To be Argued by:
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New York Supreme Court

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 PLAINTIFFS-RESPONDENTS

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PRELIMINARY STATEMENT

This case concerns New York State's (the "State") massive abdication—commencing under cover of the 2008 recession, and continuing to the present—of its constitutional obligation to ensure a structurally sound statewide education finance framework that is capable of providing all students in New York with the opportunity to obtain a sound basic education.

The Court of Appeals concluded that "by mandating a school system 'wherein all the children of this state may be educated,' the State has obligated itself constitutionally to ensure the availability of a 'sound basic education' to all its children." *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 902 (2003) (emphasis added).[1] There is no dispute that the State and no other entity—not the federal government, not local school districts, and certainly not the students—is charged with the duty to ensure New York State's education finance system is constitutionally compliant.

Plaintiffs' Amended Complaint alleges the Court of Appeals' findings and constitutional interpretations in the *Campaign for Fiscal Equity, Inc.* litigation ("*CFE Litigation*" or "*CFE*") made clear the State's obligation to comply with

[1] The three Court of Appeals decisions from the *Campaign for Fiscal Equity, Inc.* litigation are hereinafter referred to as "*CFE I*" (*Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307 (1995)); "*CFE II*" (*Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003)); and "*CFE III*" (*Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14 (2006)).

Article XI, § 1 of the New York State Constitution (the "Education Article"), not only vis-a-vis New York City, but also at the statewide, structural level.[2] Moreover, the State itself recognized its education finance system as a whole, not just concerning the 38% of students who attended New York City schools, must be designed to establish and then fully allocate State education aid based on the ascertained "actual costs" (*CFE II*, 100 N.Y.2d at 930) of providing students in *all* school districts with the opportunity to obtain a sound basic education.

Plaintiffs allege that during and following the *CFE Litigation*, the State initially fulfilled its duty to design, and then started to implement, a constitutionally compliant statewide system. Reformative efforts are exactly what would be expected from the State following judicial determinations indicating the system was constitutionally infirm. The State first undertook to fulfill its obligations through a "successful schools" cost analysis, to estimate the actual amount of funding needed to ensure all school districts would have sufficient funding to meet the constitutional sound basic education standard. This successful schools study was a fundamental building block for developing the Foundation Aid Formula, adopted and codified in N.Y. Educ. Law § 3204 in 2007. Plaintiffs allege the statutory Foundation Aid Formula, which has not been fully implemented for

[2] The Education Article mandates that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. Const. Art. XI §1.

the past six years, is the State's only funding mechanism designed to ensure State aid is calibrated directly with the opportunity to obtain a sound basic education.

Following the 2008 recession, the State eviscerated its newly compliant system. It froze and slashed funding under the Foundation Aid Formula and further enacted several unconstitutional legislative contrivances, all based on fiscal expediencies that ignore the constitutional rights of millions of schoolchildren, even though under New York law fiscal constraint does not excuse constitutional violations.

This Court should reject Defendants' untenable position that despite the fact that Plaintiffs have identified a constitutional violation concerning the structure of education finance system that applies statewide, Plaintiffs should be compelled to litigate the *CFE*-style inputs-outputs-causation test district by district for every single one of the 700 school districts in New York. Only then, according to Defendants, may Plaintiffs seek to compel the State to fully adhere to a constitutionally mandated needs-based funding process. Simply put, it is the State, not student advocates, and not the Court, that in the first instance holds the self-executing duty to design and implement a constitutionally compliant system.

Defendants' position has no support in law or common sense. The law of New York has not foreclosed Plaintiffs' viable and sensible basis for stating an

Education Article claim. The trial court correctly held the Amended Complaint states valid Education Article claims. This Court should affirm.

COUNTERSTATEMENT OF THE ISSUES PRESENTED

(1) Does the Education Article impose on the State a self-executing duty to design and fully implement structural mechanisms in its system for financing public education to ensure the system is capable of providing all students in districts statewide with the opportunity to obtain a sound basic education?

(2) Does the Amended Complaint state Education Article claims of a statewide nature by alleging the State (a) in 2007 acknowledged its obligation to design and fully implement structural mechanisms in the education finance framework, including the Foundation Aid Formula, to ensure the system is capable of providing all students statewide with the opportunity to obtain a sound basic education; (b) designed such a system, but failed to fully implement it or any alternative constitutionally compliant system; (c) adopted various contrivances to reduce or suppress State aid with no regard for ensuring State funding aligned with the "actual cost" of providing all students with the opportunity to obtain a sound basic education; and (d) failed to maintain an education finance system, including an accountability system, that accounts for current educational and economic circumstances?

(3) Does the Amended Complaint adequately allege the State has failed to provide students in New York City, specifically, with the opportunity to obtain a sound basic education, in contravention of the decisions of the Court of Appeals?

(4) Do Plaintiffs have standing and capacity to sue?

Supreme Court answered each question in the affirmative by sustaining the Amended Complaint.

COUNTERSTATEMENT OF THE CASE

I. Background of the *CFE Litigation*

The *CFE Litigation* fashioned a remedy based on the constitutional deficiencies alleged in the pleadings in that case concerning New York City. R. 19-20 (¶¶ 32-37). In *CFE II*, the Court of Appeals ordered the State to:

> (1) "ascertain the actual cost of providing a sound basic education in New York City"; (2) adopt "[r]eforms to the current system of financing school funding and managing schools [to ensure] . . . that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education"; and (3) "ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education."

R. 19 (¶ 33).

Then, *CFE III* addressed the State's failure to implement these remedial actions following an impasse between the executive and legislative branches. R. 19 (¶ 34). The legislature disagreed with Governor Pataki's proposal that $1.93

billion appropriately estimated the amount of additional funds needed to provide students in New York City with the opportunity to obtain a sound basic education. The *CFE III* court nonetheless found $1.93 billion was a rational estimate, and could serve as the lower end in the range of figures the State should consider as a possible increase needed to meet the appropriate minimum constitutional amount of funding for New York City. R. 19-20 (¶¶ 34-37).

The *CFE Litigation* also revealed fundamental structural defects existing in the State's education finance framework up through the 2006 *CFE III* decision.

At trial, the evidence proved statewide distribution of education funds was not calibrated to the actual costs of providing a sound basic education, and was not calibrated to student need in districts throughout the state. *Campaign for Fiscal Equity v. State*, 187 Misc. 2d 1, 83, 88 (Sup. Ct. N.Y. Cnty. 2001). "[R]esources [we]re not aligned with need. Those schools with the greatest need frequently ha[d] the fewest fiscal resources . . . ." *Id.* at 83. The court found it was "an open secret in Albany" that, statewide, funding was instead calibrated to the dictates of "three men in a room." *Id.* at 88. The hodgepodge of funding formulas existing at the time was a sham and the amounts of State aid different districts received were based on implicit "shares" negotiated behind closed doors based on political

considerations, unrelated to student need, during the annual budget negotiations process.[3]

CFE II concluded "[n]o one disputes the trial court's description of the existing education funding scheme as . . . not designed to align funding with need." *CFE II*, 100 N.Y.2d at 929. The court found State education funding should "be calibrated to student need." *Id.* It also found the "political process"—which manipulated statewide distribution of education funds—"allocat[ed] to City schools a share of state aid that d[id] not bear a perceptible relation to the needs of City students." *Id.* at 930. But because the record before *CFE II* concerned only New York City, the court was constrained to order the State "need only ascertain the actual cost of providing a sound basic education in New York City." *Id.* at 930.

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[3] The court found that:

> State aid has historically been divided without reference to the formulas. The evidence at trial demonstrated that the formulas and grant categories are not allowed to operate neutrally but rather are manipulated during the State's annual budget negotiations by State officials to produce consistent funding allocations of aid increases among school districts around the State. . . . [A]nnual increases in State education aid are allocated pursuant to an agreement struck by the Governor and the leaders of the State Assembly and the State Senate as part of the overall annual budget negotiations. These negotiations produce a general agreement on the overall amount to be spent on education and how it is to be distributed across the State which is then ratified by the Legislature. This phenomenon is commonly referred to as "three men in a room."

Id. (emphasis added).

II. The State Responded to *CFE* with Statewide Constitutional Reforms Culminating in Adoption of the Foundation Aid Formula.

Immediately following and in response to the *CFE Litigation*, Defendants acknowledged the inherent defects in the entire education finance system and undertook efforts to reform the system on a statewide basis. R. 10, 21-24, 53, 55-56, 63-64, 66 (¶¶ 2, 38-44, 134, 142, 145, 146, 170-73, 179). The holdings and findings made during *CFE* clarified what was required of the State to ensure its funding system complied with the Education Article.

Defendants implemented major initiatives to (1) ascertain the estimated actual cost of providing a sound basic education based on student need on a statewide basis, and (2) establish a new funding allocation methodology—the Foundation Aid Formula—to calibrate funds distribution with need, and ensure the opportunity for a sound basic education would be offered to all students statewide by the end of a four-year phase-in. R. 21-24, 63-64 (¶¶ 38-44, 170-73).

To calculate the estimated actual costs of a sound basic education, the State Education Department ("SED") first developed a "successful schools" cost analysis methodology, and further refined that methodology following *CFE III*'s order. R. 21-22 (¶ 38). SED updated the definition of "successful schools," gathered new data, and, among other reforms, added to the analysis an extra cost weighting for students living in sparsely populated rural districts. R. 21-22 (¶ 38), 64 (¶ 173); *see* Appellants' Br. at 7 ("[T]he State commissioned a study to

ascertain the cost of providing the opportunity for a sound basic education statewide."), 9-10 (The "Foundation Aid . . . formula . . . [is] based upon amounts spent on educating students in successful school districts . . . .").

The Foundation Aid Formula responded directly to *CFE*'s mandate of a simplified, needs-based funding methodology. R. 22-24 (¶¶ 39-43). It has four basic components: (1) a base amount per pupil reflecting the cost to educate students, based on the amount spent by "successful school" districts; (2) a regional cost index to ensure a dollar of State aid can buy a comparable level of goods and services around the state; (3) an expected minimum contribution by the local community; and (4) a pupil-need index recognizing added costs for providing extra time and help for students with special circumstances. R. 23-24 (¶ 43); Appellants' Br. at 10.

In January 2007, then-governor Elliot Spitzer proposed a four-year "Educational Investment Plan" to implement these constitutional reforms. R. 22, 23 (¶¶ 39, 41). The legislature overwhelmingly adopted the reforms, with a slight increase in the total funding level and other minor changes, by a vote of 60-1 in the Senate and 126-16 in the Assembly, as the Budget and Reform Act of 2007 (the "2007 Reform Act"), which is codified in N.Y. Educ. Law § 3602. R. 23 (¶¶ 41-42); *see* Appellants' Br. at 9-10 ("[T]he Legislature [enacted] . . . Foundation Aid . . . as part of the Budget and Reform Act of 2007 . . . .").

The 2007 Reform Act requires the State to provide substantial increases in State education aid, and to increase Foundation Aid, which is the constitutional touchstone of the State aid system covering teacher and principal salaries, and schools' basic operating costs. The 2007 Reform Act requires a $5.49 billion increase in Foundation Aid, according to the following four-year phase-in:

School Year	Percentage of Total Funding	Amount
2007-2008	20%	$1.1 billion
2008-2009	22.5%	$1.24 billion
2009-2010	27.5%	$1.5 billion
2010-2011	30%	$1.65 billion

R. 24 (¶ 45).

III. Since the 2008 Recession, the State Has Abandoned its Constitutional Reforms and Legislated Contrivances to Further Cut and Freeze State Education Aid Notwithstanding Actual Student Needs.

The State adhered to its constitutional reforms for the 2007-2008 and 2008-2009 school years. But with the onset of the 2008 recession, the State reverted to a noncompliant system starting in 2009-2010. R. 10 (¶ 2).

First, Foundation Aid was frozen at the level attained from the first two years of implementing the 2007 Reform Act. Foundation Aid statewide is still many billions of dollars less than the full needs-based amount determined through

the Foundation Aid Formula. R. 25-27 (¶¶ 46-51), 29 (¶ 58). Defendants have failed to adhere to a needs-based funding methodology for six years and counting. R. 24-30 (¶¶ 45-61), 55-57 (¶¶ 140-49); *see also* Appellants' Br. at 11-13.

Second, beyond abandoning the Foundation Aid Formula's needs-based methodology, the State legislated several contrivances to further reduce or suspend the already-frozen level of Foundation Aid. R. 26-29 (¶¶ 51-59), 66-67 (¶¶ 179-188). The State did so notwithstanding that the reduced levels deviated tremendously from the amount it had determined was actually needed to provide students in districts statewide with the opportunity to obtain a sound basic education. R. 55-56 (¶ 143).

Before enacting any of the statutes, the State did not account for whether the new funding levels, billion-dollar reductions from the 2007 Reform Act, comport with the actual costs of providing a sound basic education. R. 10 (¶ 3), 27 (¶ 52), 55-57 (¶¶ 143-49), 58 (¶ 153). Nor did the State account for whether these funding cuts or freezes would undermine the education finance system by misaligning funding and actual student needs. *Id.* Nor did the State repeal the 2007 Reform Act.

A. The GEA

The Gap Elimination Adjustment ("GEA") is a euphemism for legislation that cuts State education funding to levels far below those mandated by the 2007

Reform Act. Educ. Law § 3602.17. It purports to allow the State to ignore what it calls "the gap" between the money the State estimated it constitutionally must provide and distribute pursuant to the 2007 Reform Act, and the money the State in a given year is willing to allocate from its total annual budget. R. 27 (¶¶ 52-53).

The GEA was first introduced in the Executive Budget for 2010-2011 as a "one-time" $2.1 billion reduction in State education funding. R. 26-27 (¶ 51). The only stated goal was "[t]o achieve necessary State savings." R. 27 (¶ 52). Education was targeted solely because, "with education funding representing over 34 percent of State Operating Funds spending and the State continuing to face massive budget gaps, reductions in overall School Aid support are required." *Id.*

The GEA is now a permanent fixture in the State's education finance calculus. *See* R. 27 (¶ 53); Educ. Law § 3602.17). Although the GEA amounts have been reduced in recent years, the full appropriations required by the Foundation Aid Formula have not been reinstated, and the shortfall in State funding required by that Formula is approximately $4 billion statewide. R. 29 (¶ 58).

B. The Allowable Growth Cap

In the 2011-2012 budget, the governor proposed—and the legislature enacted—a cap on increases in State aid to education (the "Cap") allowing State

aid to increase annually by no more than the increase in personal income in the state for the previous year. Educ. Law §§ 3602.1(dd), 3602.18; R. 28 (¶ 54).

As with the GEAs, the Cap is legislation purporting to allow the State to simply ignore what it calls "the gap" between money the State constitutionally must provide and distribute pursuant to the 2007 Reform Act, and money the State is willing to allocate from its total annual budget.

Even though the State has chosen to waive the Cap in recent years, the Cap's very purpose is to violate the Education Article's needs-based funding requirements, and it may be invoked in future years.

C. The Supermajority Property Tax Constraint

The current education finance system includes an expectation that school districts, in accordance with their wealth, will contribute funding in addition to State aid to generate the full amount of money needed to provide students with a sound basic education. R. 28 (¶ 56).

In 2012-2013, the legislature enacted a "supermajority" (60%) vote requirement to approve a tax levy increase of a district's portion of education funding, if that increase exceeds two percent of the prior year's levy or the increase in the national Consumer Price Index, whichever is less (the "Supermajority

Constraint").[4] Educ. Law § 2023-a(2)(i); R. 28 (¶ 55). If the vote is not garnered, the district is stuck with an increase no greater than the prior year's amount, regardless of the amount actually needed to fund a sound basic education in the district. *Id.* § 2023-a(6)-(7). By design, the statute hamstrings the system's local financing component, disregarding the actual costs of providing a sound basic education (i.e., the 2007 Reform Act).

Defendant Regents agrees that "State Aid is Capped and Local Revenue-Raising Options are Constrained." The Regents' "Proposal on State Aid to School Districts for School Year 2012-13," incorporated into the Amended Complaint (*see* R. 23 (¶ 42)), evinces Defendants' full awareness of grave impacts the Supermajority Constraint and the GEA both have on education funding.[5] There, Defendant warns of the "disproportionate effect of freezing aid on high need, low wealth school districts, which rely most heavily on State funds as the largest portion of their total budgets, and have more limited capacity to raise additional

[4] There are a limited number of exemptions from the Supermajority Constraint for capital expenditures, large legal expenses in tort actions, and some pension cost increases. These exemptions count only for the purpose of determining whether a proposed levy increase requires 60% or a simple majority for approval. *Id.* § 2023-a(6).

[5] The incorporated Regents Proposal on State Aid to School Districts for School Year 2012-13 is electronically available at http://www.p12.nysed.gov/stateaidworkgroup/2012-13RSAP/RSAP1213final.pdf.

revenue through tax increases."[6] Defendant further warns that "a tax levy cap places limits on local revenue for education" by "restrict[ing] tax levy increases for local governments, [including] most school districts."[7] According to Defendants:

> The tax levy cap not only limits districts' ability to raise revenue, it also heightens the need for the equitable distribution of funding. . . . The cap is especially restrictive for low property wealth districts that are significantly limited in the amount of revenue that they can raise with each percentage point increase in the levy. . . . The wealthiest districts would be allowed a levy increase that is approximately nine times greater than the poorest districts.[8]

D. Annual Professional Performance Review Penalties

At Governor Cuomo's request, the legislature adopted a statute requiring all school districts to enter into agreements on Annual Professional Performance Review ("APPR") plans with their collective bargaining units by a date certain. R. 52-53 (¶ 131). Because New York City was unable to meet that deadline, $290 million in State aid was withdrawn from the City's schools, without any consideration of the impact on student need. *Id.* In 2015, the State enacted two statutes that again authorize withholding the entire increase in general State aid from districts that fail to enter into a new APPR plan by November 15, 2016, or to

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[6] *Id*. at 7.

[7] *Id.* at 7-8.

[8] *Id.* at 8.

fully implement that plan for all the years thereafter. *See* Educ. Law § 3012.d.11.[9] These school-aid penalty provisions were enacted with no consideration for how the reduced funding would impact the districts' ability to cover the actual costs of a sound basic education.[10]

IV. The Lower Court Denied Defendants' Motion to Dismiss the Amended Complaint.

The Amended Complaint pleads four causes of action. All are based on the Education Article and *CFE*'s findings and determinations, and all primarily address Defendants' conduct concerning the education finance system at the structural, statewide level following *CFE III*.

The first cause of action (R. 68-69) alleges, *inter alia*, that in violation of the Court of Appeals' orders in *CFE*, New York City schoolchildren are not being provided the opportunity to obtain a sound basic education because the State has abandoned a needs-based funding methodology, and has enacted statutes that further cut or suspend already-frozen State aid, disregarding funding levels the State has estimated are necessary to ensure a constitutionally compliant

[9] The SED granted the City and many other districts "hardship waivers" allowing them to delay submission of a new APPR plan to March 15, 2016. *See* "Hardship Waiver Approved," available at http://usny.nysed.gov/rttt/teachers-leaders/plans/districts/new-york-city.html.

[10] These issues are discussed in more detail in *Aristy-Farer v. State*, No. 100274/13, which was consolidated with this case and is being argued before this Court on the same calendar as the present case.

framework. The second cause of action (R. 69-71) alleges, *inter alia*, students in districts statewide are harmed by the State's aforementioned conduct because defects exist in the very design of the education finance system itself, intrinsically preventing the State from "ensuring" its system is even capable of providing all students with the constitutional opportunity. The third cause of action (R. 71-72) alleges, *inter alia*, Defendants have failed in their self-executing duty to maintain a constitutionally compliant education finance system that appropriately accounts for changing educational and economic circumstances, including an appropriate accountability system. And the fourth cause of action (R. 72) alleges, generally, that Defendants' conduct following *CFE III* cumulatively and collectively violates the right of all students in New York to be provided the opportunity to obtain a sound basic education.

Defendants moved to dismiss the Amended Complaint largely on the ground that the State's conduct impacting the education finance system at the structural, statewide level is untouchable unless student advocates first meet an inputs-outputs-causation test for every single one of the 700 school districts in New York. *See* Appellants' Br. at 18.

The court denied the motion, implicitly accepting Plaintiffs' theories concerning statewide violation of the Education Article. The court concluded as follows:

> Plaintiffs have stated potentially meritorious claims of violations of the requirements of a sound basic education under the New York State Constitution. . . . Plaintiffs' allegations of unconstitutional finance and budgetary legislation affecting funding and the provision of a sound basic education are presumed true, and the "gap elimination adjustment," . . . the cap on state aid increases . . ., and the supermajority requirements concerning increases in local property tax levies together with the penalty provisions . . . and related penalties could potentially be found irrational, arbitrary or capricious and capable of preventing a sound basic education.

R. 8.

LEGAL STANDARD OF REVIEW

"In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), . . . [the court must] determine whether, 'accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated."' *CFE I*, 86 N.Y.2d at 318 (citations omitted). The court must "accord plaintiffs the benefit of all favorable inferences which may be drawn from their pleading, without expressing . . . [its] opinion as to whether they can ultimately establish the truth of their allegations before the trier of fact." *Id.* (citations omitted). The Court of Appeals has "recognized the right of plaintiffs 'to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets a minimal standard necessary to resist dismissal of a complaint.'" *Id.* (citations omitted). "If . . . [the court] determine[s] that plaintiffs are entitled to

relief on any reasonable view of the facts stated, . . . [the court's] inquiry is complete and . . . [it] must declare the complaint legally sufficient." *Id.* (citation omitted); *see also Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994) ("We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . [even if] inartfully drafted . . . .").

ARGUMENT

POINT I

THE AMENDED COMPLAINT PLEADS EDUCATION ARTICLE VIOLATIONS AT THE STATEWIDE LEVEL

I. The State Has Failed to Implement an Education Funding Structure Designed to Provide All Students with the Opportunity to Obtain a Sound Basic Education.

A. The Education Article and *CFE* Provide Benchmarks for the Present Litigation.

Plaintiffs allege that *CFE* first clarified measures the State should proactively take to attain full compliance with the Education Article. *See supra* pp. 5-10. Based on the constitutional principles elucidated during the *CFE Litigation*, and the findings made concerning the structural defects in its funding framework, the State recognized it must establish a system designed to provide students statewide with the opportunity to obtain a sound basic education. *Id.* The State's funding methodology must at the threshold be designed and implemented to meet

actual student needs, measured by the constitutional standard, in all districts statewide. *Id.*

To be sure, Plaintiffs do *not* allege *CFE II* expressly ordered the State to undertake the statewide funding process overhaul culminating in the 2007 Reform Act and its Foundation Aid Formula. That is because the actual case and controversy the *CFE* plaintiffs presented to the *CFE* courts focused on funding deficits only for New York City. *CFE II*, 100 N.Y.2d at 928. Facts concerning harms to other school districts were not before the *CFE* courts.

But *CFE II*'s narrowed remedy was not a holding that the State's design and implementation of its education finance framework need only concern New York City to comply with the Education Article. Indeed, the Court of Appeals repeatedly held that pursuant to Art. XI, the State must "ensure the availability of a "sound basic education to all its children." *CFE I*, 86 N.Y.2d at 314; *CFE II*, 100 N.Y.2d at 902 (emphasis added).

The broader constitutional implications of *CFE* are precisely what compelled the State, in 2007, to reform its entire education finance system to fulfill its obligations on a statewide basis. The Foundation Aid Formula applies to all districts, not just New York City. The State acknowledged that the findings of unconstitutionality concerning the system as it applied to New York City also impacted districts throughout the state. The governor, legislature, and regents at

the time understood that compliance with the Education Article required the State to implement a process to allocate State aid based on actual student needs statewide. To do otherwise would have openly invited piecemeal district-by-district Education Article litigation concerning every single one of the roughly 700 school districts in New York, an irrational approach which, astoundingly, Defendants now ask this Court to endorse.

B. The State, and No Other Entity, Bears the Obligation to Design and Implement a Constitutionally Compliant Education Finance System.

The Court of Appeals has concluded the Education Article makes it the State's, and no other entity's, responsibility to ensure a constitutionally compliant education funding system. "[B]y mandating a school system 'wherein all the children of this state may be educated,' the State has obligated itself constitutionally to ensure the availability of a 'sound basic education' to all its children." *CFE II*, 100 N.Y.2d at 902 (emphasis added) (quoting *CFE I*, 86 N.Y.2d at 314). Ensuring that availability means "[t]he State must ensure that New York's public schools are able to teach 'the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.'" *CFE III*, 8 N.Y.3d at 20 (emphasis added) (quoting *CFE I*, 86 N.Y.2d at 316).

In their brief, Defendants confirm their understanding that the State bears the obligation to ensure a constitutionally compliant education funding system. In Defendants' phraseology, "[t]he State's obligation is to ensure that school districts are provided with an adequate overall funding stream." Appellants' Br. at 40. The State must "ensure adequate funding" to the local school districts, which "serve as the vehicle for the State's provision of educational resources" to students. *Id.* at 23 (emphasis added).

Conceptually, New York's education finance framework has three interdependent points: (1) The starting point—the State's methodology that establishes and allocates education aid calibrated to the estimated amount of funding needed to provide all students the opportunity to obtain a sound basic education; (2) the middle point—as Defendants describe it, the school district "vehicle" "responsible for receiving and using [S]tate funding." Appellants' Br. at 23 (quoting *NYCLU*); and (3) the end point, which is the students on the receiving end whom the State must provide the opportunity to obtain a sound basic education.

The State at the starting point is clearly the lynchpin of the system. If local districts are the "vehicle" (Appellants' Br. at 23), then the State is the driver. Thus, it is "the State [that] remains responsible . . . [for] the measures by which it secures for its citizens their constitutionally-mandated rights." *CFE II*, 100 N.Y.2d at 922

(emphasis added); *see also id.* at 924 (confirming "the simple constitutional principle that the State has ultimate responsibility for the schools"); *NYCLU*, 4 N.Y.3d at 182 (confirming "education is ultimately a responsibility of the State" notwithstanding any "sabotage" by local school districts). That is why Education Article claims are brought against the State, and focus on "the State's funding system." *CFE II*, 100 N.Y.2d at 902 (emphasis added); *see id.* at 920 (rejecting the State's "funding scheme" arguments "concern[ing] the apportionment of responsibility among various government actors").

Defendants therefore miss the mark with their argument that "funding from other sources together with state funding may" provide students with the opportunity to obtain a sound basic education. Appellants' Br. at 40 (emphasis added). Variable indiscriminate monies that might be received from other sources in any given year of course "may"—or may not—fund districts in an amount that could theoretically provide the opportunity students are entitled to.

Defendant Regents concedes the State cannot rely on funds that may, or may not, be received from the federal government to fulfill its duty to ensure a constitutionally compliant education finance system. This was made clear during *CFE*:

> [F]unding education is a State responsibility, [and] . . . [m]ost federal funds can be used only to supplement, not supplant, a state's commitment to education. In fact, . . . the No Child Left Behind Act specifically prohibits states from considering payments of federal

> education dollars under NCLB in determining the amount of State aid payable to school districts. Accordingly, the [*CFE*] Panel [of Referees] should not consider federal funds as a source to meet the State's obligation to fund education.[11]

Reliance on happenstance tied to the vagaries of funding received from non-State sources in any given year, which is what Defendants now advocate, clearly falls far short of the State's constitutional obligation to "ensure a system" designed to comply with the Education Article.

Indeed, implementing a constitutionally compliant system premised on a reliable, process-based method is exactly what the State intended to accomplish, as it knew it must, when it enacted the Foundation Aid Formula into law. Appellants' Br. at 9-10 ("[T]he Legislature created a new program, called Foundation Aid, that altered the State's method of providing general operating aid to school districts." (emphasis added)).

C. Contrary to Defendants' Implications, the Foundation Aid Reforms Were No Mere Gratuitous Undertaking.

According to the 2007-2008 Executive Budget, "[t]he new Foundation Aid formula link[ed] school funding to the cost of a successful education and

[11] Memorandum of Law on Behalf of Amicus Curiae New York State Board of Regents at 18 (Sup. Ct. N.Y. County Index No. 111070/93) (emphasis added).

allocate[d] State Aid in a transparent, equitable, and predictable manner."[12] The Foundation Aid "method" "had several goals including adequate funding for a sound basic education in response to the Campaign for Fiscal Equity decision." R. 23 (¶¶ 42-43).[13] The objective was "to provide a statewide solution to the school funding needs highlighted by the Campaign for Fiscal Equity Law Suit." R. 22 (¶ 39).[14] To attain the objective, the SED performed an extensive cost study, and that costing-out work formed a cornerstone of the Foundation Aid Formula. *See supra* pp. 8-9. The costing-out work estimated additional funding needed to provide students in districts statewide with the opportunity to obtain a sound basic education, because doing so was a necessary prerequisite to calibrating funding with actual student needs.

The "Regents Proposal on State Aid to School Districts for 2007-08," incorporated into the Amended Complaint (*see* R. 21-22 (¶ 38)), explains in detail

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[12] Paragraph 39 of the Amended Complaint incorporates the "Educational Investment Plan," contained in the 2007-2008 Executive Budget, Investing in Education, which is electronically available at http://www.budget.ny.gov/pubs/archive/fy0708archive/fy0708littlebook/Education.html.

[13] Paragraphs 42-43 of the Amended Complaint incorporate the New York State Board of Regents, Proposal on State Aid to School Districts for School Year 2012-13, which is electronically available at http://www.p12.nysed.gov/stateaidworkgroup/2012-13RSAP/RSAP1213final.pdf.

[14] Quoting the "Educational Investment Plan," *see supra* note 12.

the process and methodology the SED followed for its costing-out work.[15] The robust explanation, detailed in a section entitled "Estimating the Additional Cost of Providing an Adequate Education,"[16] leaves no doubt what the State intended to accomplish. The SED explained that it was calculating its estimate of the additional funds needed to provide a "sound basic education" under the conditions existing at that time, and not the costs of an aspirational education in excess of a "sound basic education."[17]

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[15] The incorporated Regents Proposal on State Aid to School Districts for 2007-08 is electronically available at http://www.p12.nysed.gov/stateaidworkgroup/2007-08RSAP/rsap0708.pdf.

[16] *See id.* at 44 ("The purpose of this report is to describe the methodology that was used to estimate the likely additional expenditures needed by districts with lower academic performance to achieve educational outcomes that demonstrate that an adequate education is being provided.").

[17] *See id.* at 52:

> The notion of an adequate education implies one that provides all students with the opportunity for a sound basic education, not one that goes beyond this particular standard. As Justice DeGrasse explains in his [CFE] decision, 'the Education Article requires a sound basic education, not one that is state of the art.' He further explains that 'the Court repeatedly used the terms 'adequate,' 'basic,' and 'minimally adequate' to describe the education to be provided to the State's public school students (State Supreme Court Decision,[ ]719 N.Y.S.2d 475, January 9, 2001, p.15).

Accordingly, the Foundation Aid Formula and the 2007 Reform Act were constitutional reforms. They were not mere "state support for public education in New York." Appellants' Br. at 8.

The Amended Complaint properly pleads a statewide violation of the Education Article by the State's abandonment of its only attempt to implement a process-based funding methodology—the Foundation Aid Formula. It further pleads the State's enactment of statutes that by design prevent school districts from receiving funding the State itself determined was needed to provide students with the opportunity to obtain a sound basic education. If the State fails and refuses to distribute the funding it determined is needed to provide students the opportunity to obtain a sound basic education, then the State violates its constitutional obligation to ensure a system that is capable of providing students with that educational opportunity.

D. *CFE*-Style Inputs-Outputs-Causation Tests for All 700 Districts in New York Is the Wrong Template to Address the State's Education Article Violation in This Case.

Justice Mendez correctly concluded the Amended Complaint pleads violations of the Education Article at the statewide level (R. 8), and Defendants' opposition to the Amended Complaint hinges on false precepts unsupported by New York law. New York law does not dictate an Education Article claim can only "be established for each individual district, rather than as a state-wide matter."

Appellants' Br. at 19. Nor does New York law require "a statewide claim . . . must be founded on concrete factual allegations of constitutional educational deficiencies in each of the State's nearly 700 school districts." Appellants' Br. at 21 (emphasis added).

Paradoxically, notwithstanding the State's obligation to ensure a constitutionally compliant system, Defendants appear to argue the State has no self-executing duty to design and implement a funding system that fully aligns State aid with actual student needs. In Defendants' view, the State need not in the first instance fully allocate the amount of State aid it has calculated is needed to provide students with the opportunity to obtain a sound basic education. Rather, according to Defendants, such failures are categorically unchallengeable unless and until plaintiffs conduct a district-by-district, inputs-outputs-causation analysis for every one of the 700 school districts in New York. If even one district by happenstance passes those tests, Defendants imply, the State's framework is constitutionally compliant and Plaintiffs can have no claim against the State for relief of any statewide nature.

Surely the State does not have judicial imprimatur to operate an education finance system like that. Surely the State is not permitted to claim to fulfill its constitutional obligations following court rulings, through structural safeguards implemented at the statewide level, only to shortly thereafter abandon those

mechanisms and revert to business as usual until student-advocate plaintiffs file suit. That result would improperly make it plaintiffs' and the courts' obligations to in both the first and the last instance "ensure" New York's education finance framework complies with the Education Article.

The Court should reject Defendants' untenable position.

1. *Defendants' Position Is Not Supported by the Law*

New York law does not preclude an Education Article claim challenging the State's failure to implement structural mechanisms that ensure its framework is capable of providing students the opportunity to obtain a sound basic education. If Plaintiffs' allegations are "novel" (Appellants' Br. at 1), that is only because *CFE* for the first time clarified the need to reform the structure of the system on a statewide basis, and Plaintiffs are the first to challenge Defendants' failure to carry out those necessary reforms.

Indeed, none of the cases Defendants cite challenged defects in the State's funding system at the structural, statewide level.

a. In *Paynter v. State*, African-American students in the Rochester Central School District ("RCSD") brought claims against the State seeking relief concerning only their district. 100 N.Y.2d 434 (2003). They alleged the Education Law's residency and non-resident tuition requirements caused poverty concentration and racial isolation that decreased student performance in their

district. *Id.* at 438-39. The RCSD students wanted to make it the "State's responsibility to change the school population until the results improved." *Id.* at 441. The claim was noncognizable because, unlike here, it in no way concerned the State's funding system. *Id.* at 438-39. The *Paynter* court refused to recognize an Education Article claim based on circumstances it held were outside the bounds of the State's obligation to maintain a constitutionally compliant education finance framework.

Defendants thus misrepresent *Paynter* as standing for the proposition that an Education Article claim cannot be pleaded "as a state-wide matter." Appellants' Br. at 19.

b. In *New York Civil Liberties Union v. State* ("*NYCLU*"), the plaintiffs brought claims concerning twenty-seven *schools*, and, as in *Paynter*, failed to clearly link their Education Article allegations to any defects in the State's funding system. 4 N.Y.3d 175, 179 (2005). The plaintiffs wanted the State to discover unspecified failings in their individual schools, and then work directly with those schools, not with the school districts, to remedy the purported failings. *Id.* at 178-79. The claim was dismissed because plaintiffs had not "articulate[d] . . . the asserted failings of the State," and because working directly with individual schools would bypass local districts and "subvert local control." *Id.* at 180, 181-

82. In the present case, Plaintiffs do clearly articulate the "failings of the State," and do not ask the State to bypass local school districts.

c. In *New York State Association of Small City School Districts, Inc. v. State*, a standing case, the plaintiffs challenged the amount of funding the State's education finance system had allocated to eighteen small city school districts. 42 A.D.3d 648 (N.Y. App. Div. 2007). The complaint did not challenge the basic structure of the statewide system and its impact on the other approximately 682 districts in the state. Indeed, the Third Department highlighted that plaintiffs' "complaint . . . does not address any specific defects or illegalities in the State's methodology in allocating funds." *Id.* at 650..

d. The First Department's decision in *New York City Parents Union v. Board of Education* also fails to support Defendants' position that an Education Article challenge cannot focus on conduct at the structural, statewide level. 124 A.D.3d 451 (N.Y. App. Div. 2015). There, the plaintiff failed to state an Education Article claim because they did not allege a districtwide, let alone statewide failure, in simply alleging "traditional public school students" received an education "inferior to that provided to co-located charter school students." *Id.* at 451.

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In sum, none of the cases cited by Defendants foreclose Plaintiffs' ability to plead an Education Article claim of a statewide nature. And as explained below, not only has the Court of Appeals left the door open to variations on how an Education Article claim may be pleaded, it has in fact explicitly left the door open for claims challenging the State's education finance system at the structural level.

2. *The Court of Appeals Has Authorized, Not Foreclosed, Plaintiffs' Ability to Plead an Education Article Claim by Challenging Structural Defects in the State's System*

Court of Appeals' decisions have not "dictated" *CFE*'s inputs-outputs-causation model as the only way to plead an Education Article claim. Appellants' Br. at 25. Nor has the Court of Appeals circumscribed the limits of how plaintiffs can challenge the State's conduct in relation to the Education Article. On at least two occasions, the Court of Appeals indicated New York courts have yet to flesh out the full contours of such claims. And on a third occasion, it acknowledged plaintiffs may plead a claim based on the Education Article by challenging structural defects in the State's education finance system.

a. *Paynter*. Defendants repeatedly cite *Paynter* for their position that the only conceivable way to raise an Education Article claim is by using the district-centric inputs-outputs-causation analyses the *CFE* courts found appropriate for the claims raised in that case. Appellants' Br. at 19, 20, 21, 27. But *Paynter* stands for the opposite notion:

> [A]s a logical and jurisprudential matter, we recognize that in CFE I we addressed the sufficiency of the pleadings then before us and had no occasion to delineate the contours of all possible Education Article claims.

Paynter, 100 N.Y.2d at 441 (emphasis added). *Paynter* expressly framed the inputs-outputs-causation test as simply being "the elements of the CFE plaintiffs' viable Education Article claim" in that particular case. *Id.* at 440. *Paynter's* Education Article claim failed because it did not even concern the State's education finance framework. *See supra* pp. 29-30.

b. *NYCLU.* Defendants likewise repeatedly cite *NYCLU* to argue an Education Article claim necessarily must focus only on districts. Appellants' Br. at 21, 23, 25, 26. But again, *NYCLU* does not stand for that. The *NYCLU* court plainly acknowledged the boundaries of an Education Article claim had not yet been formed. 4 N.Y.3d 175. The court there declined to "explore those contours" only because, as discussed *supra* pp. 30-31, the *NYCLU* plaintiffs did not even clearly allege defects in the State's funding system, could not identify any specific failings of the State, and wanted the State to discover the supposed failings and work directly with individual schools to fix them. *Id.* at 180 & n.2, 182.

c. *Reform Educational Financing Inequities Today (R.E.F.I.T.) v. Cuomo*, 86 N.Y.2d 279 (1995). The Court of Appeals decided *R.E.F.I.T.* the same day it decided *CFE I.* Plaintiffs in *R.E.F.I.T.* sought a declaration that "New York's system for financing its public elementary and secondary schools [wa]s

unconstitutional." 86 N.Y.2d at 283 (emphasis added). Plaintiffs alleged "the statutory scheme by which New York finances its public schools violates the Education Article." *Id.* (emphasis added). They further alleged the Court of Appeals' decision in *Board of Education, Levittown Union Free School District v. Nyquist*, 57 N.Y.2d 27 (1982), had "left the door open for a challenge to the constitutionality of the *educational financing structure*." *Id.* at 284.

The *R.E.F.I.T.* court agreed the door is open for pleading an Education Article claim through allegations of structural defects in the education finance system. Although the court affirmed dismissal of the claim, it pointedly modified the Appellate Division's affirmance to indicate future plaintiffs could attempt to plead an Education Article claim by directly challenging defects in the State's funding scheme. The court "modif[ied] to declare that the school financing scheme of the State of New York has not been shown in this case to be unconstitutional." *Id.* at 285 (emphasis added).

The claim in *R.E.F.I.T.* failed because plaintiffs there rehashed claims concerning disparities in levels of funding provided to various school districts previously rejected in *Levittown*. *Id.* at 284-85. Critical was that the *R.E.F.I.T.* plaintiffs' claim did not allege the structural defects in any way prevented provision of the opportunity to obtain a sound basic education. *Id.* at 285.

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For these reasons, Court of Appeals precedent supports, not forecloses, the structural, statewide claims alleged in the Amended Complaint.

3. *Defendants' Position Is Irrational*

The irrationality of the State's position that it will fix the broken structure of its system only after student-advocates prove inputs-outputs-causation for every single one of the 700 districts in New York is self-evident, but warrants emphasis. It took thirteen years of litigation and three trips to the Court of Appeals for the *CFE* plaintiffs to prove students in a single large district were being deprived of their constitutional rights. Litigation involving 700 districts could drag on for decades, overwhelming the judiciary's institutional capacity.

That is why the courts in more than two dozen states in which similar challenges have been brought have uniformly held plaintiffs may plead statewide claims without alleging harm in each individual district. *See, e.g.*, *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) (allowing statewide organization, 7 school districts, and 22 students from 6 school districts to challenge the statewide education finance system on behalf of all students in the state); *Lobato v. State*, 218 P.3d 358, 362 (Colo. 2009) (allowing 14 school districts and parents of students in 8 school districts to proceed on a claim the statewide school financing system was underfunded and distributed funds on an irrational and arbitrary basis). Plaintiffs are aware of no state, and Defendants cite none, that has

ever required plaintiffs to provide evidence of inputs and outputs for every district in the state to fix a structural defect in the system.[18]

E. Even Assuming, Arguendo, Plaintiffs Were Required to Allege Specific "Inputs" and "Outputs" on a Statewide Basis, the Amended Complaint Does So.

Plaintiffs may state an Education Article claim with allegations of structural defects in the State's education finance system. Regardless, the Amended Complaint's lengthy discussion of recent reductions of State funding, and their impact on students' educational opportunities, provides sufficient detail concerning the effect of funding reductions on educational services (inputs) and student achievement (output) sufficient to survive Defendants' motion to dismiss.

The Amended Complaint contains over 67 paragraphs detailing the impact of the State's reduced funding on students in New York City and throughout the state. Defendants dismiss these hundreds of allegations because they purportedly are "too sparse," and supposedly contain insufficient statistics and quantitative indicia of systemic impact to state a claim. Appellants' Br. at 26.

[18] If, as Defendants would have it, plaintiffs were compelled to litigate the full evidentiary paces of trials and appeals concerning 700 school districts, the extensive delays involved would infringe the rights of generations of students. Even if plaintiffs prevailed in that protracted litigation, the cycle of constitutional non-compliance and litigation would begin anew under color of law if the State again failed to implement a constitutionally compliant system and plaintiffs were again compelled to litigate to uphold their rights.

Defendants essentially demand that Plaintiffs plead the extensive facts and statistics a party can obtain only after full discovery. They cite no authority for this erroneous proposition, however, because that is not the pleading standard applicable on a motion to dismiss. *See supra* pp. 18-19.

Even so, the Amended Complaint does contain numerous concrete allegations of systemic violations. For example, paragraphs 62-74 discuss in detail the impact of a number of new unfunded mandates the State has recently imposed on all school districts, and that these mandates have "put additional financial stress on school districts that have not received sufficient resources to meet their pre-existing instructional and operational obligations." R. 34 (¶ 73). Paragraph 83 alleges the State Comptroller has declared that "87 school districts in New York State are currently in conditions of financial stress." R. 37.

Plaintiffs have also alleged that "hundreds of thousands of students in Buffalo, Rochester, Syracuse and Yonkers, and in numerous other rural, small city and suburban districts are currently being denied the opportunity for a sound basic education on a systemic basis" because they lack qualified teachers, up-to-date curricula, and instructional materials. R. 53-54 (¶ 135-36). Extremely low achievement test scores and outcome statistics are cited for all of these districts in paragraphs 128 and 139 (R. 51, 55), and the specific problems they face are illustrated through a detailed analysis of the inability of Syracuse schools to

provide students a sound basic education, despite heroic efforts to do so within current funding levels (R. 38-40 (¶¶ 85-92)).

Defendants wrongly claim that insufficient detail has been pleaded regarding inputs and outputs in New York City. Plaintiffs pled 39 detailed paragraphs (R. 41-53 (¶¶ 93-133)), replete with hundreds of factual allegations and statistics regarding the impact of the budget shortfalls on City students in the areas of qualified personnel, suitable curricula, expanded platform of services to help "at-risk" students, adequate resources for students with disabilities and English language learners, appropriate class sizes, current books, libraries, technology and laboratories, a safe, orderly environment, and adequate and accessible facilities.[19]

[19] Defendants claim Plaintiffs' allegations are "short on specifics," and fault the Amended Complaint for alleging "many" but not "most" schools in the City exhibit various resource deficiencies. Appellants' Br. at 28. However, among the 39 paragraphs describing resource deficiencies throughout the City's schools are very many concrete statistical allegations. *See*, *e.g.* R. 48-49 (¶¶ 116-118 (average class sizes are above Court of Appeals benchmarks and above state-approved class size targets)); R. 50 (¶ 123 (30% of high school students do not have access to art or music rooms; 11% of schools lack libraries; 45% of schools that have libraries have diminished access; 16% of high schools lack science labs)). Plaintiffs have also alleged that "most" schools are failing to provide mandated AIS remedial services (R. 44 (¶101)) and that "most" schools in the City lack sufficient funds to purchase up-to-date textbooks and curricula aligned with the common core (R. 46 (¶110)). Moreover, the reason specific statistics are not pled in some other areas is that after the *CFE* trial, the State stopped issuing the "655 report," a detailed statistical summary of education resources for New York City and all other districts in the state, which was a major source of information for plaintiffs in *CFE*. At this time, many of these statistics can only be obtained through discovery, which has not commenced in this case.

The Amended Complaint also cites unacceptably low citywide outcome statistics on achievement tests and graduation rates. R. 53 (¶¶ 132, 133).[20]

F. Separation of Powers Principles Support Plaintiffs' Claims.

The careful balance that must be struck between the judiciary and the legislature where the State's budgetary powers are implicated is no barrier to Plaintiffs' claims. Indeed, Plaintiffs' claims sit plumb in the realm of constitutional claims for which judicial intervention is most appropriate.

The law of New York disagrees with Defendants' view the judiciary cannot confront the State's conduct here simply because legislation regarding education funding is at issue. Appellants' Br. at 1, 23-25. Contrary to Defendants' view, "Courts are, of course, well suited to . . . extrapolate legislative intent . . . [and are] also well suited to interpret and safeguard constitutional rights and review

[20] Defendants' comparisons of the allegations in the Amended Complaint with those they interpret as being more specific in *CFE* (Appellants' Br. at 30-31, 34-35) are erroneous and misleading. Numerous allegations in the *CFE* complaint are worded in terms of "many" students being deprived of certain services. *See, e.g.*, ¶ 52 ("many" students are being denied access to mandated courses; "many" lack sufficient laboratory facilities); ¶ 54 ("many" are being denied instructional materials needed to meet minimum state standards); ¶ 69 ("thousands of students" are not receiving mandated remedial services), *cf.* R. 44 (¶ 101 (*most* schools are not providing mandated AIS remedial services)). In terms of outputs, the Amended Complaint (R. 53 (¶ 132)) alleges that only 26% of third graders met the proficiency standard the State has now established, compared with 40% of third graders who were below proficiency levels according to the *CFE* complaint (¶ 64).

challenged acts of [thei]r co-equal branches of government—not in order to make policy but in order to assure the protection of constitutional rights." *CFE II*, 100 N.Y.2d at 931 (citation omitted). "That is what . . . [courts] have been called upon to do by litigants seeking to enforce the State Constitution's Education Article." *Id.*; *see also Levittown*, 57 N.Y.2d at 39; *Hussein v. State*, 19 N.Y.3d 899, 901 (2012) (Ciparick, J., concurring) (quoting *CFE II* and *Levittown*).

New York's system of government does not permit the State to serve as its own "constitutional watchdog" concerning education funding; "nor does it allow . . . [the Court] to abdicate . . . [its] function as 'the ultimate arbiters of our State constitution' . . . simply because public funds are at stake." *Hussein*, 19 N.Y.3d at 903 (Ciparick, J., concurring) (in part quoting *CFE III*).

Defendants misstate Plaintiffs' allegations as an "attempt to transmute the judgments of the Legislature and Governor, as reflected in 2007's public-school funding legislation, into judicially enforceable constitutional norms." Appellants' Br. at 41. But Plaintiffs do not allege the State acted in an abstract vacuum when it adopted the 2007 Reform Act and the Foundation Aid Formula. Rather, Plaintiffs allege the State knew <u>from the judicial determinations and findings made in the CFE Litigation</u> what structural reforms were needed to ensure the education finance system complies with the Education Article at the statewide level. The State fashioned, and then legislatively enacted, the reforms it determined were

necessary to meet those constitutional obligations, i.e., the Foundation Aid Formula and the 2007 Reform Act.

Implementing reform measures through legislation is exactly how the State is supposed to respond to concerns that an existing law or system is not in compliance with the state constitution on the heels of judicial determinations and findings about that law or system.

Plaintiffs do not contend the Foundation Aid Formula is the only possible mechanism through which the State can fulfill its constitutional obligations. Plaintiffs thus also do not contend subsequent legislatures have no power to deviate from the Foundation Aid Formula. *See* Appellants' Br. at 42 n.26 ("[T]he Legislature in 2007 could not have enacted education funding formulas from which future lawmakers could not depart . . . ."). The gravamen of Plaintiffs' funding process claims is that the State—as it acknowledged by enacting the Foundation Aid Formula—has a self-executing, constitutional duty to have a compliant mechanism at the front end of its education finance system before that system is even arguably capable of "ensuring" students in all districts are provided the opportunity to obtain a sound basic education. That mechanism must calculate and fully allocate State aid based on the amount of funding the State estimates is actually needed to provide the opportunity. Plaintiffs state a claim that the State is not currently adhering to that constitutional duty because it has failed to implement

the Foundation Aid Formula it adopted in 2007 after analyzing student needs and constitutional requirements, and has undertaken no subsequent process to reconsider current costs or to create an alternative constitutionally compliant system.

For similar reasons, Plaintiffs state a claim that the State's education finance system does not currently comply with the Education Article because the State has enacted various statutes intended to prevent districts from receiving, or generating, the full amount of needs-based funding the Foundation formula calls for. *See supra* pp. 10-16. All education funding legislation must account for the requirement that funding be established and fully allocated based on the amount the State determines is actually needed in districts statewide. The Amended Complaint adequately alleges the current framework is unconstitutional because current education funding legislation does not meet that requirement. *See id.*

G. Fiscal Budgeting Constraints or Desires Cannot Abridge Constitutional Rights

Longstanding New York law forecloses Defendants' argument that "revenue constraints caused by ongoing economic difficulties" could ever justify abandoning a constitutionally compliant education finance system. Appellants' Br. at 11-13; *see, e.g.*, *Sloat v. Bd. of Exam'rs of Bd. of Educ. of City of N.Y.*, 274 N.Y. 367, 370 (1937) ("Disobedience or evasion of a constitutional mandate may not be tolerated even though such disobedience might, perhaps, at least temporarily, promote in

some respects the best interests of the public."). No matter how real or dire, fiscal considerations never justify curtailment or delay of constitutional rights.

In *Sgaglione v. Levitt*, the Court of Appeals invalidated the New York State Financial Emergency Act. 37 N.Y.2d 507, 514 (1975). The case pitted "the obviously compelling and urgent stringency with which the city and State [we]re faced" against the state constitution's non-impairment clause. *Id.* at 511 (emphasis added). The Court concluded the statute was unconstitutional and the legislature was "powerless" to abridge public employees' constitutional rights notwithstanding the dire straits faced by the city and the State. The court "was not at liberty to hold otherwise," even if the "system will be plunged into bankruptcy." *Id.* at 512, 514 (emphasis added).

In *Flushing National Bank v. Municipal Assistance Corporation for the City of N.Y.*, the Court again rejected the fiscal hard-times defense where a law delayed entitlement to a constitutional right. 390 N.Y.S.2d 22 (1976). There, the Emergency Moratorium Act was unconstitutional because its three-year freeze on actions to enforce the City's debt obligations abrogated creditors' rights under the "faith and credit" clause of the state constitution. *Id.* at 732-33. As in *Sgaglione*, the court had no problem rejecting the defense of "insufficient funds," even at the

risk of potential national disaster. *Id.* at 736, 739 ("The portrait [of dire straits] is a correct one, but the duty of this court is to determine constitutional issues. . . .").[21]

Sgaglione and *Flushing National Bank*, which resoundingly rejected the "fiscal hard times" defense to constitutional violations, equally compel rejection of that same infirm rationale from the State now, if not even more so.

II. Plaintiffs' Allegations Concerning the State's Failure to Implement Appropriate Accountability Mechanisms Plead a Statewide Education Article Claim.

A. The *CFE*-Style Inputs-Outputs-Causation Test Is the Wrong Template to Resolve the Third Cause of Action.

Plaintiffs' third cause of action (R. 71-72) states a constitutional violation in the State's systemic failure to respond to the changed conditions of the recession and maintain a constitutionally adequate education finance system, including a constitutionally compliant accountability system.

Defendants first argue the claim should be dismissed because such a claim may turn only on district-centric allegations of "gross and glaring . . . educational

[21] The Court of Appeals has consistently reaffirmed that resource constraints provide no basis to excuse constitutional violations. *See Hurrell-Harring v. State*, 15 N.Y.3d 8, 11 (2010) (the need to "reorder[] legislative priorities" in times of fiscal "scarcity" "does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right"); *Klostermann v. Cuomo*, 61 N.Y.2d 525, 537 (1984) (rejecting argument that there "simply [was] not enough money to provide the services that plaintiffs assert[ed] [were] due them" as "particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights").

deficiencies." Appellants' Br. at 48. But this claim, too, properly attacks the structure of the education finance system and is thus of a statewide nature. Defendants' argument should therefore be rejected for all the reasons explained above. *See supra* pp. 19-36.

B. Challenging the State's Accountability System Is Neither "Unprecedented" Nor "Unfounded"

Defendants further argue the third cause of action should be dismissed because it is purportedly an "unprecedented and unfounded attempt to micromanage the manner in which the State creates, delivers, and monitors pedagogical services." Appellants' Br. at 48.

In *CFE II*, however, the Court of Appeals underscored the need for an education finance framework to have a "system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education." *CFE II*, 100 N.Y.2d at 930. In *CFE III*, the Court of Appeals then directed the courts to do precisely what Defendants now call "unprecedented": analyze whether the State's accountability system is constitutionally sufficient. As Defendants recognize, *CFE III* held there were then adequate systems in place to assess accountability. Appellants' Br. at 49-50. The court even noted it had remitted the case for the trial court to determine whether the State had implemented the reforms the Court of Appeals held were constitutionally required. *See CFE III*, 8 N.Y.3d at 29. Thus, a constitutional claim that the State has failed to ensure an education

finance system with appropriate accountability is neither "unprecedented," nor "unfounded"; it is rooted firmly in the *CFE Litigation*.

Moreover, to the extent Defendants contend a remedy might potentially result in judicial "micro-management" of education services, that argument is premature on a motion to dismiss. *See CFE I*, 86 N.Y.2d at 316 (stating "[t]he question of remedies is not before the Court" on a motion to dismiss). Plaintiffs have adequately alleged the current educational services in place are insufficient to meet the constitutional standard, and the Court may determine and order the relief it deems appropriate at the proper stage of this action. As discussed above, the Court is well within its authority to craft judicial relief to remedy the specific harms before it. *See supra* pp. 39-42.[22]

C. The Current Accountability System, and Current Educational and Economic Circumstances, Are Markedly Different from Those Existing During *CFE*.

Defendants' argument that the Court of Appeals "already rejected the claim that the State's efforts are inadequate" regarding an accountability system fares no better. Appellants' Br. at 50. *CFE III* considered a vastly different set of facts and a vastly different accountability system, as Plaintiffs have pleaded. *See, e.g.*, R. 32-34 (¶¶ 67-68, 71-72). Defendants revised the accountability system assessed by

[22] Nor does Defendants' argument that "local control" requires dismissal of Plaintiffs' third cause of action pass muster. The Court of Appeals addressed these issues in *CFE III* and did not find that the requirement of an accountability system infringed local control. *CFE II*, 100 N.Y.2d at 930; *CFE III*, 8 N.Y.3d at 29.

CFE when they adopted the 2007 Reform Act and, among other things, created new, extensive obligations through the "contract for excellence." Educ. Law § 211-d. In recent years, Defendants have adopted even further additional accountability requirements. *See, e.g.*, R. 32-34 (¶¶ 67-68, 71-72).

Since the State has substantially reduced funding, it has become virtually impossible for school districts to comply with the Regents' learning standards. R. 32-32 (¶ 66). And Plaintiffs have pleaded that Defendants have failed to provide the schools with guidance as to which standards and regulations are constitutionally essential, and which are not. R. 60 (¶¶ 157-160). The only guidance school districts have received from the State is to "do more with less." R. 60 (¶ 158).

In sum, Plaintiffs have alleged the State has "failed since 2009[] to respond to changes in fiscal and educational conditions." R. 71 (¶ 195). Thus, although *CFE III* found the accountability system before it adequate at <u>that</u> time, Plaintiffs have alleged the system is <u>now</u> deficient, based on both the state of the current system and the educational circumstances as they now exist. Defendants' contention that the State "already provides substantial educational and fiscal guidance to school districts" (Appellants' Br. at 50-51) does not resolve the claim and is a non-sequitur at the motion to dismiss stage where, as the trial court did here, factual averments pleaded in the complaint are to be deemed true.

D. The State Cannot Ensure a Constitutionally Compliant System If It Never Adjusts to Current Conditions

Defendants correctly note that the Court of Appeals rejected the *CFE* plaintiffs' call to require the State to conduct a cost study every four years. *See CFE III*, 8 N.Y.3d at 32. But by concluding it was unnecessary to order that a new review be conducted every four years, the Court of Appeals did not mean that funding need not be based on the "actual cost" of providing a sound basic education, nor be calibrated directly in line with actual student needs.

Accordingly, even though Defendants are not required to conduct a cost study every four years, per se, Plaintiffs allege Defendants must nonetheless do so at some regular interval. Defendants certainly must do so if they choose, as they have done here, to abandon the framework they proactively designed to attain compliance with the Education Article following the findings and determinations made in *CFE*. *See supra* pp. 5-16, 19-27.

Defendants have abandoned the Foundation Aid Formula, but they are not absolved of their self-executing duty to maintain a constitutionally compliant education finance framework. The work underlying the 2007 Foundation Aid Formula is—not surprisingly—now outdated. R. 63-67 (¶¶ 170-86). Given the changed economic circumstances that even Defendants repeatedly emphasize (*see, e.g.*, Appellants' Br. at 12-14 (emphasizing "revenue constraints caused by ongoing economic difficulties")), the State simply cannot ensure a compliant

system is put back in place—through a modified Foundation Aid Formula or otherwise—without first studying the current conditions and needs districts face in providing a sound basic education, and then incorporating those findings into the structure of the system.[23]

POINT II

THE AMENDED COMPLAINT ADEQUATELY ALLEGES VIOLATIONS OF NEW YORK CITY SCHOOLCHILDREN'S RIGHT TO A SOUND BASIC EDUCATION

Supreme Court correctly sustained Plaintiffs' claims alleging the State has failed to ensure New York City schoolchildren are provided the opportunity to obtain a sound basic education. Concerning the City, the Amended Complaint alleges that (a) the State's failure to fully adhere to a needs-based funding process, and provide the requisite State aid, calculated and allocated by the Foundation Aid Formula or through a constitutionally compliant alternative system, has deprived

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[23] As the Supreme Court of Arkansas put it in enforcing the framework for constitutional compliance it had established:

> Without a continual assessment of what constitutes an adequate education, without accounting and accountability by the school districts, without an examination of school district expenditures . . . the General Assembly is "flying blind" with respect to determining what is an adequate foundation-funding level.

Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 220 S.W.3d 645, 654-55 (Ark. 2005); *see also, e.g.*, N.H. Rev. Stat. Ann. § 193-E:3-b ("Accountability for the Opportunity for an Adequate Education"); Me. Revised Stat. Ann. § 15686-A ("Review of Essential Programs and Services Components").

City students of their opportunity to obtain a sound basic education; (b) the State's statutory contrivances reduced funding to the City even further below the amount the State had determined to be necessary to meet actual student needs; and (c) alternatively, even the minimum $1.93 billion "estimate" "endorsed" by *CFE III* has not been provided. R. 68 (First Cause of Action); *see also* R. 10 (¶¶ 2-4), R. 18-30 (¶¶ 30-61), R. 55-56 (¶¶ 143-46).

Thus, as with Plaintiffs' Education Article claims concerning all school districts, the claims concerning New York City, specifically, also principally center on Defendants' failures to adhere to the constitutional reforms enacted into law by the 2007 Reform Act following *CFE III*.

I. The Amended Complaint Properly Focuses on the 2007 Reform Act, Even for New York City.

It is Defendants, not Plaintiffs, who "misread" (Appellants' Br. at 45) the import of *CFE III* and the comprehensive reforms initiated by the State both during and after the *CFE Litigation*.

A. *CFE III* "Endorsed" an "Estimate"

Defendants misconstrue the meaning of *CFE III* with their argument that the Reform Act was merely a "policy choice" to exceed a supposedly inflexible minimum amount of constitutionally determinate funding for the City. Appellants' Br. at 47. They do, however, acknowledge *CFE III* only "endorsed" $1.93 billion as a potentially viable "estimate." Appellants' Br. at 8 n.2, 15, 43, 44, 46. So

while *CFE III* may have "approved of" (*id.* at 45) $1.93 billion as a "reasonable remedial estimate" (*id.* at 44), "acceptable" (*id.*), "adequate" (*id.* at 46), and "satisfactory" (*id.*), the court understood it should not in the first instance assume responsibility for estimating the most appropriate constitutional funding increase. That is why, consistent with its emphasis on deference to the legislature, the court correctly left the decision on determining the methodology and estimated State aid needed to provide a sound basic education to its coordinate branches of state government, which then chose to adopt the 2007 Reform Act and its Foundation Aid Formula.

There is no immutable "constitutional floor" to be divined here. There is no magic number. The "actual costs" concept, *CFE II*, 100 N.Y.2d at 930, is one of best estimates, based on rational assessment. Best estimates will necessarily fluctuate in range over time based on many factors including evolving state education standards, changes in technology, changes in career orientation that impact supply-and-demand for teachers, and changing student demographics, in terms of both student quantity and quality. This reality underscores why the Education Article requires the State to have in place a solid framework, founded on process, to ensure students' constitutional rights are properly safeguarded on an ongoing basis.

Accordingly, because actual costs can only be estimated, the Court's only role is to determine whether the State's calculations were rational. *CFE III* could not have been clearer: "The role of the courts is not . . . to determine the best way to calculate the cost of a sound basic education . . ., but to determine whether the State's proposed calculation of that cost is rational." *CFE III*, 8 N.Y.3d at 27.

For all those reasons, Defendants' argument that $1.93 billion, or any "estimate" "endorsed" by the judiciary, sets a fixed constitutional determination from which the legislature cannot deviate also makes no sense from a practical standpoint. If Defendants were correct, the judiciary, not the State, would be charged with in the first instance ensuring a constitutionally compliant system, and the State could never adapt its system to changed circumstances without returning for the court's approval every time.

B. *CFE III*'s Posture Supports Plaintiffs', Not Defendants', Position

To be clear, as alleged in the Amended Complaint (R. 19-21 (¶¶ 32-37)), directly at issue in *CFE III* was the State's failure to meet the compliance deadline the Court of Appeals had established in *CFE II*, 100 N.Y.2d at 930, for ascertaining the actual cost of a sound basic education. Governor Pataki had proposed the $1.93 billion figure to the legislature, which rejected that figure, and the executive and legislative branches were at an impasse. To address this stalemate in light of *CFE II*'s compliance deadline, *CFE III* held the governor's

figure, if approved by the legislature, would be acceptable. But the court's role was only to determine whether the proposed calculation was rational. *CFE III*, 8 N.Y.3d at 27. The court thus directed the State to make a final decision on the matter in adopting a budget for the next fiscal year, and in doing so, to consider a range of potentially (constitutionally) acceptable figures between $1.93 billion and $5.63 billion for New York City, rather than the range of $4.7 to $5.63 billion that the Appellate Division had ordered.[24]

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[24] Specifically, the Court of Appeals' directive in *CFE III* was that the appellate division's order be modified to state that "the constitutionally required funding for the New York City School District includes additional operating funds in the amount of $1.93 billion . . . ." *CFE III*, 8 N.Y.2d at 30 (emphasis added). As modified by the *CFE III* order, then, the operative appellate division order reads in relevant part as follows:

> Defendants are directed to act as expeditiously as possible to implement a budget that allows the city students the education to which they are entitled . . . [and] that, in enacting a budget for the fiscal year commencing April 1, 200[7], the Governor and the Legislature consider, as within the range of constitutionally required funding for the New York City School District, as demonstrated by this record, the proposed funding plan of at least [$1.93] billion in additional annual operating funds, and the Referees' recommended annual expenditure of $5.63 billion, or an amount in between, phased in over four years, and that they appropriate such amount, in order to remedy the constitutional deprivations found in *CFE II* . . . .

Campaign for Fiscal Equity, Inc. v. State, 29 A.D.3d 175, 191 (N.Y. App. Div. 2006), *as modified by* 8 N.Y.3d at 29.

Critically, it was only following *CFE III*, with further refinement to the basic operating aid formula approach, that the Regents and then-Governor Spitzer were able to demonstrate to the state legislature that the Foundation Aid Formula and its unrestrained calculations approximated a proper constitutional benchmark both for New York City and for districts in the rest of the state. Thus, the 2007 Reform Act effectively superseded *CFE III's* limited findings concerning the $1.93 billion "endorsed" "estimate" for New York City schools, and filled the gap of constitutional responsibilities concerning statewide funding allocation that was not part of *CFE III's* express holding.

This is why the Amended Complaint focuses on the 2007 Reform Act. Defendants tellingly do not argue the City has been given all the State aid the Foundation Aid Formula already determined is necessary to provide students in the district with the opportunity to obtain a sound basic education. Defendants' focus on the "endorsement" of a $1.93 billion "estimate" for New York City is just an attempt to distract the Court from the actions the State has both taken and failed to take to fulfill its constitutional obligations since *CFE III*.

II. Alternatively, Plaintiffs Allege the State Has Not Even Provided the City with the $1.93 Billion Minimum Endorsed as Potentially Viable in *CFE III*

Plaintiffs have pleaded, in the alternative, State aid allocations for the relevant operational costs in New York City have not, in fact, even increased by

the $1.93 billion endorsed in *CFE III*. R. 30 (¶¶ 60-61). Defendants' arguments to the contrary do not demonstrate Plaintiffs have failed to state a claim. Rather, they demonstrate a factual dispute incapable of being resolved on a motion to dismiss.

Although total education spending in New York City may have increased by more than $1.93 billion since 2007-2008,[25] the Court of Appeals' order in *CFE III* was that the potentially appropriate range of funding for New York City beginning in the 2007-2008 school year "includes additional operating funds in the amount of $1.93 billion, adjusted with reference to the latest version of the GCEI [cost of living adjuster] and inflation since 2004." *CFE III*, 8 N.Y.3d at 31. Leaving aside the question of how much inflation since 2004 and cost-of-living adjustments increased the $1.93 billion figure, Plaintiffs have alleged most of the recent increase in funding for the City has been allocated to pay for huge increases in expenses in areas such as mandatory pension and health costs, and contractual payments to private schools for pre-school and school-age special education that were not anticipated in the cost analyses that informed the Court of Appeals' *CFE III* decision and the Reform Act. R. 30 (¶ 61). These increased City funds have

[25] Defendants do not provide a baseline figure for total spending in 2007-2008; they cite a baseline figure for 2002-2003 taken from the Recommendation of the Special Referees. Appellants' Br. at 44. Those recommendations were rejected by the Court of Appeals, which accepted the Appellate Division's proposal that the $1.93 billion figure be calculated as of April 1, 2007. *Campaign for Fiscal Equity, Inc. v. New York*, 29 A.D.3d at 191, *as modified by* 8 N.Y.3d at 29.

not been used to increase operational funding for City schools to ensure students there have the opportunity to receive a sound basic education.

In short, whether "operating costs" in New York, as understood by the *CFE III* court, have increased by more than $1.93 billion plus inflation and cost of living adjustments is a complex issue of material fact that can only be resolved through a close examination of the details of New York City's current budget in comparison with its budget in 2006-2007, based on the Court of Appeals' understanding of "operating funds." Although Defendants would have it otherwise, such factual inquiries are patently inappropriate on a motion to dismiss.

POINT III

PLAINTIFFS HAVE STANDING AND CAPACITY TO SUE

I. Students From 699 Additional Districts Are Not Needed For Redress Here

Recognizing that Plaintiffs' standing and capacity to sue are irrefutable, Defendants try a "hail Mary" pass: they wrongly argue that plaintiffs challenging structural defects in the education finance system, which necessarily impact all districts statewide, must nonetheless plead *CFE*-style inputs-outputs-causation allegations for each of the 700 districts in New York. *See supra* pp. 19-36.[26]

[26] Defendants' argument is really not a standing argument at all, but a repackaging of their merits argument.

For the same reasons, Defendants wrongly contend Plaintiffs have no standing to sue unless a student or parent of a student from all 700 school districts is named in the caption of the complaint. Each of the 17 individual Plaintiffs here has adequately alleged injury to their respective 9 districts from Defendants' misconduct following *CFE III*. Each has standing to sue on these claims of a statewide nature, as does Plaintiff NYSER. Each Plaintiff, and NYSER, is empowered to seek relief from their injuries notwithstanding that very many other districts statewide will also, necessarily, benefit from redress once Defendants fix the broken structure of their system. *See, e.g.*, *Matter of DeBlasio v. City of New York*, 883 N.Y.S.2d 843, 852-53 (Sup. Ct. N.Y. Cnty. 2009) (holding that a class action against the government would not be appropriate, stating "any relief granted to an individual petitioner challenging a governmental operation will adequately flow to others similarly situated under principles of stare decisis"); *Matter of Legal Aid Soc'y v. New York City Police Dept.*, 713 N.Y.S.2d 3, 7 (N.Y. App. Div. 2000).

Defendants' press for a contrary result aligns with their twofold aim: To make it student-advocates' duty to "ensure" a constitutionally compliant system; and to simultaneously guarantee a compliant system will never be "ensured," by forcing indefinite replication of extensive *CFE*-style litigation for 700 school districts.

II. NYSER Has Standing to Sue

Putting aside that any one of the seventeen individual Plaintiffs has standing to sue on the claims, Defendants incorrectly argue NYSER lacks organizational standing because *some* members of NYSER would not have standing if they sued individually. New York law requires only that one of an organization's individual members have standing, and that is met here. NYSER also meets New York's other standing requirements.

NYSER has standing to bring an action if (1) at least one of the organization's members would have standing to sue; (2) the organization is representative of the organizational purposes it asserts; and (3) the action does not require the participation of individual members of the organization. *New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004); *Rudder v. Pataki*, 93 N.Y.2d 273, 278 (1999); *Matter of Dental Soc'y of State of N.Y. v. Carey*, 61 N.Y.2d 330 (1984). Those factors are satisfied here.

A. NYSER's Individual Members Have Standing

Defendants incorrectly assert that all of NYSER's members are corporations or organizations. Appellants' Br. at 53. NYSER's membership also consists of the seventeen named individual Plaintiffs and the "other parents of students enrolled in public schools." R. 11-17 (¶ 5). Each of these individuals has standing to sue.

An individual has standing to bring a claim where he or she falls within the zone of interest protected by the constitutional guarantee and suffers an injury in fact. *New York Ass'n of Convenience Stores v. Urbach*, 230 A.D.2d 338, 342 (3d Dep't 1997), *rev'd on other grounds*, 92 N.Y.2d 204 (1998). In New York, parents have standing to sue on behalf of their children for a violation of the Education Article, which expressly extends the right "of a sound basic education to all the children of the State." *CFE I*, 86 N.Y.2d at 315 (emphasis added). New York courts have concluded an injury-in-fact exists when the State fails to meet this constitutional obligation, as Plaintiffs have pled here. *Campaign for Fiscal Equity v. State*, 187 Misc. 2d 1, 18 (N.Y. Sup. Ct. 2001).

Thus, "at least one" of NYSER's members has standing to sue. *See New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d at 211.

Moreover, Plaintiffs also have standing because individuals who are members of NYSER's organizational members have standing. *See Dental Soc'y of State of New York*, 61 N.Y.2d at 333. For example, the New York State PTA is comprised of parents and students who have standing. *See id.*; *see also* R. 11-17 (¶ 5 (e), (g) and (l)) (identifying the Hudson Valley Parent Educator Initiative (an advocacy organization that is made up of 1,000 parents), the New York City

Parents Union, and Padres Abogando por sus Ninos).[27] Defendants' reliance on the *Small City School Districts* case is inapposite. There, the plaintiff organization was entirely comprised of school districts, which lack capacity to sue and standing as a matter of law.

B. NYSER Is Representative of Its Organizational Purpose

The requirement that NYSER is representative of its organizational purpose is easily met here. NYSER "is an unincorporated association based in New York City, but with members throughout the state, which is dedicated to ensuring that all students in the State of New York receive the opportunity for a sound basic education to which they are entitled under N.Y. Const. art. XI § 1." R. 11 (¶ 5). The membership of NYSER is consistent with this mission as it is comprised of parents and other organizations devoted to the needs of public school students. Defendants have not argued otherwise. *Id*.

C. Individual Participation Is Not Required Here

In *Dental Soc'y of State of New York*, the New York Court of Appeals recognized that to survive a motion to dismiss, "[i]t is enough to allege the adverse effect of the decision sought to be reviewed on the individuals represented by the organization; the complaint need not specify individual injured parties." 61

[27] *CFE* held that parents of New York City schools students, who belonged to the organizations comprising the Campaign for Fiscal Equity, established an injury-in-fact that was redressable by the court.

N.Y.2d at 334 (citing *Douglaston Civic Ass'n v. Galvin*, 36 N.Y.2d 1, 7 (1974), and *Nat'l Org. for Women v. State Div. of Human Rights*, 34 N.Y.2d 416 (1974)). The adverse effect on school children represented by NYSER and its members across the state is pled in numerous paragraphs throughout the Amended Complaint. R. 40-54, 60, 66-68 (¶¶ 92, 94-129, 135-37, 160, 180-89).

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For all of these reasons, NYSER has standing to pursue all the claims alleged in the Amended Complaint.

III. NYSER Has Capacity

Defendants contend NYSER has no capacity to bring this action because some of "the organizations making up NYSER are school districts or school boards." Appellants' Br. at 54. This argument fails because not every member of an organization must have capacity for the organization itself to have capacity. Rather, an association has capacity to sue if at least *some* of its members have capacity to sue. *See Small City Sch. Dists.*, 42 A.D.3d at 649. As set forth above, the named Plaintiffs are all members of NYSER and, therefore, NYSER has the required capacity. *See* R. 14-17 (¶¶ 6-22). In *Campaign for Fiscal Equity v. State*, 162 Misc. 2d 493, 496-97, 500 (Sup. Ct. N.Y. Cnty. 1994), the membership of the named organization consisted of individual plaintiffs, parent associations, advocacy groups, and fourteen community school boards. Although the Supreme

Court held that community school boards lacked capacity to sue, it nevertheless did not dismiss all claims by Campaign for Fiscal Equity. *Id.* at 500. NYSER's membership structure almost precisely parallels that of *CFE*, and it clearly has organizational capacity to proceed with this litigation.

CONCLUSION

For the foregoing reasons, the lower court's denial of Defendants' motion to dismiss Plaintiffs' Amended Complaint should be affirmed.

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