

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

To be argued by:
ANDREW W. AMEND

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.

BRIEF FOR APPELLANTS

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<p>The Campaign for Fiscal Equity, <i>Deficient Resources: An Analysis of the Availability of Basic Educational Resources in High Needs Schools in Eight New York State School Districts</i> (Dec. 2012), http://www.equitycampaign.org/i/a/document/25804_DeficientResources2-21-13.pdf.....</p>	29
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<p>DOB, <i>New York State 2008-09 Enacted Budget Financial Plan</i> (May 1, 2008), available at https://www.budget.ny.gov/pubs/archive/fy0809archive/enacted0809/2008-09EBReportFinal.pdf.....</p>	9
<p>DOB, <i>New York State 2009-10 Enacted Budget Financial Plan</i> (Apr. 28, 2009), available at https://www.budget.ny.gov/pubs/archive/fy0910archive/enacted0910/2009-10EnactedBudget-FINAL.pdf</p>	11, 12

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Miscellaneous Authorities	Page(s)
SED, FARU, <i>Column Headings in Each Spread Sheet</i> , http://www.oms.nysed.gov/faru/Profiles/datacolumns1.htm	5
SED, FARU, <i>Master File for 2013-14</i> , http://www.oms.nysed.gov/faru/Profiles/27thMasterfileforweb.xlsx	5, 15, 44, 45
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PRELIMINARY STATEMENT

Plaintiffs in this action under article XI, § 1, of the New York Constitution (the “Education Article”) invite the judiciary to play a far larger—and more invasive—role in the highly complex and policy-driven process of public-education appropriations than governing case law permits. The gravamen of plaintiffs’ complaint is that public-school-funding *statutes* passed in 2007 established a *constitutional* floor that plaintiffs may enforce on a statewide basis without the need to identify constitutional deficiencies in educational services in any of the State’s nearly 700 school districts. Plaintiffs’ novel approach is directly contrary to Court of Appeals precedent and important underlying policies. Supreme Court, New York County (Mendez, J.), therefore should have dismissed the complaint. This Court should reverse his failure to do so.

The Court of Appeals has long emphasized judicial restraint in matters of public-school financing, a subject governed at both the state and local levels and one that presents issues of enormous complexity and intense debate properly addressed to the political branches. To warrant judicial intervention, the Court requires plaintiffs asserting

claims of insufficient public-school funding to plead both (a) detailed allegations of gross and glaring educational deficiencies throughout the schools in a particular district and (b) causes attributable to the State funding system.

Plaintiffs' complaint does not satisfy these requirements. Although plaintiffs seek statewide relief affecting New York's nearly seven hundred school districts, the complaint contains allegations about educational deficiencies in only five districts. Four of those districts are addressed in only a handful of scant assertions that are plainly insufficient to meet plaintiffs' pleading burden. And the allegations concerning the remaining school district, New York City, do not come close to raising a plausible inference of a district-wide failure to provide the opportunity for a sound basic education, or causes attributable to the State's public-education funding system.

Plaintiffs nonetheless insist that they have pleaded a viable claim that public-education funding is constitutionally deficient in every school district across the State because the State, following the financial crisis of 2008-2009, did not provide certain categories of education funding at levels initially envisioned in 2007. But the public-education

laws on which plaintiffs rely were not a constitutional mandate from which the Legislature could never depart without violating the Education Article. Moreover, plaintiffs lack standing and capacity to assert claims regarding the vast majority of the State's public school districts.

ISSUES PRESENTED

1. Did plaintiffs fail to state an Education Article claim by making insufficiently concrete allegations of (a) gross and glaring, district-wide deficiencies that deny the students of any specific school district the opportunity to receive a sound basic education, and (b) causes attributable to the State?

2. Do plaintiffs lack standing and capacity to assert Education Article claims pertaining to school districts of which no plaintiff is a student or parent of a student?

Supreme Court answered both questions in the negative.

STATEMENT OF THE CASE

A. The State's Constitutional Authority and Obligation to Provide for Public Schools

Under the New York Constitution, the Legislature has both the authority and the duty to “provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. Const. art. XI, § 1. This provision requires that “the opportunity for a sound basic education be provided to all.” *N.Y. Civil Liberties Union v. State*, 4 N.Y.3d 175, 178 (2005) (“*NYCLU*”). To fulfill its obligations under the provision, the Legislature has enacted a detailed statutory framework governing many aspects of public education.

The State fulfills its constitutional obligation to maintain and support public schools in part through the combined provision of state, local, and federal funding. *See Bd. of Educ., Levittown Union Free School Dis. v. Nyquist*, 57 N.Y.2d 27, 44-47 (1982) (“*Levittown*”); *Campaign for Fiscal Equity v. State*, 100 N.Y.2d 893, 904 (2003) (“*CFE II*”); *see also, e.g.*, Education Law § 3602(4) (foundation aid); § 3609-a (prescribing payments); *see also* § 2576(5-a) & (5-b) (limiting discretion of large cities to decrease local funding from year to year). The level of support that these sources provide in the aggregate is considerable. For

instance, in 2013-14, the State’s public schools had total combined revenues of more than \$60 billion, including approximately \$25 billion in state revenues, more than \$32 billion in local revenues, and \$2.5 billion in federal revenues.¹

B. Factual Background

1. The Campaign for Fiscal Equity (“CFE”) Litigation

Because plaintiffs’ claims rely on a fundamental misunderstanding of the Court of Appeals’ decisions in, and the

¹ The New York State Education Department (SED) publishes detailed financial data about all of the State’s school districts employing eight or more teachers in annual fiscal profiles available on SED’s website. SED, Fiscal Analysis & Research Unit (FARU), *The Fiscal Profile Reporting System*, http://www.oms.nysed.gov/faru/Profiles/profiles_cover.html. These fiscal profiles are published as Microsoft Excel files, in which each school district occupies a row and the columns correspond to various categories of revenues and expenditures, including total state revenue (column H), local revenue (column I), federal revenue (column J), and total revenue (column K). 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>.

Statewide data appear in row 676 of the 2013-2014 fiscal profile spreadsheet, SED, FARU, *Master File for 2013-14*, <http://www.oms.nysed.gov/faru/Profiles/27thMasterfileforweb.xlsx>.

Legislature's responses to, the *Campaign for Fiscal Equity* ("CFE") litigation, we begin with an overview of that proceeding.

In the *CFE* litigation, plaintiffs alleged educational deficiencies in a single school district, the New York City Public School District. The litigation spanned from 1993 to 2006 and ended up in the Court of Appeals on three separate occasions.

In the first appeal, the Court held that plaintiffs had adequately pleaded an Education Article claim based on their detailed allegations of deficiencies in instructional inputs (such as teaching, curricula, school facilities, classrooms, supplies, textbooks, libraries, and computers); and outputs (such as test results and graduation rates). *Campaign for Fiscal Equity v. State*, 86 N.Y.2d 307, 317, 319 (1995) ("*CFE I*").

The trial court subsequently held a trial that spanned seven months and included the testimony of 72 witnesses and 4,300 exhibits. Based on this extensive evidence, the court concluded that the State had failed to provide students in New York City the opportunity for a sound basic education. In the second appeal, the Court of Appeals upheld this determination. *CFE II*, 100 N.Y.2d at 902-03, 908-13. However, in deference to the Legislature, the Court of Appeals did not

order any specific funding remedy because it did not have “the authority, nor the ability, nor the will, to micromanage education financing.” *Id.* at 925. Instead, the Court directed the State to “ascertain the cost of providing a sound basic education in New York City,” to take steps to reform school financing to ensure that New York City students have sufficient resources to have the opportunity for a sound basic education, and to enact accountability reforms. *Id.* at 930. The Court of Appeals’ remedial order was limited to New York City, although it noted that the State “may of course address statewide issues if it chooses.” *Id.* at 928.

In response, the State commissioned a study to ascertain the cost of providing the opportunity for a sound basic education statewide. That study concluded that approximately \$1.93 billion in additional operating funds (i.e., excluding transportation, debt service, and capital expenditures) from all sources (i.e., federal, state, and local) would provide constitutionally adequate educational services in New York City. *Campaign for Fiscal Equity v. State*, 8 N.Y.3d 14, 21-27 & n.3 (2006) (“*CFE III*”). On the third and final occasion on which *CFE* reached the Court of Appeals, that Court deferred to the State’s

analysis as a reasonable cost study prepared by the elected branches and declared that “the constitutionally required funding for the New York City School District includes . . . additional operating funds in the amount of \$1.93 billion” from all sources, subject to two one-time-only adjustments agreed to by the State.² *Id.* at 27.

2. Public-education spending in New York between *CFE* and the financial crisis of 2008-2009

In 2007, the year after *CFE III* was decided, the Legislature enacted significant modifications to state support for public education in New York. Two such changes are relevant here.

² The \$1.93 billion figure was derived from an analysis conducted by Standard & Poor’s (S & P) that compared two sets of numbers: (i) spending estimates of the costs of providing a sound basic education (excluding capital, debt, and transportation costs), and (ii) relevant spending figures for 2002-2003. *See CFE III*, 8 N.Y.3d at 21-27. The Court of Appeals endorsed the \$1.93 billion estimate, subject to two one-time-only adjustments agreed to by the State. *Id.* at 27; *see also* Brief for Defendants-Respondents-Cross-Appellants at 26 & n.6, *CFE III*, 8 N.Y.3d 14 (Sup. Ct. N.Y. County Index No. 111070/93). First, the \$1.93 billion estimate was to be adjusted to take into account a later version of a certain cost index used by S & P (the Geographic Cost of Education Index) than the version S & P had used. *See CFE III*, 8 N.Y.3d at 23, 25, 27. Second, the \$1.93 billion estimate was to be adjusted for inflation to reflect 2004-2005 dollars. *See id.* at 27; Brief for Defendants-Respondents-Cross-Appellants, *supra*, at 26 & n.6.

First, the State substantially increased overall education funding. Education appropriations rose by \$1.76 billion in 2007, *see* Ch. 53, 2007 N.Y. Laws 573, and by a further \$1.75 billion in 2008, *see* Ch. 53, 2008 N.Y. Laws 593.³ The financial plans prepared in each of those years by the State Division of the Budget (DOB) anticipated additional funding increases in subsequent years, though no funds were appropriated to satisfy those proposed funding levels.⁴ *See* State Finance Law § 22(4) (requiring Governor’s executive budget submitted annually to the Legislature to include financial plan with three-year financial projection); *id.* § 23(3) (requiring update to financial plan and three-year projection within thirty days after enactment of annual budget).

Second, the Legislature created a new program, called Foundation Aid, that altered the State’s method of providing general

³ *See* N.Y. State Div. of the Budget (DOB), *New York State 2007-08 Enacted Budget Financial Plan* 57 (Apr. 19, 2007); DOB, *New York State 2008-09 Enacted Budget Financial Plan* 62 (May 1, 2008).

⁴ *See* DOB, *New York State 2007-08 Enacted Budget Financial Plan*, *supra*, at 57; DOB, *New York State 2008-09 Enacted Budget Financial Plan*, *supra*, at 62. These out-year projections reflected the Governor’s 2007 proposal to increase education funding substantially over four years. *See, e.g.*, DOB, 2007-08 Executive Budget Briefing Book 29-30 (Jan. 31, 2007).

operating aid to school districts. Enacted as part of the Budget and Reform Act of 2007, see Ch. 57, pt. B, § 13, 2007 N.Y. Laws 2410, 2444-45 (codified as amended at Education Law § 3602(4)), Foundation Aid is a formula used to calculate per-pupil education funding for each district. Simplifying greatly, the formula essentially calculates a base per-pupil amount, based upon amounts spent on educating students in successful school districts, that is adjusted on a district-specific basis for regional cost factors and the additional costs of educating certain high need students. That figure is then further adjusted according to a phase-in provision, which as originally enacted made districts eligible to receive their maximum per-pupil allocation of Foundation Aid after four years. *See* Education Law § 3602(4)(a)-(b).⁵

In adopting New York’s 2007 public-education funding statutes, the Legislature went far beyond the scope of *CFE III*. Whereas *CFE* had addressed public schools in New York City—and New York City only—the Legislature substantially increased funding for all school districts in

⁵ *See also* SED, *2014-15 State Aid Handbook* at 7-13 (Feb. 2, 2015), *available at* https://stateaid.nysed.gov/publications/handbooks/handbook_2014.pdf (describing Foundation Aid calculation).

the State. See *supra* 9. In addition, the legislation was proposed by Governor Spitzer as part of a plan designed to increase total state and city funding to New York City by \$5.4 billion over the course of four years⁶—more than twice the \$1.93 billion total estimated increase the Court had approved in *CFE III*.

3. Public-education funding in New York since the financial crisis of 2008-2009

After the 2008 financial crisis, the State was forced to close a \$20.1 billion budget gap—“the largest budget gap ever faced by the State”—in enacting the 2009-10 State budget.⁷ The Legislature closed that gap through a series of measures enacted in April 2009 as part of that year’s budget that included tax increases and across-the-board spending cuts.⁸

⁶ See, e.g., DOB, 2007-08 Executive Budget Briefing Book, *supra*, at 29-30. (See also R. 22-23 (¶¶ 39-41).)

⁷ DOB, *New York State 2009-10 Enacted Budget Financial Plan 4* (Apr. 28, 2009).

⁸ DOB, *New York State 2009-10 Enacted Budget Financial Plan*, *supra*, at 4, 12-17.

Education spending was affected in several ways, including changes to the State’s public-education funding formulas. For instance, the Legislature eliminated a planned Foundation Aid increase for the 2009-2010 school year and extended the phase-in period for Foundation Aid from four years to seven years—thus delaying the time at which school districts would receive their maximum per-pupil allocation of Foundation Aid. *See* Ch. 57, pt. A, § 13, 2009 N.Y. Laws 2657, 2663-64 (codified at Education Law § 3602(b-1)). And it enacted the Gap Elimination Adjustment (or GEA), a formula to apportion reductions to formula-based aid among school districts according to certain district-specific factors, including relative wealth and student need.⁹ *See* Ch. 53, 2010 N.Y. Laws 1187, 1242-45; *see also* Education Law § 3602(17). The Gap Elimination Adjustment essentially revised the multiple formulas used to calculate total aid to school districts in a manner that, practically

⁹ The GEA was first enacted as part of the 2010 budget and was partially offset by emergency federal funds provided by the American Recovery and Reinvestment Act of 2009. A similar measure, called the “Deficit Reduction Assessment,” was enacted as part of the 2009 budget; however, that reduction was entirely offset by emergency federal funds. *See* DOB, *New York State 2009-10 Enacted Budget Financial Plan*, *supra*, at 81; *see also* DOB, *New York State 2010-11 Enacted Budget Financial Plan* 79-81 (Aug. 20, 2010).

speaking, further reduced the amount of aid that school districts could expect to receive compared to the prior formulas in place in 2007.

Due to further revenue constraints caused by ongoing economic difficulties, as well as the expiration of temporary supplemental federal funding, the Legislature extended the Gap Elimination Adjustment in 2011-2012. *See* § 3602(1)(cc), (17). In addition, the Legislature enacted a measure known as the Allowable Growth Amount, which provides for growth in state education aid increases each year based on the growth in the State's total personal income as reflected in annual data from the United States Department of Commerce. *See id.* § 3602(1)(aa)-(gg), (17)-(18).

Despite these measures, New York continues to lead the Nation in public education funding, which is at an all-time high. The State's public education spending of \$19,818 per pupil surpasses that of all other States in the Nation, and is 85 percent above the national average of \$10,700.¹⁰ Moreover, the State's enacted budget for 2015-2016 includes a 6.1 percent year-over-year increase in School Aid, amounting

¹⁰ *See* U.S. Census Bureau, *Public Education Finances: 2013*, Table 8 (June 2015), <http://www2.census.gov/govs/school/13f33pub.pdf>.

to approximately \$1.4 billion in additional funds for total School Aid of \$23.5 billion.¹¹

In addition, as part of public-education appropriations in recent years, the State has reduced the impact of various cost-cutting measures adopted in the wake of the 2008-2009 crisis. Since 2011, the Legislature has enacted annual Gap Elimination Adjustment restorations, which reduce each year's Gap Elimination Adjustments. See Education Law § 3602(17)(d)-(e). These restorations have reduced the GEA's funding cuts from \$2.56 billion in the 2011-2012 school year to \$434 million in the 2015-16 school year, with many high-need school districts' GEA almost completely restored by 2015-16—thus substantially restoring Foundation Aid and other state aid.¹² The

¹¹ See Andrew M. Cuomo, Governor, *FY 2016 Enacted Budget Financial Plan* 10 n.1 (May 2015) (reporting growth on school-year basis), <https://www.budget.ny.gov/budgetFP/FY16FinPlan.pdf>.

¹² See DOB, *Description of 2015-16 New York State School Aid Programs* at 2, (Sept. 15, 2015); DOB, *Description of 2011-12 New York State School Aid Programs* at 3 (Oct. 31, 2011).

Legislature also has exceeded the allowable growth limits in each of the past three years.¹³

Moreover, spending on New York City's public schools is well above the approximately \$1.93 billion the Court of Appeals endorsed as a reasonable estimate of needed additional operating funding in *CFE III*. As of 2013-2014, operating funding for New York City's public schools had increased by some \$9 billion above the baseline amount used to calculate the \$1.93 billion estimated spending increase endorsed by the Court of Appeals.¹⁴

C. The Present Action

1. Plaintiffs' allegations

Plaintiffs bring this action claiming that the State has violated its constitutional obligations because the Foundation Aid increases contemplated in 2007 have not been fully implemented. They assert two primary causes of action: (1) that Defendants have failed to comply with

¹³ See Ch. 53, § 1, 2015 N.Y. Laws (LRS), pp. 160-174; Ch. 53, § 1, 2014 N.Y. Laws (LRS), pp. 158-172; Ch. 61, § 1, 2015 N.Y. Laws (LRS), pp. 7-17.

¹⁴ SED, FARU, *Master File for 2013-14*, *supra* (cells AD323, AE323, AF323, AG323); see also *infra* 43-44.

the *CFE* decisions (R. 68-69 (¶ 191)) and (2) that students statewide have been denied the opportunity for a sound basic education in violation of the Education Article (R. 69-72 (¶¶ 193-197)).

Plaintiffs make no allegations whatsoever about the vast majority of the State’s nearly 700 school districts. The complaint describes educational services only in New York City, Buffalo, Rochester, Yonkers, and Syracuse—with just a handful of paragraphs devoted to the latter four districts. (R. 41-55 (¶¶ 94-139).) Plaintiffs’ claims as to the State’s remaining districts are based on the assertion that the Budget and Reform Act of 2007 is a judicially enforceable “remedy” for unspecified “constitutional violations” that supposedly existed in every school district in the State when it was passed. (R. 53-55 (¶¶ 134-139).) Plaintiffs allege that the State’s post-2007 adjustments to its education-financing formulas—and especially changes affecting Foundation Aid—violate the constitutional rights of every student in every public school district in the State.

Plaintiffs principally challenge the Gap Elimination Adjustment and Allowable Growth Amount provisions described above (see *supra* 12-13). (R. 26-28 (¶¶ 51-54).) In addition, they object to a “Property Tax

Cap,” which establishes a levy-increase threshold above which a school district must engage in certain procedures—including obtaining the approval of at least 60 percent of the district’s voters—to adopt a levy increase, *see* Education Law § 2023-a(6). (R. 28-29 (¶¶ 55-56).) Moreover, plaintiffs challenge legislation conditioning certain annual increases in state aid on school districts’ timely implementation of revised Annual Professional Performance Review Systems for teachers and principals.¹⁵ (R. 32-33 (¶ 68).) Finally, plaintiffs assert that the State has violated the Education Article by failing to provide school districts with information and guidance on courses of study, services, supports, resources, efficiency, and cost-effectiveness; by failing to ensure a system of public-school accountability; by neglecting to perform a new study estimating the cost of providing a sound basic education; and by declining to revise state aid formulas. (R. 58-68 (¶¶ 150-189).)

¹⁵ *See* Education Law § 3012-c; Ch. 57, pt. A, § 1, 2012 McKinney’s N.Y. Laws 476, 478-84; Ch. 57, pt. A, § 1, 2013 McKinney’s N.Y. Laws 290, 293. This APPR Compliance Provision is the sole focus of the complaint in *Aristy-Farer v. State of New York*, which is legally insufficient for reasons stated in the State’s Brief for Appellants in *Aristy-Farer v. State of New York*, Sup. Ct. N.Y. County Index No. 13-100274 (1st Dep’t Feb. 20, 2015).

2. Defendants' motion to dismiss

Defendants moved to dismiss plaintiffs' complaint for, among other things, failure to plead the required elements of an Education Article claim—i.e., gross and glaring district-wide deficiencies in educational services that deny the students of particular districts the opportunity to receive a sound basic education, and a causal connection to the State's education-financing system. (R. 103-128.) The court denied defendants' motion. (R. 8.) Without identifying allegations of deficient educational services amounting to a constitutional violation in any school district in the State, the court stated that plaintiffs had stated "potentially meritorious" state-wide claims based on their assertions concerning the Gap Elimination Adjustment, Allowable Growth Amount, and other education-financing statutes adopted since 2007. (R. 8.) This appeal followed. (R. 2-3.)

ARGUMENT

POINT I

PLAINTIFFS FAIL TO STATE AN EDUCATION ARTICLE CLAIM

A. An Education Article Claim Requires District-Specific Allegations of Constitutional Educational Deficiencies and Causes Attributable to the State.

An Education Article claim can survive a motion to dismiss only if it satisfies two requirements. First, the claim must include specific, concrete allegations that the public schools throughout a particular district do not provide constitutionally adequate educational services. Second, the claim must allege that the reason for these deficiencies is the State’s failure to ensure sufficient funding for the district. Moreover, both the identification of deficiencies and the explanation of causation must be established for each individual school district, rather than as a state-wide matter. *Paynter v. State*, 100 N.Y.2d 434, 440 (2003).

The first element of an Education Article claim—gross and glaring inadequacy—requires specific allegations that the public schools in a district are not equipped with even “minimally adequate” educational *inputs*. See *CFE I*, 86 N.Y.2d at 317-18. These inputs consist of physical facilities (such as classrooms and laboratories), instrumentalities of

learning (such as computers and textbooks), and teachers who are both sufficient in number and adequately trained to cover essential materials. *See id.* at 319 (“fact-based claims of inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books, etc.” sufficed to state Education Article claim); *see also, e.g., N.Y. City Parents Union v. Bd. of Educ.*, 124 A.D.3d 451, 451 (1st Dep’t 2015) (“[T]he soundness of a basic education is not measured by comparing the educational opportunities offered by other districts or schools.”).

Additionally, allegations of deficient educational *outputs*, such as poor student results on standardized tests and low graduation rates, may be relevant to an assertion of gross and glaring inadequacy. But such outputs should be used “cautiously,” given that “there are a myriad of factors which have a causal bearing on test results,” *CFE I*, 86 N.Y.2d at 317, and “causes of academic failure may be manifold, including such factors as the lack of family supports and health care,” *Paynter*, 100 N.Y.2d at 441. Moreover, noncompliance with one or more minimum statewide educational standards established by the Regents and the Commissioner “may not, standing alone, establish a violation of

the Education Article,” because many of those standards “exceed notions of a minimally adequate or sound basic education” and “some are also aspirational.” *CFE I*, 86 N.Y.2d at 317.

The second element of an Education Article claim is causation—a complaint must include “allegations that the State somehow fails in its obligation to provide minimally acceptable educational services.” *Paynter*, 100 N.Y.2d at 441; *see also NYCLU*, 4 N.Y.3d at 178-79 (“[E]ven gross educational inadequacies are not, standing alone, enough to state a claim under the Education Article.”). This element “requires a clear articulation of the asserted failings of the State.” *NYCLU*, 4 N.Y.3d at 180. It will not suffice for plaintiffs asserting an Education Article claim to allege deficiencies in public schools and then “charge the State with the responsibility to determine the causes of the schools’ inadequacies and devise a plan to remedy them.” *Id.*

These two elements of an Education Article claim must be established for particular school districts—and thus a statewide claim (as plaintiffs attempt to plead here) must be founded on concrete factual allegations of constitutional educational deficiencies in each of the State’s nearly 700 school districts. As the Third Department has held, an

Education Article claim cannot rely solely on aggregate or state-wide information. *See N.Y. State Association of Small City School Districts, Inc. v. State*, 42 A.D.3d 648 (3d Dep’t 2007) (“*Small City School Districts*”). Plaintiffs in *Small City School Districts* alleged that districts for small cities suffered constitutional deficiencies as a result of lower per-student funding than that provided to noncity school districts. *Id.* at 652. The Third Department affirmed dismissal of the complaint because it included no factual allegations “specific to the four school districts” represented by plaintiffs who had standing. *Id.* Although the complaint contained aggregate statistics and generalized data about small-city school districts, “no district-wide failure” was alleged “for any particular district,” and no facts or statistical data were alleged to show that the four districts with representative plaintiffs were “actually experiencing the problems reflected by the aggregate statistics.” *Id.* It was thus “impossible to determine” whether those plaintiffs were “actually aggrieved,” and the complaint was properly dismissed. *Id.*

The need to establish deficiencies and causation on a district-wide basis for each school district makes sense because the school district is the basic unit allowing local participation in public-school governance under

the “state-local partnership” that the Education Article has “enshrined in the Constitution,” and it is the school district that serves as the vehicle for the State’s provision of educational resources. *NYCLU*, 4 N.Y.3d at 182 (quotation marks omitted). As the Court of Appeals has explained, because school districts “are the local units responsible for receiving and using state funding, and the State is responsible for providing sufficient funding to school districts, a claim under the Education Article requires that a district-wide failure be pleaded.” *Id.* Accordingly, a plaintiff’s Education Article claim warrants dismissal if the claim improperly focuses on aggregate rather than district-specific information, *see Small City School Districts*, 42 A.D.3d at 652, or if it focuses on individual schools rather than “alleg[ing] any *district-wide* failure,” *NYCLU*, 4 N.Y.3d at 181 (emphasis added).

The requirement that plaintiffs plead a failure by a specific school district to provide adequate educational services, based on a State failure to ensure adequate funding to that district, serves important underlying policies. As the Court of Appeals has recognized, the primary responsibility for implementing the Education Article lies with the executive and legislative branches, especially with respect to public

school financing. The “determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous practical and political complexity.” *Levittown*, 57 N.Y.2d at 38-39. Thus, “resolution appropriately is largely left to the interplay of the interests and forces directly involved and indirectly affected, in the arenas of legislative and executive activity.” *Id.* “This is of the very essence of our governmental and political polity.” *Id.*; *see also, e.g., CFE III*, 8 N.Y.3d at 28 (“Our deference to the Legislature’s education financing plans is justified not only by prudent and practical hesitation in light of the limited access of the Judiciary to the controlling economic and social facts, but also by our abiding respect for the separation of powers upon which our system of government is based.” (quotation marks omitted)); *CFE II*, 100 N.Y.2d at 925 (“We have neither the authority, nor the ability, nor the will, to micromanage education financing.”).

Judicial involvement in decisions about spending on public education is therefore “normally . . . inappropriate.” *Levittown*, 57 N.Y.2d at 39. Such involvement is justified only in the extraordinary circumstance where deficiencies are so acute, and the State’s

responsibility so clear, that it is appropriate for a court to intrude into a sensitive policy area generally reserved for the other branches of government. Requiring Education Article plaintiffs to supply concrete allegations of district-wide deficiencies so severe they deny students “the opportunity to learn ‘basic literacy, calculating, and verbal skills,’” *N.Y. City Parents Union*, 124 A.D.3d at 452 (quoting *CFE I*, 86 N.Y.2d at 316)), is thus not only dictated by Court of Appeals decisions, but critical to keeping judicial intervention within the narrow bounds that the Court has repeatedly emphasized as an essential matter of public policy.

B. Plaintiffs Do Not Adequately Plead the Required Elements of an Education Article Claim as to Any School District in the State.

In this case, as in *NYCLU* and *Small City School Districts*, plaintiffs’ complaint must be dismissed because it does not allege the required elements of an Education Article claim—namely, a district-wide failure to provide constitutionally adequate educational services and causes attributable to the State—as to any specific school district.

1. Plaintiffs' allegations concerning school districts outside New York City are cursory or nonexistent.

Plaintiffs' allegations concerning school districts outside of New York City are plainly insufficient to state an Education Article claim. The complaint contains no allegations at all concerning the vast majority of the approximately 700 school districts in the State: in addition to New York City, the complaint mentions only Buffalo, Rochester, Yonkers, and Syracuse. (R. 53-55 (¶¶ 134-139).) Claims concerning any other school district must be dismissed at the outset. *See, e.g., NYCLU*, 4 N.Y.3d at 178-79 (educational deficiencies and causes attributable to State are essential elements of an Education Article claim).¹⁶

Similarly, the complaint's allegations concerning Buffalo, Rochester, and Yonkers are far too sparse and conclusory to state a claim. (R. 53-55 (¶¶ 134-139).) The complaint contains only five paragraphs concerning those districts, and none of those paragraphs contains a single factual allegation concerning the educational inputs specific to those

¹⁶ Claims regarding the vast majority of the State's other school districts also must be dismissed for lack of standing and capacity because no plaintiff is a student, or a parent of a student, of those districts. *See infra* 52-54.

districts—i.e., teaching, curricula, facilities, classrooms, or instrumentalities of learning. While the complaint devotes a handful of additional paragraphs to Syracuse (R. 38-41 (¶¶ 85-92)), only one such paragraph refers to educational inputs, and it contains only vague, general assertions about class sizes, lack of staff and services, and custodial cutbacks. (R. 40-41 (¶ 92).) The complaint alleges no concrete facts about Syracuse concerning class sizes, how staff numbers compare to actual need, or how students in the district are adversely affected. (R. 40-41 (¶ 92).)

Such allegations fall well short of the type of concrete, detailed allegations of gross and glaring educational deficiencies required to state an Education Article claim. *Cf. CFE I*, 86 N.Y.2d at 318-19; *Hussein v. State of N.Y.*, 81 A.D.3d 132, 136 (3d Dep’t 2011), *aff’d*, 19 N.Y.3d 899 (2012). Moreover, the complaint’s scant assertions concerning student performance in Buffalo, Rochester, Yonkers, and Syracuse—consisting of scoring statistics from language arts testing and high school graduation rates from a single year—do not make up for the paucity of other allegations, especially given that “causes of academic failure may be manifold,” *Paynter*, 100 N.Y.2d at 441.

2. Plaintiffs’ allegations concerning the New York City Public School District are also insufficient to state a claim.

The complaint devotes more space to New York City than to any other public school district (*see* R. 41-53 (¶¶ 93-133)), but those allegations still do not evince a district-wide failure to provide constitutionally adequate educational services.

a. Plaintiffs do not allege a constitutional violation based on New York City’s educational inputs.

Plaintiffs’ complaint contains several generalizations about New York City, but—unlike the complaint in *CFE*—is short on specifics indicating a district-wide failure. For instance, the complaint says some eighteen times that “many” schools suffer from one alleged deficiency or another. (*See* R. 42-51 (¶¶ 95-97, 108-109, 111, 115, 119, 121, 124, 126, 128); *see also* R. 44 (¶ 103) (referring to a “substantial number” of schools).) But the vague assertion that “many” schools have a problem is insufficient to support an inference of a district-wide deficiency in New

York City, which has more than *1,800 public schools*.¹⁷ Indeed, a study cited by plaintiffs that supposedly reflects insufficient numbers of qualified teachers at “many” New York City schools (R. 42-43 (¶¶ 95, 97)) was based on a review of just twelve high-needs schools.¹⁸ *Cf. N.Y. City Parents Union*, 124 A.D.3d at 451-52 (affirming dismissal of complaint that included “examples of poor conditions in four public schools,” but it “d[id] not allege any district-wide failure” (quotation marks omitted)). And plaintiffs’ allegations about supposed educational deficiencies affecting “many” students are likewise insufficient. (R. 45-47, 51 (¶¶ 107, 113, 128); *see also* R. 43 (¶ 98) (referring to “[m]any recent New York City public school graduates”).) New York City’s public schools educate approximately *1.1 million students*.¹⁹

¹⁷ *See* N.Y. City Dep’t of Educ., *About Us*, <http://schools.nyc.gov/AboutUs/default.htm>.

¹⁸ The Campaign for Fiscal Equity, *Deficient Resources: An Analysis of the Availability of Basic Educational Resources in High Needs Schools in Eight New York State School Districts* at 3 (Dec. 2012), http://www.equitycampaign.org/i/a/document/25804_DeficientResources-2-21-13.pdf.

¹⁹ *See* N.Y. City Dep’t of Educ., *About Us*, *supra*.

Such nondescript allegations are not comparable to the detailed and concrete, district-wide allegations that allowed plaintiffs to survive a motion to dismiss in *CFE*. The pleading in that case repeatedly alleged hard numbers about resource limitations throughout the New York City school district and compared those numbers to corresponding figures for school districts statewide, for suburban school districts, or both. For instance, the *CFE* complaint quantified, on a district-wide basis, New York City's comparatively high level of uncertified teachers and teacher turnover rate, and its comparatively low level of teacher experience.²⁰ Plaintiffs here, by contrast, assert only that "many" schools have "insufficient numbers" of qualified teachers (R. 42-43 (¶¶ 95, 97).)

Similarly, the *CFE* complaint contained specific, district-wide allegations quantifying New York City's comparative lack of other

²⁰ See Record on Appeal at 65-66 (¶ 50), *CFE I*, 86 N.Y.2d 307 (Sup. Ct. N.Y. County Index No. 111070/93) ("New York City has the largest percentage of uncertified teachers (11.8% in 1991-92 compared to 7.3% statewide, and 4.6% in suburban districts), the least experienced teachers (13 years, compared to 16 years statewide, and 19 years for suburban districts) and the highest teacher turnover rate in the state (14% in 1989-90, compared to a statewide average of 9% and a suburban average of 7%).").

educational resources, such as library books,²¹ computers,²² and high school course offerings.²³ In contrast, plaintiffs allege in broad and conclusory terms that “[m]any . . . schools” lack adequate library books and computer hardware, and that “[m]any recent New York City public school graduates” could not meet coursework recommendations and requirements set by the City University of New York. Plaintiffs thus attempt to mimic the language of the complaint in *CFE*, but fail to supply hard data of the type that was essential to the viability of the complaint in that case.

²¹ See Record on Appeal at 67-68 (¶ 59), *CFE I*, 86 N.Y.2d 307 (Sup. Ct. N.Y. County Index No. 111070/93) (“[I]n 1991-92, the city’s schools had an average of only 10.4 library books per pupil, compared with 20.9 in suburban areas, and 16.5 statewide.”).

²² See Record on Appeal at 67 (¶ 55), *CFE I*, 86 N.Y.2d 307 (Sup. Ct. N.Y. County Index No. 111070/93) (“[I]n 1991-92, New York City students on average had only one computer for every 19 students, compared to a statewide public school average of one computer for every 13 students.”).

²³ See Record on Appeal at 66 (¶ 53), *CFE I*, 86 N.Y.2d 307 (Sup. Ct. N.Y. County Index No. 111070/93) (“[O]nly 15 of approximately 125 high schools in the City of New York have an academic program which allows students to meet the full academic unit prerequisites for admission newly promulgated by the City University of New York.”).

In addition, plaintiffs devote seventeen of their forty-one paragraphs about New York City to issues concerning discrete groups of students with distinct needs, such as at-risk students, English language learners and bilingual students, and students in need of special education services. (R. 43-48 (¶¶ 99-115).) Those allegations do not attempt to quantify the scope of the shortcomings they describe,²⁴ and thus do not support an inference of district-wide deficiencies in the services provided to affected students—let alone an inference of district-wide deficiencies in services provided to the City’s broader student population.

Moreover, a number of plaintiffs’ allegations deal with auxiliary services and resources such as extracurricular activities. (*See, e.g.*, R. 44 (¶ 104) (afterschool, summer, and extended day programs for at-risk students); R. 46 (¶ 110) (field trips for non-native English speakers); R. 51 (¶ 128) (extracurricular activities).) Such allegations do not state

²⁴ One notable exception—the allegation that some 50,000 students are without access to a full-day publicly funded prekindergarten program (R. 45 (¶ 106))—is now demonstrably false, *see* N.Y. City Dep’t of Educ., *Pre-K Schools, “With Pre-K For All, Opportunity Starts Now”*, <http://schools.nyc.gov/ChoicesEnrollment/PreK/default.htm>.

a claim that New York City schools prevent students from acquiring the “basic literacy, calculating, and verbal skills” that make up a sound basic education. *CFE I*, 86 N.Y.2d at 316. Nor do plaintiffs’ few allegations that do contain district-wide numbers on educational resources (*see* R. 48, 50 (¶¶ 118, 123)), which are too scant to raise an inference that students are systemically being denied the opportunity to acquire such basic skills.

b. Plaintiffs also do not allege a constitutional violation based on New York City’s educational outputs.

Beyond these deficiencies in plaintiffs’ allegations about educational “inputs” in New York City, the complaint suffers from a lack of facts sufficient to show that the City’s educational “outputs” are deficient on a district-wide basis. Instead, plaintiffs rely on just a few summary allegations. (R. 52-53 (¶¶ 132-133).)

First, they rely on allegations of test results from a single year without alleging any facts to (a) demonstrate that those results are part of a broader pattern, (b) compare them to test results elsewhere in the State, or (c) explain the significance of those test results in terms of plaintiff students’ basic skills. Again, a comparison to the pleading in

CFE is in order: the complaint there specifically alleged that certain test results showed that a disproportionately high number of third graders in New York City were “unable to read with comprehension the easiest connected sentences and paragraphs.”²⁵ No such detail is supplied here.

Second, plaintiffs rely on the City’s graduation rate from a single year that includes students who entered high school two years before the 2009 budgetary decisions at issue in this case. The graduation rate alleged by plaintiffs is significantly higher than the graduation rate relied upon in *CFE*. See *Campaign for Fiscal Equity v. State*, 187 Misc.2d 1, 60-64 (Sup. Ct. N.Y. County 2001).

In addition, plaintiffs attempt to rely on allegations that a majority of New York City public school students fall short of a standard that *exceeds* the constitutional minimum. Plaintiffs claim that only about twenty percent of students who entered New York City high schools in 2007 were “college and career ready” (as plaintiffs define that term) five years later—but the “college and career ready” standard alleged in the complaint is an aspirational level of achievement higher

²⁵ See Record on Appeal at 69 (¶ 64), *CFE I*, 86 N.Y.2d 307 (Sup. Ct. N.Y. County Index No. 111070/93).

than the requirements for earning a high school diploma. (R. 59 (¶ 155) (equating “college and career ready” with scores of at least 75 on the Regents Examination in English and at least 80 on the Regents Examination in Mathematics)). *Cf.* 8 N.Y.C.R.R. § 100.5(b)(7)(ix) (requiring scores of 65 on Regents Examinations to earn a diploma). That is a more rigorous standard than the Constitution requires.

As the Court of Appeals has explained, the sound basic education mandated by the Education Article is one that provides students with an “opportunity to acquire the *basic* literacy, calculating and verbal skills necessary to enable them to function as civic participants capable of voting and serving as jurors.” *CFE I*, 86 N.Y.2d at 318 (emphasis added). Exceeding the requirements for earning a high school diploma goes beyond such basic skills. Plaintiffs’ “college-and-career-ready” allegations thus present a classic example of an attempt to state an Education Article claim based simply on assertions that many students do not meet educational standards set by the Regents that “exceed notions of a minimally adequate or sound basic education.” *Id.* at 317; *see also CFE II*, 100 N.Y.2d at 907-08 (adopting Regents’ standards, however ambitious, as definition of a sound basic education would

improperly “cede to a state agency the power to define a constitutional right”). Such allegations do not suffice to plead a violation of the Education Article.

c. Plaintiffs do not adequately allege causes attributable to the State.

Finally, even if plaintiffs had adequately alleged that New York City’s public school students were being denied the opportunity to receive a sound basic education, plaintiffs have not alleged causes attributable to the State. Plaintiffs’ allegations of causation are limited to broad-brushed assertions that the State is not providing sufficient funding for schools in all districts. But there are no specific allegations about the amount of funding from all sources currently being spent on schools in New York City (or, for that matter, any other district in the State). And in fact, some of plaintiffs’ generalized allegations concerning a purported lack of public school funding are based on surveys that specifically exclude New York City. (R. 54 (¶ 137).)

Such assertions do not concretely allege that the State has caused constitutional deficiencies in New York City by failing to ensure the provision of adequate funding. Moreover, plaintiffs cannot remedy

this—or any other—fatal defect in their pleading simply by criticizing the State’s departure from its 2007 state aid goals, as we now explain.

C. Plaintiffs May Not Avoid Dismissal by Asserting a Failure to Provide State Aid to Public Schools at Levels Initially Envisioned in 2007.

Plaintiffs’ failure to plead the basic elements of an Education Article claim—i.e., gross and glaring, district-wide educational deficiencies and causes attributable to the State—requires dismissal of their complaint. Plaintiffs nevertheless attempt to manufacture a claim by asserting that the Legislature’s 2007 education funding statutes established a constitutional floor, and that any deviation from the funding formulas in those statutes as initially enacted—and in particular the Foundation Aid formula—necessarily violates the constitutional rights of every public school student in the State. (*See* R. 56, 69-71 (¶¶ 145-146, 192-193).)

Plaintiffs’ novel and expansive Education Article theory is and should be rejected for three basic reasons.

First, plaintiffs ignore that educational services are funded by state, local, and federal sources, not by the State alone. Thus,

allegations based solely on *state* aid goals do not support an inference that *overall* funding is inadequate.

Second, the State’s 2007 education funding statutes did not, and could not, establish a constitutional floor. It is the exclusive function of the judiciary to set constitutional standards. Plaintiffs’ assertion that the State violated the Constitution by deviating from funding goals established by legislation is thus deeply flawed.

Third, plaintiffs cannot avoid that basic principle of separation of powers by labeling the 2007 legislation a statewide “*CFE* compliance” plan. To the extent the judiciary in *CFE*—as opposed to the Legislature in 2007—did establish a constitutional benchmark for educational funding, it did so in a case about New York City alone, not the State as a whole. Further, the remedy the Court of Appeals endorsed—for New York City alone—was additional operating funding in an estimated amount of \$1.93 billion from all sources (federal, state, and local). That amount has been provided several times over. Plaintiffs’ attempt to argue that the State has not complied with *CFE* is therefore meritless.

1. Public funding to provide a sound basic education includes state, local, and federal moneys—not just state appropriations.

The first fatal flaw in plaintiffs’ position that defendants violated the Constitution by failing to fully implement state education aid increases envisioned in 2007 is plaintiffs’ exclusive focus on *state* aid—and in particular one component of state aid, i.e., Foundation Aid. Plaintiffs wrongly overlook the tremendous amount of funding that comes from sources other than the State—and that school districts appropriately use to provide a sound basic education to their students. *See, e.g., CFE II*, 100 N.Y.2d at 904 (“[A] combination of local, state and federal sources generates school funding.”).

Federal and local funds together accounted for some \$35 billion of the \$60 billion spent by the State’s public schools in 2013-2014. See *supra* 4-5. Those funds are just as capable of furnishing educational services as state appropriations are. And the adequacy of those services does not vary depending on who pays for them, whether it be the federal government, the State, or local school districts. Thus, allegations that *the State* has not provided funding in a given amount—untethered to any resulting impact on educational services—do not establish a *per se*

failure to provide the educational opportunities the Constitution requires, since funding from other sources together with state funding may satisfy that constitutional requirement. Any suggestion here that the State violated the Education Article merely because it did not provide Foundation Aid as initially envisioned in 2007 ignores this basic fact and thus does not state a claim.

Similarly, plaintiffs fail to state a claim insofar as they allege that individual measures, such as the Property Tax Cap and APPR Compliance Provision, violate the Constitution. The State's obligation is to ensure that school districts are provided with an adequate overall funding stream. No individual statute (or combination of individual statutes) can be the basis of a constitutional challenge absent concrete allegations that it, and it alone, reduces overall funding to a level that deprives a school district's students the opportunity to receive a sound basic education. Plaintiffs make no such allegations here.

2. The State's 2007 public education funding *statutes* did not establish a *constitutional floor*.

Beyond ignoring that *overall* public education funding (not just state funding) is the proper focus of an Education Article claim, plaintiffs' theory that funding legislation adopted in 2007 set a constitutional floor overlooks a foundational tenet of constitutional law: the Legislature 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 907.

This fundamental principle of New York government, rooted in the separation of powers, defeats plaintiffs' attempt to transmute the judgments of the Legislature and Governor, as reflected in 2007's public-school funding legislation, into judicially enforceable constitutional norms. In fact, all statutes are entitled to a presumption of constitutionality. *See, e.g., Hotel Dorset Co. v. Trust for Cultural*

Resources of City of N.Y., 46 N.Y.2d 358, 370 (1978). And that includes school-financing legislation enacted since 2008.²⁶

3. **To the extent *CFE* adopted a constitutional benchmark, that benchmark related to New York City only and is far surpassed by operating spending on New York City schools today.**

Finally, plaintiffs suggest that the State's 2007 public education funding statutes were a *CFE III* compliance measure—such that any departure from the funding formulas adopted in those statutes effectively violates the Constitution under *CFE*. This theory, too, fails.

²⁶ Indeed, the Constitution expressly forbids lawmakers from passing appropriations statutes that will be binding on future generations: article VII limits the Legislature's authority to appropriate funds to the succeeding two fiscal years. *See* N.Y. Const. art. VII, § 7. Thus, the Legislature in 2007 could not have enacted education funding formulas from which future lawmakers could not depart, even if it had wished to do so.

- a. **The State’s 2007 legislation was not, and could not be, a statewide “*CFE* compliance” plan because *CFE* addressed New York City alone.**

Plaintiffs assert that the public education statutes adopted by the Legislature in 2007 were a state-wide “*CFE* compliance” plan (R. 21). But that assertion is untenable. The State was logically and legally incapable of having a state-wide plan to “comply” with *CFE*. The entire *CFE* litigation and resulting declaratory judgment dealt with one district and one district only: New York City. There was thus nothing for the State to “comply with” regarding any other district, and plaintiffs’ concept of a “compliance plan” for any other district is a nonstarter.

- b. **Operating spending on New York City’s public schools has risen by more than four times the amount endorsed by the Court of Appeals in *CFE*.**

Additionally, to the extent that *CFE III* established a constitutional funding norm respecting the one school district before it in that case (i.e., New York City), there is no merit to plaintiffs’ conclusory allegation (see R. 30 (¶ 60)) that the State has violated that norm.

The Court of Appeals in *CFE III* endorsed the State’s figure of approximately \$1.93 billion in increased operational funds, from all

sources, as a reasonable remedial estimate. 8 N.Y.3d at 27. Total operational funding for New York City’s public schools has increased by more than \$9 billion—more than four times the amount the *CFE III* Court deemed acceptable. Pertinent public data demonstrate as much. The estimated \$1.93 billion increase endorsed in *CFE III* was based on a baseline figure of \$12.62 billion in total operational spending (i.e., excluding transportation, capital, and debt expenses, see *supra* 7-8) for New York City’s schools in 2002-2003.²⁷ By 2013-2014, the corresponding figure had grown to more than \$21.7 billion, for an increase of approximately \$9 billion.²⁸ Plaintiffs make no concrete allegation suggesting that this \$9 billion increase failed to provide the \$1.93 billion in added funding approved by the Court of Appeals.

²⁷ Record on Appeal at 4875, 5833, *CFE III*, 8 N.Y.3d 14 (Sup. Ct. N.Y. County Index No. 111070/93).

²⁸ See SED, FARU, *Master File for 2013-14, supra* (cells AD323, AE323, AF323, AG323). Row 323 of the SED fiscal profile spreadsheet for 2013-14 contains data for the New York City School district. Cell AG323 in that spreadsheet contains the City’s total expenditures of approximately \$23.7 billion for 2013-14. When amounts for transportation (approximately \$1.1 billion, see cell AD323) and debt service (approximately \$0.9 billion, see cells AE323, AF323), the remaining sum is approximately \$21.7 billion.

c. Plaintiffs' misreading of *CFE* cannot salvage their constitutional claims even as to New York City.

Ignoring the plain import of *CFE*, plaintiffs posit that the State has failed to provide New York City with increased state aid in the amount initially envisioned by the Governor and Legislature in 2007. (*See, e.g.*, R. 53-54 (¶¶ 134-135).) But that theory fails—both because it ignores the impact of federal and local funding²⁹ (see *supra* 39-40), and because the funding formulas enacted in 2007 were designed to provide *more* state aid to New York City than the amount approved of by the Court of Appeals in *CFE III*.

As plaintiffs themselves allege, the fiscal analysis underlying the State's 2007 legislation incorporated a number of weightings higher than those utilized by the analysis that had produced to the \$1.93 billion estimate. (R. 21-22 (¶ 38).) Further, by plaintiffs' own account,

²⁹ Local revenues alone, a major component of New York City's overall public school funding, went up by approximately \$5.92 billion between 2003-2004, when the calculations at issue *CFE III* were done, and 2013-2014. *Compare* SED, FARU, *Master Profile for 2013-14*, *supra* (cell I323 (total local revenue for New York City of approximately \$12.86 billion)), *with*, SED, FARU, *Master Profile for 2003-04* (cell I326 (total local revenue for New York City of approximately \$6.94 billion)), www.oms.nysed.gov/faru/documents/webMasterfile0304.xls.

the 2007 legislation was based on a plan to provide \$3.2 billion in increased state aid (which, together with anticipated spending increases of more than \$2 billion by the City, were expected to result in a total increase of more than \$5 billion). (R. 22 (¶ 39).) That amount was well above the \$1.93 billion estimate endorsed in *CFE III*. Thus, the 2007 legislation set a *higher* funding goal than that the Court of Appeals endorsed as adequate in *CFE III*. The failure to meet that higher goal did not violate the Constitution.

Plaintiffs attempt to obscure this point, and the holding of *CFE III*, by claiming that the Court established a “constitutionally-required funding *range* for the New York City School District” (R. 30 (¶ 60) (emphasis added)). But the Court did no such thing. Nor did it set the State’s \$1.93 billion figure as the “low end” of any such range (R. 21-22 (¶ 38)), or “direct[]” the political branches to “consider” such a range and “appropriate” an amount falling within it (R. 20-21 (¶ 37) (quotation marks omitted)).

Rather, the Court granted a declaratory judgment endorsing the State’s \$1.93 billion figure as a satisfactory funding increase. *CFE III*, 8 N.Y.3d at 31, 32. Indeed, the Court explicitly stated that proposed funding

increases above the State’s \$1.93 billion estimate would be a “policy choice to *exceed* the constitutional minimum.” *Id.* at 27 (describing Governor Pataki’s proposed operating funding increase of \$4.7 billion) (emphasis added).³⁰ The State’s funding legislation was just such a policy choice—and defendants did not violate the Constitution by making a different policy choice when faced with the worst financial crisis to hit the State and the Nation since the Great Depression.

D. Plaintiffs Have Not Pleaded a Violation of the Education Article Due to Insufficient Guidance from the State to School Districts.

Plaintiffs also assert as a separate cause of action that the State has violated the Education Article by, among other things, failing to provide school districts with information and guidance on courses of study, services, supports, resources, and cost-efficiency. (R. 57-68, 71-72 (¶¶ 148, 150-189, 195).) This theory, however, fares no better than any

³⁰ *See also CFE III*, 8 N.Y.3d at 33 (Rosenblatt, J., concurring) (“Judging by Governor Pataki’s higher budgeting and the similarly heartening indications that Governor-elect Spitzer will continue in a direction *higher than the minimum*, there is every indication that the amounts dedicated will be *well above the constitutional floor*.” (emphasis added)).

of plaintiffs' other claims for the basic reason that plaintiffs do not allege facts indicating gross and glaring, district-wide educational deficiencies depriving students in any school district in the State the opportunity to receive a sound basic education—let alone a causal connection to the State's supposed failure to provide needed information and guidance to school districts.

Moreover, plaintiffs' "information and guidance" claim is an unprecedented and unfounded attempt to micromanage the manner in which the State creates, delivers, and monitors pedagogical services. The Court of Appeals has never suggested that it is appropriate for courts, even in Education Article cases, to nitpick the State's educational policy judgments. Rather, it has expressly observed that its function is *not* to make policy, and that "the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government." *CFE III*, 8 N.Y.3d at 28 (quotation marks omitted); *see also, e.g., Klostermann v. Cuomo*, 61 N.Y.2d 525, 536 (1984) (where plaintiffs seek to "litigate the wisdom of the State's policy, which involved the conflicting views of experts as to what constituted the better course," matter "was not one

properly presentable in a judicial forum”); *Jones v. Beame*, 45 N.Y.2d 402, 409 (1978) (courts are the wrong forum where “resolution of the ultimate issues” rests on policy set by elected officials). Courts are ill-equipped to second-guess policymakers’ determinations concerning the curricular and other matters plaintiffs describe. *Cf. Levittown*, 57 N.Y.2d at 48 (Education Article is satisfied if State’s provisions for “required courses, textbooks, qualifications of teachers,” and other pedagogical matters produce what “may properly be said to constitute an education”).

Similarly, plaintiffs seek to impose on the State constitutional obligations to develop enhanced accountability systems, new costing-out studies, and revisions to state aid formulas. But in *CFE III*, the Court of Appeals upheld the First Department’s decision, which had “struck [the] Supreme Court’s call for state costing-out studies every four years and its requirement that the New York City Department of Education prepare a comprehensive ‘sound basic education’ plan, to ensure accountability.” *CFE III*, 8 N.Y.3d at 32. The Court of Appeals held that there were adequate accountability mechanisms in place, and that a new, costly layer of bureaucracy was not constitutionally required. *Id.*

Further, the Court of Appeals held that the Constitution does not mandate that the State perform regular costing-out studies to assess the cost of providing the opportunity for a sound basic education. *Id.* Thus, the Court of Appeals has already rejected the claim that the State's efforts are inadequate (even in light of the constitutional violations found to exist in New York City in *CFE II*).

Further, and in any event, the State already provides substantial educational and fiscal guidance to school districts. For example, the Commissioner of Education prescribes the minimum subjects required to be provided to students. *See* Education Law § 3204(3); 8 N.Y.C.R.R. §§ 100.2(t), 100.3, 100.4, 100.5. The Board of Regents prescribes the learning standards on which instruction in the State's schools is based. *See* Education Law § 211. And school districts may not receive any state-aid apportionment unless they maintain an approved course of study that conforms to the requirements of the Education Law, the rules of the Board of Regents, and the Commissioner's regulations. 8 N.Y.C.R.R. § 3.35(a). Moreover, the State, which has an interest in maximizing the use of scarce resources, provides substantial fiscal

guidance and incentives to local school districts through the State Education Department (SED).³¹

Local control, however, is also essential. Local boards of education prescribe the courses of study by which students are graded. *See* Education Law § 1709(3) (union free school districts); *id.* §§ 1804(1), 2503(4)(c) (small cities); *id.* § 2554(11) (large cities). Likewise, legal responsibility for managing a district’s fiscal affairs lies with the local school board. *See, e.g., id.* §§ 1604, 1608, 1709, 1716, 1804, 1950, 2576(5-b), 2601-a; 8 N.Y.C.R.R. Part 170. Plaintiffs’ suggestion that the State has failed to give appropriate educational or fiscal guidance to school districts, or should give more or different guidance, thus invites judicial management of intricate details of the state-local partnership “enshrined in the Constitution” under the Education Article, *see NYCLU*, 4 N.Y.3d at 182. This Court should decline the invitation,

³¹ *See, e.g.,* NYSED, *Ed Management Services, Fiscal Fitness, A Guide to Monitoring Your Local School District’s Budget*, <http://www.p12.nysed.gov/mgtserv/FiscalFitnessGuide.htm>; NYSED, *Ed Management Services, Guidance on Implementing Fiscal Accountability Legislation*, <http://www.p12.nysed.gov/mgtserv/accounting/fiscalaccountability.html>.

especially in light of plaintiffs' failure to plead constitutional deficiencies in educational services in any school district in the State.

POINT II

PLAINTIFFS LACK STANDING OR CAPACITY TO ASSERT EDUCATIONAL ARTICLE CLAIMS AS TO ANY SCHOOL DISTRICT OF WHICH NO PLAINTIFF IS A STUDENT OR A PARENT OF A STUDENT

Plaintiffs' complaint also suffers from a fatal lack of standing and capacity with regard to the vast majority of the State's school districts. An essential element of standing is injury in fact, which ensures that a plaintiff has a concrete stake in the litigation. *See, e.g., N.Y. State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004). A complaint presenting a generalized grievance or alleging injury to someone else will not suffice. *See, e.g., Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 772-73 (1991).

Here, plaintiffs consist of students and parents residing in just nine of the State's approximately 700 school districts. (*See* R. 14-17 (¶¶ 6-22).) Those are the only individuals who could potentially allege that *they* have suffered a concrete injury in the form of constitutionally inadequate educational services—and none of them can claim a

constitutional injury based on educational services provided in a different school district, *see, e.g., N.Y. City Parents Union*, 124 A.D.3d at 451-52 (soundness of a basic education is not measured by comparing the educational opportunities offered by other districts or other schools). All claims regarding the State’s other school districts—i.e., the hundreds upon hundreds of school districts without a resident student or parent plaintiff—must be dismissed for lack of standing.

Moreover, plaintiffs may not remedy their lack of standing as to those other districts by claiming that plaintiff New Yorkers for Students’ Educational Rights (“NYSER”) has organizational standing. Organizational standing allows an organization to assert claims on behalf of its members if it shows that “at least one of its members would have standing to sue,” that maintaining the suit on behalf of members is representative of the organization’s purposes, and that the case would not require the participation of individual members. *N.Y. State Ass’n of Nurse Anesthetists*, 2 N.Y.3d at 211.

NYSER does not meet these requirements. All of its members are themselves corporations or organizations—not students capable of being injured by a school district’s lack of adequate educational services. (*See*

R. 11-14 (¶ 5(a)-(q)).) Further, many of the organizations making up NYSER are school districts or school boards (R. 13-14 (¶ 5(k), (n)-(p))) that lack capacity and standing to assert Education Article claims against the State. *See City of N.Y. v. State*, 86 N.Y.2d 286, 291 (1995); *see also Small City School Districts*, 42 A.D.3d at 649-50 (dismissing claims by school districts and school board members for lack of capacity and standing).

Similarly, other NYSER members are advocacy groups or associations of public school personnel (R. 11-13 (¶ 5(a)-(b), (h)-(i))), whose members are incapable of asserting Education Article claims because they do not receive any public education. And, to the extent NYSER's members include organizations whose members include parents of public school students, the complaint does not identify any particular districts whose schools such students attend—other than districts that already have a representative individual plaintiff. (R. 11-14 (¶ 5(f)-(g), (l)-(m), (q)).) The complaint thus fails to establish that NYSER has standing to assert claims—even indirectly—on behalf of any resident of any school district other than the nine school districts as to which an individual plaintiff already has standing.

CONCLUSION

For all of these reasons, the decision of Supreme Court should be reversed and the complaint dismissed.

Dated: New York, NY
December 7, 2015

Respectfully submitted,

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Pursuant to Appellate Division Rule 22 N.Y.C.R.R. § 600.10.3(d)(1)(v), I hereby certify that the foregoing brief was prepared on a computer (on a word processor). A monospaced typeface was used, as follows:

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

New Yorkers for Students Educational Rights
("NYSER"), &c., et al.,

Plaintiffs-Respondents,

- against -

THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

Consolidated Index No.
100274/2013 (formerly
650450/2014)
Supreme Court
New York County

**Statement Pursuant to
C.P.L.R. 5531**

1. The consolidated index number of the case below is 100274/2013. Prior to the lower court's consolidation order dated August 12, 2014, the index number of this case was 650450/2014.
2. The original parties were plaintiffs New Yorkers for Students' Educational Rights ("NYSER"), Rubnelia Agostino, Miriam Aristy-Farer, Kathryn Barnett, Ava Capote, Milagros Arcia. G. Changlerth, Mona Davids, Rolando Garita, Sara Harrington, Sonja Jones, Nicole Iorio, Heidi Mouillesseaux-Kunzman, Gretchen Mullins-Kim, Ellen Trachtenberg, Heidi Teska-Prince, and Andy Willard, and defendants the State of New York, Andrew M. Cuomo as Governor, the New York State Board of Regents, and John B. King, Jr., as President of the University of the State of New York and Commissioner of Education. The plaintiffs have changed as follows: Janet Duran and Annette Renaud have been added. Defendants have not changed, except that the parties have stipulated, and the trial court has so-ordered, the substitution of "President of the University of the State of New York and Commissioner of Education, in his or her official capacity," in the place of "John B. King, as President of the University of the State of New York and Commissioner of Education." (MaryEllen Elia is currently President of the University of the State of New York and Commissioner of Education.)
3. The action was commenced in Supreme Court, New York County.
4. The action was commenced on February 11, 2014, by a complaint served on February 11, 2014. An amended complaint was served on March 28, 2014. An answer to the amended complaint was served on February 2, 2015.
5. Plaintiffs seek declaratory and injunctive relief on the theory that the State's public-education financing system denies students throughout the state the opportunity mandated by Article XI, § 1, of the New York Constitution to receive a sound basic education.
6. This appeal is from an Order of Supreme Court, New York County (Mendez, J.S.C.), dated November 17, 2014, and entered November 18, 2014.
7. The method of appeal being used is the full record.