No. 100274/13 (Consol.)
No. 650450/14

Supreme Court, New York County

Supreme Court of the State of New York
Appellate Division – First Department

NEW YORKERS FOR STUDENTS EDUCATIONAL RIGHTS ("NYSER"), et al.,

Plaintiffs-Respondents,

-against-

THE STATE OF NEW YORK, et al.,

Defendants–Appellants.

REPLY BRIEF FOR APPELLANTS

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PRELIMINARY STATEMENT

In this action, plaintiffs seek relief for purportedly statewide violations of the Education Article of the New York Constitution, art. XI, § 1. But plaintiffs make no allegations at all about educational deficiencies in the vast majority of the State's nearly 700 public school districts, and raise only vague and generalized allegations about the few school districts that are actually mentioned in their complaint. As State defendants established in their opening brief, plaintiffs' Education Article claims should have been dismissed because they failed to meet the well-established threshold requirement of alleging gross and glaring district-wide educational deficiencies that are directly attributable to the State.

Plaintiffs claim that such allegations are not required here because they are asserting that the State's public-education funding legislation as a whole violates the educational rights of the State's public-school student body as a whole. But uniform appellate precedent requires district-specific allegations of educational deficiencies (as well as allegations of causes directly attributable to the State) to support an Education Article claim. And important principles also support the

wisdom of such a pleading requirement. The Court of Appeals has expressly recognized that judicial intervention should be limited in the area of public-education financing because decisions in this complex political area are principally dedicated to the Legislature and the Executive. Requiring plaintiffs to identify concrete educational deficiencies in specific school districts prevents excessive judicial interference with sensitive policy judgments that are the province of the Executive and the Legislature under the Constitution by limiting the judiciary's involvement to the districts that actually suffer from severe educational inadequacies. Moreover, this pleading requirement reflects the bedrock principle of New York law that the provision of public education is predominantly a local matter, not one centrally directed by the State. Given this practical and legal reality, it is improper to draw inferences about state-wide deficiencies from a set of scattered allegations of deficiencies in a few school districts, as plaintiffs seek to do here.

Plaintiffs nonetheless attempt to assert statewide Education Article claims by arguing that the Legislature automatically violated the Constitution in every single school district by modifying formulas

for state education aid that were initially enacted in 2007 but that proved untenable when the financial crisis struck the State in 2009. That theory is insufficient to support an Education Article claim. The 2007 state-aid statutes that are the linchpin of plaintiffs' argument did not—and could not—establish constitutional baselines that tied the Legislature's hands. It is the role of the courts, not the political branches, to determine what the Constitution requires. The State's 2007 public-education funding legislation thus did not set requirements the political branches had to follow to satisfy the Education Article.

Plaintiffs are also incorrect in asserting that the 2007 legislation simply implemented (and therefore imposed) a statewide constitutional rule recognized by the Court of Appeals in the *Campaign for Fiscal Equity* ("*CFE*") litigation. As the Court of Appeals expressly noted, *CFE* involved New York City's schools only, and the Court rejected the plaintiffs' call in that case for statewide relief. *CFE* thus does not support plaintiffs' attempt to obtain sweeping statewide changes to New York's public-education financing scheme.

ARGUMENT

POINT I

PLAINTIFFS DO NOT CONCRETELY ALLEGE DEPRIVATION OF STUDENTS' CONSTITUTIONAL RIGHTS IN ANY—LET ALONE ALL—OF THE STATE'S PUBLIC SCHOOL DISTRICTS

A. Uniform Appellate Precedent and Important Underlying Policies Require Concrete, District-Specific Allegations to State an Education Article Claim.

Court of Appeals precedent makes clear that "[f]undamentally, an Education Article claim requires two elements: the deprivation of a sound basic education, and causes attributable to the State." *N.Y. Civil Liberties Union v. State*, 4 N.Y.3d 175, 178 (2005) ("*NYCLU*"). The first element requires plaintiffs to identify "gross and glaring" inadequacies in educational resources throughout a particular school district. *Paynter v. State*, 100 N.Y.2d 434, 439 (2003) (quotation marks omitted); *see also NYCLU*, 4 N.Y.3d at 182. The second element requires plaintiffs to demonstrate that those inadequacies have a direct causal connection to some specific failure by the State. *Paynter*, 100 N.Y.3d at 439.

At the pleading stage, plaintiffs must establish these two indispensable components of an Education Article claim with concrete allegations grounded in specific facts about a particular school district.

"[C]onclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009). In particular, where, as here, the State's default consists of a supposed failure to ensure adequate funding, the Education Article "requires that a district-wide [educational] failure be pleaded" by identifying gross and glaring deficiencies in the educational inputs in a district's schools—including facilities, instrumentalities of learning, and teaching. *See Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 316-17 (1995) ("*CFE I*"). The Court of Appeals and other courts, including this one, have not hesitated to dismiss complaints for failure to allege sufficiently specific facts to establish the required elements of an Education Article claim. *See*, *e.g.*, *NYCLU*, 4 N.Y.3d at 180; *N.Y. City Parents Union v. Bd. of Educ.*, 124 A.D.3d 451, 452 (1st Dep't 2015); *N.Y. State Ass'n of Small City Sch. Dists., Inc. v. State*, 42 A.D.3d 648, 652 (3d Dep't 2007) ("*Small City School Districts*").

Here, contrary to these well-established pleading standards, plaintiffs make no allegations *at all* about the educational inputs in the overwhelming majority of the State's nearly 700 school districts. And plaintiffs make only vague and generalized allegations about

educational inputs in the five school districts that the complaint specifically mentions. Plaintiffs assert a right to proceed on the novel theory that such allegations are unnecessary because their claims involve "the education finance system at the structural, statewide level." Br. for Resps. ("Resp. Br.") at 16. But that theory has never been accepted by any appellate court, and indeed runs counter to consistent precedent requiring concrete allegations of educational deficiencies in specific school districts to support an Education Article claim. The Court of Appeals has expressed "doubt as to the jurisprudential prudence . . . of issuing any blanket declaration of unconstitutionality as to the entire system for financing public education," in part due to "the great difficulty of fashioning practical remedies or of implementing any such declaration." *Board of Education, Levittown Union Free School District v. Nyquist*, 57 N.Y.2d 27, 39 n.4 (1982) ("*Levittown*"). And the Third Department held in *Small City School Districts* that an Education Article claim is properly dismissed where it relies on aggregate data or allegations not particular to the plaintiffs' school districts, because in such cases it is "impossible to determine" that the

plaintiffs before the court are "actually aggrieved." 42 A.D.3d 648, 652 (3d Dep't 2007).[1]

Plaintiffs' theory is also inconsistent with two fundamental principles that the Court of Appeals has made clear are critical to evaluating Education Article claims. *First*, the Court has appropriately expressed great caution about the limits of judicial intervention in this area. As explained in State Defendants' opening brief (Br. for Appellants ("App. Br.") at 21-25), public-education financing is an area that "presents issues of enormous practical and political complexity." *Levittown*, 57 N.Y.2d at 38-39. Because the judiciary rarely has full

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[1] While plaintiffs attempt to distinguish this consistent line of decisions by citing dicta from Court of Appeals decisions (*see* Br. at 32-34), even those dicta do not actually help plaintiffs. To be sure, the Court has in the past stated that it has not had "'occasion to delineate the contours of all possible Education Article claims,'" *NYCLU*, 4 N.Y.3d at 180 n.2 (quoting *Paynter*, 100 N.Y.2d at 441)). But the Court's most recent statement to this effect, in *NYCLU*, signaled only that the Court had not had occasion to "delineate the contours" of Education Article claims alleging causes *other* than inadequate funding—contours the *NYCLU* Court did not have to explore because plaintiffs alleged insufficient funding. *Id.* at 180 & n.2. *NYCLU* thus did not suggest that anything besides a district-wide failure would suffice to state a claim that, like the present one, *is* based on supposedly insufficient public-education funding, *see id.* at 182—and thus arises in an area where concerns about judicial intervention are at their highest, *see*, *e.g.*, *Levittown*, 57 N.Y.2d at 38-39.

access to "the controlling economic and social facts" that affect sensitive questions about public-education financing, "abiding respect for the separation of powers upon which our system of government is based" counsels for deference to the political branches. *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006) ("*CFE III*") (quotation marks omitted). The Court of Appeals has thus strongly, and repeatedly, cautioned against unwarranted judicial involvement in this arena, noting that resolution of the issues presented "appropriately is largely left to the interplay of the interests and forces directly involved and indirectly affected, in the arenas of legislative and executive activity." *Levittown*, 57 N.Y.2d at 38-39; *see also CFE III*, 8 N.Y.3d at 28; *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 925 (2003) ("*CFE II*"). "This is of the very essence of our governmental and political polity." *Levittown*, 57 N.Y.2d at 38-39.

Requiring plaintiffs to make concrete allegations of gross and glaring educational inputs in specific school districts properly respects the "prudent and practical hesitation" the Court of Appeals has recommended, *CFE III*, 8 N.Y.3d at 28, by limiting judicial intervention to those circumstances where educational deficiencies are so severe that

they warrant the extraordinary involvement of the judiciary to preempt legislative judgments. Absent such allegations, the judiciary would essentially be called upon to engage in precisely the structural reforms that the Court of Appeals has emphasized are the principal responsibility of the political branches. Plaintiffs' lawsuit here highlights this problem: they assert that the constitutional rights of millions of non-party students are being violated, and seek relief on behalf of all of those students without *any allegations at all* identifying the deficiencies in the educational services those students are receiving. Essentially, plaintiffs ask the judiciary to enforce their view of the best policy of public-education financing, without establishing any underlying harm that is cognizable under the Education Article. That request is inconsistent with the judiciary's limited role in policing Education Article compliance.

Second, plaintiffs' blanket assertions of state-wide educational deficiencies also ignore the bedrock principle "enshrined in the Constitution" that public education in New York is not subject to uniform, State-led control, but is instead the product of a "state-local partnership" that is subject to substantial local variations. *Paynter*, 100

N.Y. at 442. Indeed, "[a]ny legislative attempt to make uniform and undeviating the educational opportunities offered by the several hundred local school districts . . . would inevitably work the demise of the local control of education available to students in individual districts." *Levittown*, 57 N.Y.2d at 45-46.

It therefore cannot be inferred merely from allegations that educational services are substandard to some degree in one or a few particular districts—which is all the complaint alleges here (and inadequately, at that, see *infra* 12-14)—that they are substandard in other districts, let alone the entire State. Indeed, in *CFE II*, after finding that constitutional violations had been established concerning New York City, the Court of Appeals *rejected* the trial court's order for a statewide remedy, and pointed out that plaintiffs had prevailed due to "a *unique* combination of circumstances" affecting New York City and that "[p]laintiffs in *other* districts who cannot demonstrate a similar combination may find tougher going." 100 N.Y. at 928, 932 (emphasis added). Similarly, the Third Department has explained that Education Article plaintiffs cannot rely on aggregate data or allegations outside of the plaintiffs school districts because they must identify district-specific

deficiencies to prove that they have been "actually aggrieved." *Small City Sch. Dist.,* 42 A.D.3d at 652. Here, too, plaintiffs' failure to allege educational deficiencies in the overwhelming majority of New York's school districts make it "impossible to determine" that students in the vast majority of the State's school districts are "actually aggrieved," *id.*[2]

Thus, contrary to plaintiffs' suggestion, there is no freestanding claim for structural relief based on a purported failure by the State to maintain a "needs-based" funding structure (*see* Resp. Br. at 3, 9, 10, 11, 13, 16, 42, 49); "a solid framework, founded on process" (*id.* at 51); or a funding system meeting any other particular description.[3] These attempts to assert a statewide challenge to the State's public-education funding system, without concrete allegations of deficiencies in

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[2] Indeed, plaintiffs' own allegations affirmatively indicate that adequate or superior educational services are being provided in a great many districts: plaintiffs themselves cite data indicating that in 2013, the statewide high school graduation rate for students entering ninth grade in 2008 was between 85 and 94 percent in school-district categories educating large numbers of students. (R. 55 (¶ 139).)

[3] Nor will such a claim lie to challenge a statute that purportedly makes it more difficult for localities to raise revenue for public-education funding, or one that conditions eligibility for certain state funding on compliance with state education standards. *Cf.* Resp. Br. at 12-15.

particular school districts (let alone throughout the State), conflicts with Court of Appeals precedent and important underlying policies. This Court should reject plaintiffs' theory.

B. Plaintiffs' Allegations Do Not Concretely Allege Deprivation of the Opportunity to Receive a Sound Basic Education in Any School District, Let Alone the Entire State.

Plaintiffs' conclusory allegations concerning educational services in school districts outside New York City are insufficient for the reasons explained in our opening brief (at 26-27), as are their allegations concerning New York City (see *id.* at 28-37). To those reasons, only a few observations need be added.

With respect to school districts outside New York City, most of plaintiffs' allegations do not concretely address educational inputs as to any particular district, as the Education Article requires. *See*, *e.g.*, *Small City School Districts*, 48 A.D.3d at 652. Moreover, contrary to plaintiffs' argument (Br. at 37), they cannot compensate for this absence of allegations concerning inputs by providing a few allegations concerning outputs. Allegations of substandard educational outputs—i.e., poor student performance—may be relevant to an Education Article

claim, but they are not dispositive, and indeed "allegations of academic failure alone" cannot "state a cause of action." *Paynter*, 100 N.Y.2d at 441.

Nor can plaintiffs satisfy their pleading burden for school districts outside New York City by citing allegations concerning "unfunded mandates" imposed on school districts by the State or by noting that school districts are in "conditions of financial distress." *Id.* (quotation marks omitted). An Education Article violation consists strictly in a failure to provide minimally adequate educational services. Without allegations of a lack of "minimally acceptable educational services," a claim cannot succeed. *Paynter*, 100 N.Y.2d at 441; *see also id.* (State satisfies its obligation if it "truly puts adequate resources into the classroom"); *CFE I*, 86 N.Y.2d at 316 (State's obligation satisfied "[i]f the physical facilities and pedagogical services and resources made available under the present system are adequate"). Plaintiffs identify no deficiencies in the services that school districts are actually delivering that are attributable to mandates from the State or financial distress.

While plaintiffs do set forth some allegations concerning educational inputs with respect to the New York City School District, plaintiffs exaggerate the extent of those allegations. For instance,

plaintiffs cite statistics about the number of schools that supposedly lack art or music rooms. *See* Br. at 38 n.19. But plaintiffs cite no evidence or case law to suggest that dedicated art and music rooms are necessary for art and music instruction, or that art and music instruction are indispensable to acquire the "opportunity to learn 'basic literacy, calculating, and verbal skills'" that the Education Article protects, *N.Y. City Parents Union,* 124 A.D.3d at 452 (quoting *Campaign for Fiscal Equity v. State*, 86 N.Y.2d 307, 316 (1995)). Similarly, plaintiffs cite allegations of classroom overcrowding (Br. at 38 n.19), but their own allegations reflect that the average class size throughout the City is between 24.9 and 26.8 students, and that the vast majority of classes contain fewer than thirty students (R. 48-49 (¶ 118)).[4] Plaintiffs do not plausibly allege that such classes are so overcrowded they make it impossible to learn basic skills.

[4] In contrast, the *CFE II* Court noted that "*over half* of New York City schoolchildren are in classes of 26 or more," and "*tens of thousands* are in classes of over 30." 100 N.Y.2d at 914 (emphasis added).

C. Plaintiffs Cannot Salvage Their Complaint by Asserting That the State's 2007 Public-Education Funding Proposals Established Constitutional Norms.

Plaintiffs thus fail to plead gross and glaring, district-wide educational deficiencies depriving students of the opportunity to receive a sound basic education in any particular school district in the State. Plaintiffs attempt to rectify this pleading failure by characterizing the State's 2007 public-education financing legislation as "constitutional reforms" (Br. at 8, 9, 10, 27, 50) that established a constitutional baseline that the State automatically violated when it subsequently reduced funding levels in 2009 after being hit with the worst financial crisis since the Great Depression. This argument is deeply flawed, for several independent reasons.

1. The legislative and executive branches did not, and could not, establish a constitutional baseline.

Plaintiffs' theory that the Legislature's 2007 public-education funding statutes were "constitutional reforms" founders on a basic point of constitutional law: the political branches did not, and could not, establish constitutional requirements by passing those statutes. Under

fundamental separation-of-powers principles, the Legislature and Governor cannot, in passing a statute, create an obligation that is binding under the Constitution. The courts of this State—not the political branches—are the ultimate arbiters of the scope of a constitutional right. *CFE II*, 100 N.Y.2d at 807; *see also Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 432 n.14 (2001) ("Given our system of separation of powers, a lawmaking body may not legislatively declare that a statute meets constitutional criteria."). Plaintiffs consequently cannot transmute the judgments of the Legislature and Governor, as reflected in 2007's public-school funding legislation, into judicially enforceable constitutional norms.

No legislation—even if adopted for the purpose of carrying out constitutional responsibilities—is *itself* capable of setting a constitutional norm binding on future lawmakers. In fact, with respect to appropriations in particular, the Constitution expressly bars legislators from appropriating funds beyond the succeeding two fiscal years. *See* N.Y. Const. art. VII, § 7. And with respect to all statutes, an act of the Legislature is entitled to a strong presumption of constitutionality, notwithstanding that it amends a previous law. *See*,

e.g., *People v. Knox*, 12 N.Y.3d 60, 69 (2009); *Ciafone v. Kenyatta*, 27 A.D.3d 143, 146 (2d Dep't 2005). Plaintiffs fail to show that the 2007 public-education funding statutes on which they rely are somehow an exception to this paradigm and entitled to themselves be treated as setting constitutional requirements the Legislature was somehow restrained from amending at a later point.

Plaintiffs nevertheless assert that the statutes enacted in 2007 were designed to furnish the minimum amount of funding the State had "determined" was "needed" to satisfy the Constitution, and cite as support statements from a 2006 Regents proposal suggesting that the analyses underlying the 2007 statutes were aimed at calculating the costs of a minimally adequate education. Resp. Br. at 25-27. But this argument is directly analogous to one that the *CFE II* Court expressly rejected. The Court there explained that treating educational objectives set by the Regents as the measure of a sound basic education would "be to cede to a state agency the power to define a constitutional right." *CFE II*, 100 N.Y.2d at 907. So, too, in this case, for this Court to adopt the Regents' alleged views of the funding necessary to provide the

opportunity for a sound basic education would be to cede to them the power to make constitutional pronouncements.

And, in any event, the Regents' views cannot simplistically be attributed to "the State"—nor were they universally shared by the State's relevant policymakers. To the contrary, then-Governor Spitzer said of the school aid funding provisions he proposed, and later signed into law in 2007, that they would provide not the constitutional minimum, but rather "*more than sufficient funds* to address the school funding needs highlighted by the *Campaign for Fiscal Equity* Lawsuit."[5] And the 2007 legislation was in fact substantially more generous than the fiscal analysis approved as adequate by the Court in *CFE III*, which powerfully vindicates the Governor's assessment. See App. Br. at 45-46. Funding that consciously exceeds the constitutional minimum cannot raise the constitutional floor.

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[5] *See* Press Release, N.Y. State Governor, *Unprecedented Expansion of School Aid Tied to Accountability* (Jan. 31, 2007) (emphasis added).

2. To the extent the Court of Appeals' *Campaign for Fiscal Equity* ("*CFE*") decisions set constitutional requirements, those requirements were limited to New York City and have been met.

a. The constitutional violations alleged and proved in *CFE*, and the remedies prescribed, were expressly limited to New York City alone.

A central theme of plaintiffs' brief is that *CFE* required action by the State to comply with the Education Article "not only vis-à-vis New York City, but also at the statewide, structural level." Br. at 1-2. But that characterization of *CFE* is flatly contradicted by the Court of Appeals' decisions. *CFE II* was clear and direct:

> [W]e begin our review of the trial court's directives by *rejecting the provision that the remedy be statewide* . . . . Courts deal with actual cases and controversies, not abstract global issues, and fashion their directives based on the proof before them. Here the case presented to us, and consequently the remedy, is *limited to the adequacy of education financing for the New York City public schools*, though the State may of course address statewide issues if it chooses."

100 N.Y.2d at 928 (emphasis added). This statement leaves no doubt that "the case presented" to the Court in the *CFE* litigation, and "consequently the remedy," were "limited to the adequacy of education

financing for the New York City public schools." *Id.* No other violations were established, and no broader relief was imposed.

To be sure, as the Court of Appeals made clear, the State remained free to respond to the *CFE* decisions by implementing statewide reforms. But contrary to plaintiffs' arguments (*see* Br. at 20, 40), the Court's statement that the State "*may* . . . address statewide issues *if it chooses*," 100 N.Y.2d at 928 (emphasis added), means exactly what it says: because no statewide violations were found, the State was free to address statewide reform as a policy matter, but was not compelled to do so. Plaintiffs' argument that the State subsequently violated a constitutional duty when it purportedly "abandoned" (Br. at 48) certain statewide reforms is thus untenable. The State cannot logically or legally have failed to fulfill an obligation it never had.

b. As to New York City, *CFE* yielded only a narrow, declaratory ruling endorsing the State's estimate of the funding needed to achieve constitutional compliance.

Beyond reading into *CFE* a nonexistent mandate to implement statewide structural reforms, plaintiffs misconstrue the Court of Appeals' decisions respecting the one school district that was at issue in

that litigation: New York City. According to plaintiffs, the Foundation Aid formula adopted in 2007 actually displaced the Court of Appeals' holding in *CFE III* as to the additional funding needed to achieve constitutional compliance in New York City, such that the Legislature's failure to provide the City with Foundation Aid under the formula as initially enacted in 2007 violated the Constitution.

That contention is meritless. As a threshold matter, plaintiffs' allegations about Foundation Aid do not excuse them from the need to identify current educational deficiencies. The critical inquiry for an Education Article claim is not whether any particular funding level has been maintained, but rather whether the quality of public education in a particular school district is so poor that it fails to satisfy the State's obligation to provide a sound basic education (and if so, whether the cause is attributable to the State). If no such deficiencies exist in the public education currently being provided (or if, as here, plaintiffs have failed to identify any such deficiencies), then no Education Article claim can proceed past the motion-to-dismiss stage—regardless of whether plaintiffs allege that the State has provided funding at a level previously approved by a court.

Plaintiffs' reasoning erroneously imputes constitutional significance to the State's 2007 legislation by mischaracterizing the relationship between that legislation and *CFE III*. According to plaintiffs, the Court of Appeals in *CFE III*—rather than endorsing the State's $1.93 billion—directed the State to "consider a range of potentially (constitutionally) acceptable figures between $1.93 billion and $5.63 billion." Br. at 53. Plaintiffs go on to assert that the State then "effectively superseded" *CFE III*'s holding concerning the adequacy of the State's $1.93 billion estimate when it adopted the 2007 public-education funding statutes, including their Foundation Aid provisions. *Id.* at 54.

Plaintiffs' account cannot be squared with the plain language of *CFE III*: "[W]e declare that the constitutionally required funding for the New York City School District includes, as demonstrated by this record, additional operating funds in the amount of $1.93 billion," subject to two one-time-only adjustments agreed to by the State. 8 N.Y.3d at 27. That language leaves no room for plaintiffs' claim that the Court "directed" the Legislature to "consider" any other number. And that point is reinforced by the Court's statements that proposed funding increases higher than the State's estimate were a "policy choice to

exceed the minimum," and by the Court's strong emphasis on the need for judicial restraint in supervising the public-education appropriations process. *See CFE III*, 8 N.Y.3d at 27-30.

Likewise, *CFE III* provides no support for the notion that the State's 2007 public-education funding legislation "effectively superseded" the Court of Appeals' declaratory judgment. The Legislature lacks the power to supersede constitutional decisions of the Court of Appeals. See *supra* 15-17. And it did not do so in making a "policy choice to exceed the minimum," *CFE III*, 8 N.Y.3d at 27, in 2007.

Finally, there is no merit to plaintiffs' suggestion that Foundation Aid alone is relevant for purposes of gauging the State's compliance with *CFE*, or the Education Article, whether with respect to New York City or any other local school district. Foundation Aid constitutes only one of many sources of public education funding. *See* Resp. Br. at 2-3; App. Br. at 4-5, 39-40. But the relevant question under the Education Article is not whether any particular source of funding is inadequate, but rather whether overall funding from *all sources* has caused gross and glaring educational deficiencies. Indeed, the $1.93 billion estimate the Court endorsed was a calculation of funds from all sources. *CFE III*,

8 N.Y.3d at 24 n.3, 27. And the *CFE II* Court, having observed that a "combination of local, state *and* federal sources generates school funding," 100 N.Y.2d at 904 (emphasis added), concluded that "how the burden" of paying for necessary educational improvements is "distributed between the State and City" was not a matter of judicial concern, but was among those matters left to "the Legislature desiring to enact good laws," *id.* at 930.

Thus, properly read, *CFE III* establishes only that the State's $1.93 billion remedial funding estimate was adequate and not to be second-guessed by the courts—including courts in the present moment. Consequently, there can be no basis to argue that the State has failed to comply with *CFE III* if New York City's public schools are receiving operating funds above the level approved of by the Court of Appeals—and they are.

c. Plaintiffs' conclusory allegation that New York City's schools are not receiving required funding is implausible and in any event does not state a claim.

Plaintiffs cannot avoid dismissal by relying on their conclusory assertion that New York City's public schools today are not receiving increased operational funding even in the $1.93 billion amount endorsed by *CFE III*. Br. at 54-56. First, as explained above, the State's alleged failure to comply with any particular funding level is not by itself sufficient to sustain an Education Article claim absent concrete allegations of current educational deficiencies resulting therefrom—allegations that plaintiffs have failed to make here.

In any event, plaintiffs' assertion that the State has failed to provide public-education funding consistent with *CFE III* is flatly contradicted by judicially noticeable materials whose reliability and import is not reasonably open to dispute. *See*, *e.g.*, *Thaw v. N. Shore Univ. Hosp.*, 129 A.D.3d 937, 938 (2d Dep't 2015) (affirming dismissal under C.P.L.R. 3211(a)(7) where defendant showed that "a material fact as claimed by the plaintiff" was actually "not a fact at all" (quotation marks omitted)). As demonstrated in State Defendants' opening brief (Br. at 45-47), New York City's public schools have received substantial

additional funding since *CFE III* that places their overall level of funding well above the level that the Court of Appeals deferred to as a reasonable estimation of the cost of constitutional compliance in that case.

In the *CFE* litigation, the Court of Appeals endorsed an estimate of needed additional funding calculated against a baseline funding level of $12.62 billion for the New York City public schools during the 2002-2003 school year. Record on Appeal at 4875, 5833, *CFE III*, 8 N.Y.3d 14 (Sup. Ct. N.Y. County Index No. 111070/93).[6] In the second of its three *CFE* decisions, the Court directed the State to determine the cost of remedying the constitutional deficiencies in New York City's public schools. *See CFE II*, 100 N.Y.2d at 930. In response, the State proposed an increase of "$1.93 billion, in 2004 dollars, in additional annual operating funds," and the Court "conclude[d] that this estimate was a reasonable one and that the courts should defer to this estimate, appropriately updated." *CFE III*, 8 N.Y.3d at 19-20.

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[6] Contrary to plaintiffs' assertion (Br. at 55 n. 25), the $12.62 billion baseline figure comes not from the report of the panel of referees appointed by the trial court on remand from *CFE II*, but from the State's proposed remedial estimate of $1.93 billion, which the Court of Appeals approved of in *CFE III*, *see* 8 N.Y.3d at 27. The referees adopted the same baseline, as the *CFE III* Record on Appeal shows.

The "appropriate[ ] update[s]" referred to by the Court of Appeals did not substantially increase the $1.93 billion in additional funding proposed by the State and accepted by the Court. In the Appellate Division and before the Court of Appeals, the State had agreed to two one-time-only adjustments to the $1.93 billion figure: an adjustment based on a regional cost index known as the Geographic Cost of Education (GCEI); and an adjustment for inflation to reflect 2004-2005 dollars. *See Campaign for Fiscal Equity, Inc. v. State*, 29 A.D.3d 175, 180-81, 184 (1st Dep't 2006); Br. for Defs.-Resps.-Cross-Appellants at 26, *CFE III*, 8 N.Y.3d 14 (Sup. Ct. N.Y. County Index No. 111070/93). A panel of referees appointed by the trial court had estimated that these two adjustments would require increasing the State's estimate by just $0.37 billion. Record on Appeal at 5852-5853, *CFE III*, 8 N.Y.3d 14 (Sup. Ct. N.Y. County Index No. 111070/93).

The panel had also recommended other upward adjustments, but the State opposed those increases to the $1.93 billion estimate. Accordingly, in the Court of Appeals, the State urged the Court find constitutionally adequate the $1.93 billion estimate subject only to the two adjustments it had agreed to apply. *See* Brief for Defendants-

Respondents-Cross-Appellants at 4, *CFE III*, 8 N.Y.3d 14 (Sup. Ct. N.Y. County Index No. 111070/93) (asking Court to approve an increase of "$1.93 billion, adjusted to reflect the updated regional cost index and inflation since 2004"). That is precisely what the *CFE III* Court did: it "declare[d] that the constitutionally required funding for the New York City School District includes additional operating funds in the amount of $1.93 billion, adjusted with reference to the latest version of the GCEI and inflation since 2004." 8 N.Y.3d at 31. Accordingly, the level of increased funding approved by the Court of Appeals in *CFE III* consisted of $1.93 billion plus $0.37 billion, for a total of $2.3 billion above the base line of $12.62 billion.

The increase in funding to New York City public schools since *CFE III* well exceeds this figure, as established by detailed financial information maintained by the State Education Department (SED) for each school district.[7] For the 2013-2014 school year, the New York City

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[7] SED, Fiscal Analysis & Research Unit (FARU), *The Fiscal Profile Reporting System*, http://www.oms.nysed.gov/faru/Profiles/profiles_cover.html. Information contained in and derived from SED's fiscal profiles is properly subject to judicial notice. *See*, *e.g.*, *Kingsbrook Jewish Med. Ctr. v. Allstate Ins.*

(*continued on the next page*)

School District had operating funds of $21.7 billion—an increase of more than *$9 billion* over the $12.62 baseline at the time of *CFE III*, some four times the amount the *CFE III* Court deemed acceptable to remedy the educational deficiencies at issue in that litigation.[8]

Co., 61 A.D.3d 13, 19-21 (2d Dep't 2009) (judicially noticing information derived from government website because of accuracy and reliability of source, even though website's contents "might not be readily understood by the lay public"); *Matter of LaSonde v. Seabrook*, 89 A.D.3d 132, 137 n.8 (1st Dep't 2011) (citing *Kingsbrook* and taking judicial notice of information derived from New York Department of State website). Further, SED's fiscal profiles do not require factfinding to interpret: they list data for each school district in a single spreadsheet row whose columns correspond to different categories of revenues and expenditures as explained in detail on SED's website. *See* SED, FARU, *Column Headings in Each Spread Sheet*, http://www.oms.nysed.gov/faru/Profiles/datacolumns1.htm; *see also* SED, FARU, *A Guide to the Headings of the Fiscal Profile*, http://www.oms.nysed.gov/faru/Profiles/18th/revisedAppendix.html.

[8] The $21.7 billion is calculated as follows. For purposes of *CFE III*, operating funds are defined as funds received from all sources minus costs for transportation, debt service, and capital expenditures. *See CFE III*, 8 N.Y.3d at 21-27 & n.3. SED's fiscal profile data show that the New York City School District's total funding from all sources (state, local, and federal) was more than $23.73 billion in 2013-2014. *See* SED, FARU, *Master File for 2013-14* (cells K323 (total revenues), AG323 (total expenditures)), http://www.oms.nysed.gov/faru/Profiles/27thMasterfileforweb.xlsx. The City School District also had transportation expenditures of approximately $1.1 billion and debt service expenditures of approximately $0.9 billion, with no additinal capital expenditures other than those financed through debt-issued. *See* SED, FARU, *Master File*

(*continued on the next page*)

Plaintiffs make no concrete allegation suggesting that this $9 billion increase failed to provide the adjusted $1.93 billion in added funding approved by the Court of Appeals. Consequently, their conclusory allegation that they have alleged a violation of the Education Article based on the State's failure to comply with *CFE III* is not entitled to a presumption of truth.

D. Plaintiffs' Also Do Not Concretely Allege That the State Has Violated Students' Constitutional Rights by Purportedly Failing to Give School Districts Sufficient Educational Guidance.

Plaintiffs' third cause of action does not allege educational deficiencies or inadequate education funding; it asserts that "the State has failed to, among things, "[i]dentify the essential course of study and types of service, supports and resources that must be available to meet

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for 2013-14, *supra* (cells AD323 (transportation), AE323 (debt service-principal), AF323 (debt service-interest)); SED, *ST3 Data for Year Ending June, 2014, Excel 2010 Single File Format* (cell ALK332 (capital expenditures)), https://stateaid.nysed.gov/st3/st3data/1314st3.xlsx. The City School District's operating funding thus came to approximately $23.7 billion less $2 billion ($1.1 billion plus $0.9 billion), for a total $21.7 billion for 2013-2014.

constitutional requirements" and notify school districts of their responsibility to do so. (R. 71-72 (¶ 195(a)-(f)).)

As we explained in our opening brief (at 47-49), there is no constitutional basis for this attempt to micromanage the manner in which the State oversees the delivery of educational services, especially absent concrete allegations that the State's purported lack of guidance has actually caused constitutional injury.[9] At most, plaintiffs' allegations suggest that the absence of additional guidance, beyond what the State already provides, makes it more difficult for school districts to provide minimally adequate educational services. But the Education Article does not permit challenges to statutes or regulations that supposedly make the provision of educational services more difficult; instead, a claim lies only where there are concrete allegations that a challenged provision has actually caused a constitutional deprivation—and plaintiffs make no such allegations here.

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[9] Indeed, SED, as a state agency, is not capable of determining what resources "must be available to meet constitutional requirements"; only the Courts can determine when constitutional requirements are met. *CFE II*, 100 N.Y.2d at 907; see also *supra* 17-18.

Plaintiffs nevertheless contend that dismissal is premature because their third cause of action is in reality a request for a remedy more appropriately addressed later in the litigation. Resp. Br. at 46. But plaintiffs assert a separate cause of action based solely on the State's supposed failure to provide adequate guidance to school districts, and that cause of action as pleaded must be dismissed.

Moreover, plaintiffs fail in their attempt to base their third cause of action in part on the State's purported failure to implement sufficient accountability measures or perform periodic costing-out studies. Plaintiffs do not, and cannot, deny that in *CFE III*, the Court of Appeals found the State's accountability measures sufficient. *Id.* at 47. And plaintiffs admit that the State has continually augmented its accountability measures since that decision. *Id.* at 46-47.

Plaintiffs also acknowledge the Court of Appeals' explicit holding that the State is not obligated to continually perform studies to assess the cost of providing the opportunity for a sound basic education. *Id.* at 48; *see also CFE III*, 8 N.Y.3d at 32 (affirming the Appellate Division's decision to strike the "Supreme Court's call for state costing-out studies every four years"). Plaintiffs nevertheless assert a freestanding duty to

perform costing-out studies "at some regular interval." Resp. Br. at 48 (emphasis omitted). But plaintiffs' position has no support in the case law, which imposes judicially enforceable duties on the Legislature only in the rare instance that educational services actually fall below a constitutional level.

Further, while the State does not have a constitutional obligation to do so, it already provides substantial educational and fiscal guidance to the State's school districts. See App. Br. at 50-51. Permitting plaintiffs to seek anything more in the absence of concrete allegations that the State's current operations are causing a constitutional deprivation is both untenable under the case law and inconsistent with the important measure of local control accorded to school districts under the Education Article. *Id.* at 51-52.

POINT II

PLAINTIFFS FAIL TO ESTABLISH CAPACITY AND STANDING TO ASSERT EDUCATION-ARTICLE CLAIMS CONCERNING THE VAST MAJORITY OF THE STATE'S NEARLY 700 SCHOOL DISTRICTS.

As explained above, plaintiffs' Education Article claims concerning the overwhelming majority of New York's school districts fail due to the absence of any allegations of educational deficiencies specific to those districts. But these claims fail for another, independent reason as well: as explained in our opening brief (Br. at 52-54), plaintiffs lack standing and capacity to assert claims respecting school districts other than the nine districts in which a plaintiff student or parent resides. Plaintiffs argue to the contrary that because they have asserted statewide claims and seek statewide relief, a single individual plaintiff residing anywhere in the State has standing and capacity to assert claims on behalf of all students everywhere in the State. Resp. Br. at 56-57.

But plaintiffs' attempt to plead a statewide Education Article claim fails (see *supra* 4-12), and, in any event, it is inconsistent with the state-local partnership enshrined in the Constitution to suppose that the conduct targeted by the complaint has affected educational services in all school districts in the State in the same way. Thus, students in

one district cannot properly assert claims for injuries that might or might not be visited upon students in other districts.

Moreover, plaintiffs' blanket assertions that NYSER's organizational members have individual members residing throughout the State are insufficient to establish standing. Plaintiffs do not provide the names of NYSER's members' individual members, nor do plaintiffs provide information identifying any particular school district or districts in which those individual members are located. *See Matter of Dental Soc'y of N.Y. v. Carey*, 61 N.Y.2d 330, 339-340 (1984) (noting that establishment of standing is not a "technicality" to be "palmed off" and that plaintiffs must establish standing "factually and specifically" and not in a "conclusory or speculative" manner).

CONCLUSION

For all of these reasons, and those set forth in our opening brief, Supreme Court's decision should be reversed.

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Respectfully submitted,

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