "Stancik Reports") to establish "systemic" corruption and abuse. Def. Br. at 136-37. Even cursory consideration of Mr. Stancik's testimony and the reports from his office in

evidence demonstrates that they typically focus on improprieties involving small numbers of employees or schools, and a very small portion of the BOE's education budget. These reports, even considered collectively, provide no evidence of systemwide misconduct, and they cannot reasonably be described as anything other than anecdotal in nature. PFOF ¶¶ 1740-42. For example, one of the ostensibly egregious examples touted by Defendants, Def. Br. 137, identifies only $125,000 of purported waste. Dx 10025-39 at NYS 000341 (included in Defendants' supplemental appendix). This amounts to ***a little more than one thousandth of a percent*** of the BOE's $8 billion annual operating budget. Even after years of discovery and trial (and recent months apparently searching through press reports), Defendants still cannot quantify any significant amount of fraud or waste.

This is not surprising, since the details of New York City's public school finance system, including its budgeting and spending decisions, are unusually open to public scrutiny. Donohue 15544:10-25; PFOF ¶¶ 1749-63. Indeed, a remarkable number of agencies, commissions, and government entities, including Mr. Stancik's Commission, have authority to monitor the BOE and take steps to respond to misconduct. Stancik 21693:20-21697:23. Furthermore, the record makes clear that when Mr. Stancik's office or other investigators did uncover instances of fraud or misconduct, the BOE consistently responded quickly, including terminating wrongdoers and implementing recommended structural changes. Stancik 21826:19-21827:13, 21829:11-21, 21833:21-21835:13; PFOF ¶¶ 1743-44.

In a last-ditch effort to blame the City, Defendants now offer a series of recent press releases touting various reforms of the administration of the City's schools, which they apparently hope this Court will accept as proof of the alleged inefficiencies of the prior administration that Defendants failed to prove at trial. Def. Br. 138-42. Like much of the

material outside of the record that Defendants now try to sponsor as "evidence, " these press releases have no probative force. It is entirely inappropriate for Defendants to ask this Court to guess, based on an assortment of newspaper articles and press releases, what effect, if any, the governance reforms will have on the constitutional violations established by the record.

The unreliability of these materials is particularly obvious. Far from reporting on events that have *already* happened, they are a series of statements from politicians describing proposed reforms. There is, of course, a frequent disconnect between a promise made by a politician and the concrete action required to actually implement it. And education funding cuts now being proposed in the State budget, as well as cuts being made in the City budget, suggest that funding inadequacies may well be getting worse rather than better.[24]

Even assuming, *arguendo*, that this dehors-the-record evidence suggests that there has been serious inefficiency in the administration of the BOE, that would simply prove the point that the State failed for years to take steps to remedy the deprivation of students' constitutional rights. The governance legislation is itself an example of the pervasive control that the State exercises over the City and its administration of schools. *See Trial Ct.* at 93 ("To the extent that defendants allege that corruption and waste by community school boards had a negative effect on student outcomes, the blame must lie with the State for perpetuating a form of school governance that generated corruption at waste.").

Moreover, as the City itself explains in the brief *amicus curiae* that it submitted to this

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[24] Indeed, realization of the reforms envisioned by Mayor Bloomberg is likely to be highly dependent on the adequacy of State education funding. Shortly after Governor Pataki proposed deep cuts to education in his 2003-04 executive budget, Steven Sanders, the Chair of the Assembly's Education Committee, accurately observed: "The governor has dealt a body blow to the mayor in education." Alison Gendar, *Gov Dumps Ed Cut Into Pols' Laps,* Daily News, Jan. 30, 2003, at 4.

Court in support of Plaintiffs, governance reforms alone will not remedy the constitutional violation proven in this case. The City makes clear in its brief that the State funding system must be reformed to ensure that there are sufficient resources to serve the needs of the City's student population, especially its at-risk population. *See* Brief *amicus curiae* of the City of New York, *et al.*, at 26-31.

B. Defendants' Attempt to "Clarify" the Basis for the Appellate Division's Guesses Concerning Alleged Savings in Special Education Makes it Even More Clear that They Are Entirely Baseless

Seizing on the Appellate Division's unsupported claim that reclassification and integration of special education students could magically yield up to $1 billion – ***three times the amount of waste claimed by Defendants at trial*** – that could be redeployed to serve other district needs, Defendants claim that huge sums of money are wasted through overreferral of students to special education environments. The trial court correctly found, however, that providing the additional services and supports that students with disabilities need to function effectively in an integrated environment would reduce any potential savings to (at most) "tens of millions of dollars." *Trial Ct.* at 97; *see also App. Div.* at 35-36 (Saxe, J., dissenting in part). As stated in our opening brief, the Appellate Division's assertion was a guess wholly lacking any evidentiary basis. Opening Br. at 128-31.

In an attempt to rescue this claim, Defendants now boldly assert that "it is clear" how the Appellate Division arrived at its $1 billion figure. Def. Br. at 129. In their effort to make the numbers add up, Defendants disregard the actual facts and make a number of misleading assumptions. Defendants somehow surmise that the Appellate Division "assumed that 80% of the City's 135,000 special education students have been improperly placed there and that all of them are in fully-segregated settings." Def. Br. at 129. This assumption is based on critical errors of fact, including:

(1) All special education students are not in fully segregated settings. As Defendants admit on the prior page of their brief, just over half of special education students are in segregated settings more than 60 percent of the time, a rate that is comparable to other large cities in the state. Alter 8693:7-8695:8; Px 2166A-Goldstein Stmt. ¶ 40; Px 2189.

(2) The only basis for the 80 percent assumption appears to be a study that focused only on the "learning disabled," which is one of 13 subsets of special education students. PFOF ¶ 1233.

(3) The assumptions about "improper placement" are based on an independent researcher's own views about who should be classified as learning disabled, not the actual criteria set by the State and followed by the BOE. Alter 8721:18-8722:20, 9696:9-22, 9698:11-15; Reschly 19080:11-23.

C. City Spending Levels Do Not Absolve the State of Its Constitutional Responsibilities

Defendants attempt to avoid liability because New York City purportedly provides insufficient funds to support education, Def. Br. at 142-45, and say that Plaintiffs should have sued the City. Def. Br. at 149. Of course, if Defendants believed that the City bore any of the responsibility for the failure to ensure the availability of a sound basic education, they could have joined the City or objected that Plaintiffs had failed to name an indispensable party. *See* CPLR 3211(a)(10) (providing for a motion to dismiss in the absence of a necessary party).

In any event, the State exercises extensive control over every aspect of the City's education finance system, and it has the authority to order the City to fund education at specific levels. *See Board of Educ. v. City of New York*, 41 N.Y.2d at 542-43. Moreover, as described at Plaintiffs' opening brief, Opening. Br. at 119-121, and in more than 26 pages in Plaintiffs' Proposed Findings of Fact, PFOF ¶¶ 1947-2010, the City faces significant fiscal limitations in increasing education funding, including:

- City residents face an overall tax burden that is among the highest in the country and 10 percent higher than the rest of the state, and City businesses are among the most heavily taxed in the country. Px 2694; PFOF ¶¶1991-97.

- The City's overall tax structure, which is dictated by the State, is heavily dependent on taxes that are very sensitive to business cycles. PFOF ¶¶ 1952-56.

- The City faces higher municipal costs to provide basic services (many dictated by the State), which reduce its capacity to contribute to education. PFOF ¶¶ 1957-62.[25]

In short, the evidence shows that the State has fostered and tolerated an education finance system that relies too heavily on a fiscally unstable, heavily burdened, heavily taxed, and heavily indebted local finance structure. The current structure includes no mechanism to ensure that the City's education spending, when combined with the State's share, is sufficient to provide adequate resources. In fact, the evidence is clear that the current structure inhibits sustained, sufficient funding for New York City's schools. *See* PFOF ¶¶ 1947-2010. This is the State's fault.

III. Defendants Cannot Blame The Children

At the end of their brief, Defendants make two related and extraordinary claims: Resources don't matter and poor children can't learn. Def. Br. at 155-56, 158-60. Except for the two well-compensated "experts" who have long been associated with Defendants' Atlanta, Georgia-based trial counsel, not one witness supported these claims. To the contrary, both claims were expressly and vehemently contradicted by every witness with any classroom experience (including Defendants' witnesses), by every State and City education official, and by a mountain of evidence that proved both that resources matter and that virtually all children can learn.

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[25] The percentage of the budget devoted to education reflects the already heavy burden placed on the City by the range of social services it provides, including affordable housing development, certain medical services, subsidized day care, and jobs training, that are designed assist low-income students and their families. Additional funding of such programs in accordance with the Appellate Division's suggestion that it would be more appropriate to devote funds to "eliminating the socio-economic conditions facing certain students" than to enhancing their educational opportunity, *App. Div*. at 16, would lower the ratio of education spending to total budget even more.

We have summarized this evidence at length in our opening brief and in Plaintiffs' Proposed Findings of Fact. The trial court accepted and also thoroughly summarized this evidence, and the Appellate Division agreed that the evidence established a correlation between resources and the academic improvement of at-risk children. *See Trial Ct.* at 21-23; *App. Div*. at 16 ("[T]here was evidence that certain 'time on task' programs, such as specialized reading courses, tutoring and summer school, could help such 'at-risk' students . . . ."); *see also id*. at 34 (Saxe, J., dissenting in part) ("There was substantial evidence that at-risk students who have received the type of resources proposed by plaintiffs have made impressive academic progress.").

The idea that resources do not have any effect on student outcomes is counterintuitive and contrary to all of the evidence. As a task force of education experts convened by the Regents to study this issue concluded:

> Exposure to intensive, high quality summer and extra-session programming has been proven to stem the[] cognitive losses [that at-risk children experience during summer months].
>
> Recent studies based upon rigorous experimental designs clearly indicate that reduced class sizes have pronounced achievement benefits, especially among disadvantaged children . . . .
>
> High quality teachers with strong literacy skills and in-depth substantive knowledge in their specialization exert powerful achievement effects. Comparisons of students exposed for consecutive years to highly effective teachers versus less effective teachers reveal dramatic net differences in their achievement gains.

Px 1027 at BOR 02221. These findings are consistent with the extensive evidence of success achieved with programs such as Reading Recovery in the New York City school system. *See* PFOF ¶¶ 1448-56; *App. Div*. at 34 (Saxe, J., dissenting in part). And Defendants' own expert, Dr. John Murphy, testified that, based on his real-world experience as the superintendent of school districts in Prince George's County, Maryland, and Charlotte-Mecklenberg, every child

who attends public school is capable of achieving at high levels. Murphy 16649:21-16650:5. And in stark contrast to the position that the State now takes, Dr. Murphy testified that socioeconomic status is ***not*** an acceptable explanation for poor academic outcomes. Murphy 16650:6-11.

Indeed, the evidence before the trial court established that improving the educational opportunity made available for one generation affects the achievement of that generation as well as the one that follows. Grissmer 9516:10-9517:6, 9631:19-9632: 4. Of particular significance is the fact that the benefits of increased educational funding are particularly pronounced when the children receiving these additional resources come from economically and otherwise disadvantaged backgrounds. Finn 7965:23-7966:9; Grissmer 9632:19-9633:12.

Rather than address this evidence, Defendants mischaracterize the testimony of one of Plaintiffs' witnesses and ask the Court to instead accept the testimony of their two purported experts, whose testimony was rejected by the trial court and ignored by the Appellate Division. Both Dr. Hanushek and Dr. Armor contradicted their own studies on which Defendants rely, and acknowledged that it is possible to improve the performance of minority students (by far the largest demographic of at-risk children) with increases in funding. Dr. Hanushek explicitly disagreed with the results of his own statistical analysis and testified that it was "precisely" his opinion that the performance of minority students could be improved by increased spending on the right resources. Hanushek 15940:24-15941:16. And Dr. Armor testified that increases in particular kinds of resources, such as smaller class sizes, quality teachers, and appropriate educational programs could have a positive effect on achievement. Armor 20666:23-20667:4.

Both Dr. Hanushek's and Dr. Armor's analyses also suffered from severe methodological flaws that Defendants make no attempt to address in their brief, despite the fact that these errors

were carefully catalogued by the trial court in its opinion.[26] *Trial Ct*. at 70-75. Significantly, their analyses failed to recognize the cumulative nature of education, failed to account for the interaction between resources and achievement over time, and were each based on an analysis of only a single year of data. Armor 20636:3-10; PFOF ¶ 1701. This type of study has no value in assessing the effect of resources on achievement. Berne 22627:4-23.

Dr. Hanushek purported to base his opinion in part on comparing Regents diploma rates for the 1996-97 school year with spending in the twelfth grade. PFOF ¶ 1716. Not only was this analysis skewed by its failure to account for the cumulative effect of resource levels in the previous 12 years, but the Regents examinations were optional in the 1996-97 school year, making Dr. Hanushek's sample of students who (a) had actually survived until twelfth grade and (b) had chosen to take the Regents exams a self-selected group of (relatively) high-achieving students.[27] Grissmer 22362:5-22363:21. Furthermore, Dr. Hanushek's study failed to account for which students actually received extra resources. PFOF ¶ 1703.

In the end, when asked to explain some bizarre results of his own statistical analysis that showed that reducing money actually improves student achievement, Dr. Armor admitted that this result made no sense. Armor 20627:7-20628:11. Like Dr. Hanushek, Dr. Armor's study also looked only at isolated years and Dr. Armor admitted that he had no idea what level of resources his sample population was provided with in previous years. Armor 20585:25-20591:4. Even in the individual years Dr. Armor studied, however, his analysis failed to isolate money

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[26] For an exhaustive discussion of the flaws in Dr. Hanushek's and Dr. Armor's analysis, *see* PFOF ¶¶ 1694-1721.

[27] Dr. Grissmer's study showed that privileged, high-achieving students are least likely to show improvement when additional resources are provided. PFOF ¶¶ 1687-88. It is the at-risk student population, almost entirely unaccounted for in Dr. Hanushek's self-selected sample, that improves significantly when additional resources are made available.

that was actually spent on instructional services, Armor 20625:21-24, and he purposefully did not consider such factors as facilities and whether students had access to art rooms, gymnasiums, or even libraries. Armor 20591:5-25.

Fortunately, outside of the courtroom, it is the official education policy of the State, based on years of study and real classroom experience, that all children can learn, and that "even children from the worst circumstances, if given appropriate instruction and support, can succeed in school." Px 1 at 167. Given this policy and the voluminous evidence that supports it, Defendants' arguments before this Court are inexplicable.

POINT V

THE COURT SHOULD ISSUE REMEDIAL GUIDELINES TO CURE THE CONSTITUTIONAL DEFECTS

Defendants argue that if this Court finds that the State has violated the Education Article, it should merely issue a declaratory judgment and forebear from issuing any substantive remedial order to cure the Constitutional defects. Given the State's history of decades of abject neglect of the educational rights of millions of school children, such extreme deference would clearly be unwarranted.

The Legislature has long been aware of the lack of educational opportunities caused by the State's education finance system. Over the past 40 years, five separate joint legislative committees, gubernatorial commissions, and special task forces have examined in depth the workings of the state education finance system. Each of these commissions made substantial reform proposals. Each of their recommendations was ignored.[28] Perhaps the most dramatic of

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[28] *See* Joint Legislative Committee on School Financing ("Diefendorf Committee") (1963); Report of the New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education ("Fleischmann Commission") (1972); The Report

these legislative rejections occurred shortly after this Court's 1982 decision in *Levittown*. In response to the trial court's decision in *Levittown*, Governor Carey in 1979 appointed a Special Task Force on Equity and Excellence in Education, known as the "Rubin Commission." It identified a series of deficiencies in the State education finance system, and early in 1982 issued a report that recommended significant changes in the state aid system. Many of these changes were approved by the Governor and were under active consideration by the Legislature when, in June, 1982, this Court issued its ruling reversing the lower court decisions in Levittown. Shortly thereafter, the Rubin commission was disbanded and its recommendations were ignored. Berne 12007:14-17, 12010:3-13; Brief *amicus curiae* submitted by the New York State School Boards Association, *et al*., App. A.

This extensive history of inaction in the face of repeated pleas by legislatively-appointed commissions for reform of a State education finance system that Governor Pataki himself has called a "dinosaur" that should be thrown on the "ash heap of history," Gov. George E. Pataki, State of the State Address, January 3, 2001, *available at* http://www.state.ny.us/governor/pdfs/sos2001.pdf, renders totally disingenuous and unacceptable Defendants' current plea that "[t]he State cannot be faulted for failing to act where no constitutional violation was found." Def. Br. at 162 n.31. The State's history of failing to reform its repeatedly discredited education finance

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and Recommendations of The New York State Special Task Force on Equity and Excellence in Education ("Rubin Commission") (February 1982); Funding for Fairness: A Report Of The New York State Temporary State Commission On The Distribution Of State Aid To Local School Districts ("Salerno Commission") (December 1988); Putting Children First: The Report of the New York State Special Commission on Educational Structure, Policies and Practices ("Swygert Commission") (December 1993); see also Px 534-A at 1, 4-6; Salerno 5698:6-19, 5702; Berne 12008:11-21, 12009:6-12010:13; Brief *amicus curiae* submitted by the New York State School Boards Association, *et al*., at 7, App. A.

system demonstrates that, without a clear call to action from this Court, there is no guarantee that the command of the Education Article will ever be achieved.

This Court's Prior Precedents. Reinstatement of the trial court's modest set of remedial guidelines would promote compliance without compromising the Legislature's prerogatives or appropriate separation of powers concerns. As Defendants themselves acknowledge, *id.* at 171, there is ample precedent for Plaintiffs' proposed remedy in this Court's repeated past issuance of similar remedial guidelines in cases dealing with rights of the mentally ill, the homeless, and children in need of supervision.[29] Moreover, the experience of the approximately two dozen other state high courts that have issued remedial orders in analogous cases indicates that issuance of a limited set of sound general guidelines is the most effective way to avoid the confusion and on-going compliance proceedings that have occurred in New Jersey and other states where the state courts did not initially state their remedial expectations. *See* Opening Br. at 144-48.

Plaintiffs have not asked this Court to mandate any specific increase in funding or to micromanage the development of a new funding system. Instead, following the approach of other state courts in education adequacy cases, and the remedial guidelines of the National Conference of State Legislatures ("NCSL"), *see* Opening Br. at 133-34 n.38, Plaintiffs ask this

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[29] Defendants acknowledge that in *Heard v. Cuomo*, 80 N.Y.2d 684 (1993), *McCain v. Koch*, 70 N.Y.2d 109 (1987), and *In re Lavette M.*, 35 N.Y.2d 136 (1974), this Court issued remedial guidelines of the type Plaintiffs are proposing in this case. They argue, however, that these precedents should not be applied here because the welfare rights at issue in those cases were "more limited in scope than the education and education-financing issues presented here." Def. Br. at 171. If the nature of the constitutional rights at issue is at all relevant to the appropriateness of the use of remedial guidelines, the fact that the opportunity for a sound basic education under the Education Article is one of the rare positive rights provided in New York State's Constitution, provides more, not less, justification for their use in the present situation. *See* Helen Hershkoff, *Positive*

Court to uphold the modest set of guidelines issued by the trial court that would direct the State to: (a) determine the actual costs of providing 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 an accountability system, or modify the current one, to ensure that funds are efficiently utilized in a manner that will create the conditions necessary to improve student learning.

The "Costing Out" Study. The type of "costing-out" study that the trial court recommended (and that Justice Saxe endorsed) clearly is necessary in order to "align funding with need." *Trial Ct*. at 83; *App. Div.* at 36-37 (Saxe, J., dissenting in part). It is a requisite "threshold task," *Trial Ct.* at 115, because there is no way to create a funding system that will ensure all students the opportunity for a sound basic education without determining students' aggregate resource needs. This is why the NCSL recommends such a study and why courts and legislatures in over a dozen states have undertaken them. Defendants' claim that this proposed guideline would severely encroach on legislative prerogatives totally misreads what the trial court actually ordered. There are indeed a number of methodologies that may be used for such a study, and that is precisely why the proposed general guideline does not specify a methodology or any other particulars. Contrary to Defendants' hyperbole, the guideline does not ask the Court to direct or oversee the costing-out study, Def. Br. at 165; on the contrary, the guideline merely says that the *State* should undertake such an objective costing-out study through any methodology that it sees fit. *See* Opening Br. at 136-37.[30]

Rights and State Constitutions, The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1132 (1999).

[30] As noted in Plaintiffs' opening brief, an objective costing-out study, which has been endorsed by 30 statewide education, business, and public policy organizations, is currently being undertaken in the State of New York by a panel of national experts who

Adquate Resources For Every School District. Defendants also grossly misread the second proposed guideline, which simply re-states the core constitutional obligation that a reformed State education finance system should ensure that every school district has the resources necessary to provide its students with the opportunity for a sound basic education. Opening Br. at 137-38. In contrast to Defendants' unfounded assumption that this guideline would somehow empower the trial court to oversee the financing needs of each school district, Def. Br. at 166, the guideline, in fact, re-emphasizes the Legislature's prerogatives to determine all the particulars of the new funding system. In essence, this practical guideline permits the State to determine the mix of State and local funding, but emphasizes that, however the State sees fit to exercise its discretion in this regard, the bottom line is that sufficient resources, taking account of cost of living realities, must be available for students in every school district.

Defendants object to the statewide scope of the proposed remedy. But if this Court finds the present education finance system to be in violation of Article XI of the State Constitution, it is clear that any reforms that would affect financing for the 1.1 million school children in New York City would also have a major impact on funding for the rest of the school districts in the state. That is why virtually every other state court that has upheld a challenge to a State

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have completed such studies in a number of other states (and some of whom happened to have testified on behalf of Defendants in this case). Opening Br. at 137. *See also* Brief *amicus curiae* of the New York State School Boards Association, Inc., App. B. The fact that this study is now going forward demonstrates both the feasibility and strong public support for the undertaking. Plaintiffs have never suggested that the State must accept the findings of this study. Def. Br. at 164. The State clearly has the prerogative to initiate its own study, consider the results of this study, or review the results of both a legislatively sponsored study and a privately funded study, as the Maryland Legislature did recently before enacting major reforms to that state's education finance system last year. *See* Commission on Education Finance, Equity, and Excellence, Final Report at x-xiii, 3-4, 7, 19-20, 35-38, 45, 53-55 (January 2002) available at http://mlis.state.md.us/other/education/final/2002_final_report.pdf; "Bridge to Excellence in Public Schools Act," Senate Bill 856, Chapter 288 of the Laws of Maryland (2002).

education funding scheme, even when brought by a few individuals or a few small local school districts, has ordered statewide relief at the remedy stage. (Defendants do not mention or attempt to refute the long list of citations in this regard that are set forth on pages 134-135 of Plaintiffs' opening brief.) Significantly, the New York State School Boards Association, representing virtually all of the 700 school districts in the state, as well as the Midstate School Finance Consortium, representing approximately 300 school districts mostly in central and western New York, the New York State Association of Small City School Districts, and the City of Rochester, have submitted briefs *amicus curiae* supporting Plaintiffs' request for statewide relief in this case.

An Accountability System. Defendants' objection to the third proposed guideline, which would establish an accountability system to ensure that funds are used efficiently in all schools to provide maximum benefit to students, is unfathomable. Defendants argued extensively for over a dozen pages in their brief about alleged mismanagement, waste and inefficiency in the New York City school system. Although much of this discussion is exaggerated, it is difficult to understand why Defendants would now oppose a remedial guideline that would highlight the need for accountability to avoid future waste or mismanagement and would help ensure that funds are properly directed to meeting children's learning needs. Defendants claim that the "significant systematic reforms" of the governance of the New York City school system that they recently authorized obviate the need for the accountability plan that the trial court ordered. Def. Br. at 169-70. Even if these reforms have brought about real improvements,[31] a comprehensive accountability plan is still needed to take account of how these

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[31] Defendants' wide-ranging claim that "[t]hese changes will likely generate significant efficiencies and savings that will improve the quality of education in the City's schools," Def. Br. at 139, are based entirely on a slew of newspaper articles and press releases that

changes, and other reforms that may be necessary, relate to the costing-out study, and to the reforms of the funding system that may result from any order the Court may issue in this case. The availability of such a plan will also promote transparency and long-term planning, which, as the trial court emphasized, are also important elements of permanent reform in this area.

Defendants' references to "local control" in this discussion constitute a total red herring. Ever since the establishment of a statewide *system* of common schools in the 19th century and the constitutional ratification of that system in the Education Article, the degree of local control permitted to local school districts has been the prerogative of the Legislature, which is specifically vested with ultimate constitutional responsibility for the establishment and maintenance of the statewide education system.[32] In recent years, the Legislature, by endorsing statewide standards and enacting a series of mandatory statutory requirements, has, in fact, constricted the historical authority of local school districts. Nothing in Plaintiffs' proposed remedy would diminish the degree of local control that now exists, and, as Defendants themselves acknowledge, Def. Br. at 168 n.38, the proposed guidelines would encourage the State to enhance local control by emphasizing a specific role for local communities in the accountability system.

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are totally outside the record in this case. If this Court wants to consider these claims and believes that evidence regarding the impact of the post-trial governance changes is relevant to the determination of the scope of the remedy, it should remand this aspect of the remedy issue to the trial court for an evidentiary hearing.

[32] Defendants' lengthy attempt to distinguish the extent of local control of education in New York from that in Kentucky and Wyoming is both misguided and irrelevant. Def. Br. at 172-74. In both of those states, as in New York, substantial authority is granted to local school districts, and the precise amount of "local control" is determined by the legislature in accordance with the constitutional powers vested in it by the provisions that codified the adoption of a common school system in that state. *See Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1272 (Wyo. 1995); *Rose*, 790 S.W.2d at 200, 212.

Other States' Experiences. Plaintiffs' suggestion that remedial guidelines would foster an important judicial-legislative dialogue has been denigrated as an "idealized concept" by the Defendants, Def. Br. at 174, who cite examples of compliance difficulties in New Jersey and elsewhere to support their point. *Id*. at 173-180. Plaintiffs, of course, were well aware of the problems in New Jersey – and had, in fact, cited that state as an example of the type of difficulties other states have encountered when they pursued the path of total deference to the legislature that Defendants are now proposing in this case. *See* Opening Br. at 145-46.

New York has the advantage of looking to the empirical experience of the two dozen states that have adopted remedies in school funding cases in recent years. *See* Judith S. Kaye, *A Mid-Point Perspective on Directions in State Constitutional Law,* 1 Emerging Issues St. Const. L. 17, 24 (1988) (noting the need to "forge new bonds among the sister states as we pursue a common endeavor with, in many instances, similar or identical constitutional provisions"). Kentucky, Wyoming, and Arizona[33] are examples of states where courts adopted sound remedial guidelines which fostered successful judicial-legislative dialogues. Ohio, where the Court issued a set of remedial guidelines, but made radical reform of the local property tax system their centerpiece (a course that the trial court here scrupulously avoided), has seen progress, but has also encountered difficulties. After thoroughly considering the range of experiences in the other states, the trial court here crafted a modest set of remedial guidelines that respond to specific needs in New York through techniques that have proved successful in other states. This Court should re-instate those guidelines.

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[33] The Arizona Supreme Court in its original decision deferred totally to the Legislature. *See Roosevelt Elementary Sch. Dist. v. Bishop*, 179 Ariz. 233, 243, 877 P.2d 806, 816 (Ariz. 1994). Three years later, seeing that this approach had failed, that court adopted the type of remedial guidelines that Plaintiffs have proposed here, a course which led to a

The Need for Timelines. Finally, Defendants inveigh against the issuance of reasonable timelines for compliance. *See* Def. Br. at 170. They disregard the fact that virtually every other state court that has issued a remedial order in this type of case has established a timeline for compliance, *see* Opening Br. at 148-49, and that the timeline Plaintiffs suggest is not a rigid deadline, but an organizing target that could be subject to reasonable extensions as needed for good-faith compliance. Defendants request that the "Court stay its order for a reasonable period of time to give the State time to effect appropriate changes in the system." Def. Br. at 170 n.35. Plaintiffs agree that a stay may be appropriate to allow an orderly transition to a new system – but, as numerous other courts have noted, only if a clear timeline is in place during the pendency of the stay to ensure that vindication of Plaintiffs' constitutional rights is not inordinately delayed. *See, e.g., Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 476-77, 703 A.2d 1353, 1360 (N.H. 1997); *Tennessee Small Sch. Systems v. McWherter*, 894 S.W.2d 734, 735 (Tenn. 1995); *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 60, 784 P.2d 412, 413 (Mont. 1990); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 399 (Tex. 1989); *Rose v. Council for Better Educ.*, 790 S.W.2d 210, 216 (Ky. 1989).[34]

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successful remedy. *See Hull v. Albrecht*, 190 Ariz. 520, 524, 950 P.2d 1141, 1145 (Ariz. 1997) (guidelines to legislature regarding new capital funding system).

[34] The question whether Plaintiffs have a private right of action to enforce their claims under Title VI's implementing regulations through 42 U.S.C. § 1983 in light of the U.S. Supreme Court's decisions in *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002), remains open, pending definitive clarification by the Supreme Court. *Compare Robinson v. Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002) ("Disparate impact claims may still be brought . . . under 42 U.S.C. § 1983 to enforce section 602 regulations.") and *Rolland v. Romney*, 318 F.3d 42, 51-54 (1st Cir. 2003) (enforcing amendments to the Medicaid statute after *Gonzaga*) *with South Camden Citizens in Action v. New Jersey Dep't of Env. Prot.*, 274 F.3d 771 (3d Cir. 2001) (federal regulations cannot create rights enforceable in a § 1983 action), *Harris v. James*, 127 F.3d 993 (11th Cir. 1997) (same), and *Caeser v. Pataki*, No. 98 Civ. 8532(LMM), 2002 WL 472271, at *2-*3 (S.D.N.Y. Mar. 26, 2002) (same).

CONCLUSION

In their defense of the Appellate Division, Defendants are asking this Court to publicly endorse three overarching propositions that are facially absurd, are contrary to specific State policies, and have been roundly denounced by the State and City officials charged educating the state's children: (1) an eighth grade education is good enough; (2) resources have no effect on student achievement; and (3) poor students cannot overcome the disadvantages of their socioeconomic circumstances. No elected or appointed State official has, or would dare to publicly embrace *any* of these propositions, yet Defendants shamelessly ask this Court to adopt all three in an effort to avoid their constitutional duty. The Court should clearly and forcefully reject this cynical effort to protect the *status quo*.

We respectfully ask that the Court reaffirm that the Education Article speaks to *all* of the state's children and guarantees all of them the opportunity for a *sound* basic education.

In any event, it is clear, as the trial court found, that the evidence established that New York State's education finance system discriminates against New York City's largely minority student population in violation of Title VI, and that this Court should take into account the State's blatant infraction of federal law in reviewing this case. *See* Brief *amicus curiae* submitted on behalf of the Black, Puerto Rican and Hispanic Legislative Caucus, *et al*.

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Respectfully submitted,

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