No. APL-2017-00002

To be argued by:
ANDREW W. AMEND
30 minutes requested

Supreme Court, New York County, Index No. 100274/13 (Cons.)

State of New York
Court of Appeals

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

Plaintiffs-Respondents,

-against-

THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

MIRIAM ARISTY-FARER, et al.,

Plaintiffs-Respondents,

-against-

THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

BRIEF FOR APPELLANTS

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Dated: March 15, 2017

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PRELIMINARY STATEMENT

These consolidated appeals—*New Yorkers for Students Educational Rights v. State* ("*NYSER*"), and *Aristy-Farer v. State*—raise critical issues concerning the well-established pleading requirements necessary to state a claim for increased public-school funding under the Education Article of the New York Constitution, *see* N.Y. Const. art. XI, § 1. As this Court has repeatedly held, district-specific allegations of serious educational deficiencies are a core, indispensable element of an Education Article claim. In these appeals, however, the courts below held that the plaintiffs could proceed to trial on Education Article claims concerning hundreds of school districts for which they have made no allegations whatsoever about educational deficiencies. Plaintiffs' claims as to such districts must be dismissed as a matter of law, and the Appellate Division, First Department's ruling to the contrary should accordingly be reversed.[1]

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[1] The Appellate Division also held that the *NYSER* plaintiffs had adequately alleged deficiencies to state an Education Article claim (their fourth cause of action) as to two districts, New York City and Syracuse, for which the complaint contains some specific

Thus, as a threshold matter, plaintiffs' theories of liability violate the requirement that Education Article claimants sufficiently allege district-specific deficiencies. Moreover, even setting this defect aside, the First Department also erred in endorsing the plaintiffs' theories of Education Article liability for other reasons as well.

The *NYSER* plaintiffs assert that the State can be held liable under the Education Article based solely on (a) the Legislature's adjustments to previously enacted statutory funding formulas (specifically those providing for a category of state aid known as Foundation Aid) after the 2008-2009 financial crisis; and (b) the Legislature's alleged failure to maintain funding at the levels endorsed by this Court in *Campaign for Fiscal Equity, Inc. v. State*

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allegations. While the State does not agree with this determination, it does not ask this Court to review that ruling. The State does urge this Court to dismiss the *NYSER* plaintiffs' other causes of action as to all school districts, including New York City and Syracuse, for the reasons explained below. And the State reserves its right to contest in other phases of this litigation, including summary judgment, the adequacy of the *NYSER* plaintiffs' allegations and evidence as to New York City and Syracuse under their fourth cause of action.

("*CFE III*"), 8 N.Y.3d 14 (2006). But neither the prior statutory funding formulas nor this Court's decision in *CFE III* established a constitutional floor for statewide education funding. Therefore, claims alleging that funding fell below those levels do not state a violation of the Education Article. The statutory funding formulas were designed to surpass constitutional requirements, not to establish a constitutional minimum for any district, much less for every district. And *CFE III* determined only that a particular funding calculation was reasonably designed to remedy specific educational deficiencies in New York City alone; it thus did not establish a strict constitutional minimum even in New York City, much less in any other district. And the New York City school district has since received increased funding well above the level endorsed in *CFE III*, in any event.

Finally, the First Department also erred in failing to dismiss the complaint in *Aristy-Farer*, which deals only with New York City and raises a narrower Education Article claim about the City's one-time ineligibility for a specific annual funding increase making up only a small portion of its education budget. The complaint contains

no allegations about the current level of educational services in New York City and makes no effort to establish a causal link between any educational deficiencies and the specific funding decision being challenged. The *Aristy-Farer* plaintiffs have thus also failed to satisfy this Court's well-established pleading requirements for Education Article claims.

ISSUES PRESENTED

1. Did the *NYSER* plaintiffs fail to state a claim concerning the hundreds of school districts as to which the complaint lacks concrete, district-specific allegations of (a) gross and glaring educational deficiencies that deny public school students the opportunity to receive a sound basic education, and (b) causes attributable to the State—both of which must be pleaded under this Court's precedent?

2. Did the *NYSER* plaintiffs fail to state a claim by failing to make the required allegations of educational deficiencies and causation and by instead attempting to rely solely on allegations concerning (a) the Legislature's adjustments to previously enacted

statutory funding formulas and (b) the Legislature's alleged failure to maintain funding at levels endorsed by this Court in *CFE III*?

3. Did the *Aristy-Farer* plaintiffs fail to state a claim by failing to allege (a) educational deficiencies that deny New York City public school students the opportunity to receive a sound basic education, and (b) a causal link to the lone funding decision challenged in the complaint?

The Appellate Division, First Department, answered all three questions in the negative.

STATEMENT OF THE CASE

These appeals involve two complaints that were initially filed as separate actions in Supreme Court, New York County: *Aristy-Farer v. State* (Index No. 100274/13) and *NYSER v. State* (Index No. 650450/14). While the two complaints set forth separate and distinct factual allegations and claims for relief, both complaints claim that the State has violated its school funding obligations under the Education Article and this Court's decisions in the *Campaign for Fiscal Equity* ("*CFE*") litigation, and the two were

consolidated for decision in the trial court and the First Department. Accordingly, this Statement begins with an overview of the law pertinent to both actions, then discusses the distinct claims made in each case, and finally explains the procedural history.

A. Constitutional and Statutory Background

1. The State's constitutional obligation to ensure the opportunity for a sound basic education

Under the New York Constitution, the Legislature has both the authority and the duty to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. Const. art. XI, § 1. This provision "imposes a duty on the Legislature to ensure the availability of a sound basic education to all the children of the State." *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 315 (1995) ("*CFE I*"); *see also Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 47 (1982) ("*Levittown*"). And courts, as the arbiters of constitutional norms, are "responsible for

adjudicating the nature of [the] duty" imposed by the Education Article. *CFE I*, 86 N.Y.2d at 315.

This Court has endorsed a cautious and measured role for the judiciary in adjudicating claims asserting a violation of that duty, given that matters of education financing and policy are quintessentially the domain of the executive and legislative branches. The "determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous practical and political complexity." *Levittown*, 57 N.Y.2d at 38. Such questions strike at the "the very essence of our governmental and political polity," and their resolution thus appropriately is "largely left to the interplay of the interests and forces directly involved and indirectly affected, in the arenas of legislative and executive activity." *Id*. at 38-39.

Judicial involvement in such matters is, therefore, "normally . . . inappropriate." *Id.* at 39. This deference "is justified not only by prudent and practical hesitation in light of the limited access of the Judiciary to the controlling economic and social facts,"

but also by the Court's "abiding respect for the separation of powers upon which our system of government is based." *CFE III*, 8 N.Y.3d at 28 (quotation marks omitted).

2. The *Campaign for Fiscal Equity* litigation

The three decisions in the *CFE* litigation constitute this Court's most extensive consideration of the obligations imposed by the Education Article. This Court's first decision provided a "template" of the types of allegations that a court "must consider" in evaluating a claim to enforce those obligations. *CFE I*, 86 N.Y.2d at 317. The second decision adjudicated the sufficiency of plaintiffs' trial evidence of educational deficiencies in the New York City school district. *See Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 902-03, 908-25 (2003) ("*CFE II*"). The third decision considered the question of remedy. *See CFE III*, 8 N.Y.3d at 27.

Plaintiffs in *CFE* alleged that the State had failed to provide students in a single school district—the New York City school district—with the opportunity to receive a minimally adequate sound basic education. *CFE I* addressed the State's motion to dismiss the complaint. The Court held that the State's

constitutional obligation required it to ensure that school districts provide the "physical facilities and pedagogical services and resources" necessary to allow students an opportunity to obtain "basic literacy, calculating, and verbal skills." 86 N.Y.2d at 316-18. Plaintiffs had adequately pleaded the State's failure to satisfy this obligation by alleging "gross educational deficiencies" in both educational inputs (such as teaching, curricula, school facilities, classrooms, supplies, textbooks, libraries, and computers) and educational outputs (such as test results and graduation rates). *Id.* at 317, 319.

The trial court then held a trial that spanned seven months and included the testimony of 72 witnesses and 4,300 exhibits. Based on extensive evidence of gross deficiencies in both educational inputs and outputs, the court concluded that the State had failed to provide students in New York City the opportunity for a sound basic education. This Court upheld that determination in its second decision in the *CFE* litigation. *See CFE II*, 100 N.Y.2d at 902-03, 908-13.

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

In response, then-Governor Pataki commissioned a study to ascertain the cost of providing the opportunity for a sound basic education. That study concluded that approximately $1.93 billion in additional operating funds (i.e., excluding transportation, debt service, and capital expenditures) from all sources (i.e., federal, state, and local) would provide constitutionally adequate

educational services in New York City.[2] *CFE III*, 8 N.Y.3d at 21-27 & n.3. The study also reviewed education spending statewide and concluded that applying the same methodology would result in a $2.45 estimate for the entire State, including the $1.93 billion figure for New York City, though New York City was the only district at issue in *CFE* and the only one for which the State was directed to supply a remedy. *See id.* at 21, 23-24.

On the third and final appeal in the *CFE* litigation, this Court deferred to the State's analysis as a reasonable estimate prepared by the elected branches, and declared that "the constitutionally

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

required funding for the New York City School District includes . . . additional operating funds in the amount of $1.93 billion" from all sources, subject to the two one-time-only adjustments agreed to by the State. *Id.* at 27. The Court noted, however, that its decision would not foreclose the elected branches from making "a policy choice to exceed the constitutional minimum." *Id.*

In doing so, the Court did not rule on the sufficiency of public-education spending as to any other district. It also did not impose any requirement that increased funds for New York City be phased in over a particular period of time or direct the State to revisit its determination of the amount of funds needed going forward. Indeed, it affirmed the Appellate Division's decision to strike a trial court requirement that the State perform "costing-out studies every four years" in the future.[3] *See id.* at 32.

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[3] The Court also affirmed the Appellate Division's decision to strike a trial-court requirement that the "New York City Department of Education prepare a comprehensive 'sound basic education' plan, to ensure accountability." *CFE III*, 8 N.Y.3d at 32. The Court noted that "a new and costly layer of city bureaucracy is not constitutionally required," and that "[i]t is undisputed that there are minimally adequate accountability mechanisms now in place for the evaluation of New York schools." *Id.*

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

In 2007, the year after *CFE III* was decided, the Legislature enacted significant modifications to state support for public education in New York that went well beyond the proposed New York City-only funding increase that this Court approved in *CFE III*. Two such changes are relevant here.

First, the State substantially increased overall education funding statewide. Education appropriations rose by $1.76 billion in 2007, *see* Ch. 53, 2007 N.Y. Laws 573, and by a further $1.75 billion in 2008, *see* Ch. 53, 2008 N.Y. Laws 593.[4] The financial plans prepared in each of those years by the State Division of the Budget (DOB) anticipated additional funding increases in subsequent years, though no funds were appropriated to satisfy those proposed

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

funding levels.[5] *See* State Finance Law § 22(4) (requiring Governor's executive budget submitted annually to the Legislature to include financial plan with three-year financial projection); *id.* § 23(3) (requiring update to financial plan and three-year projection within thirty days after enactment of annual budget).

Second, the Legislature created a new program, called Foundation Aid, that altered the State's method of apportioning general operating aid among school districts. Enacted as part of the Budget and Reform Act of 2007, *see* Ch. 57, pt. B, § 13, 2007 N.Y. Laws 2410, 2444-45 (codified as amended at Education Law § 3602(4)), Foundation Aid is a formula used to calculate per-pupil education funding for each district. Simplifying greatly, the formula essentially calculates a base per-pupil amount, based upon amounts spent on educating students in successful school districts, which is then adjusted on a district-specific basis for regional cost

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

factors and the additional costs of educating certain high-need students. That figure is then further adjusted according to a phase-in provision, which as originally enacted made districts eligible to receive the maximum per-pupil allocation of Foundation Aid after four years. *See* Education Law § 3602(4)(a)-(b).[6]

In adopting these education funding statutes, the Legislature went far beyond the scope of *CFE III*. Whereas *CFE* had addressed public schools only in New York City, the Legislature substantially increased funding for all school districts in the State. In addition, even as to New York City, the legislation called for an increase in total funding well beyond the levels specified in *CFE III*. In particular, the legislation was proposed by then-Governor Spitzer as part of a plan designed to increase total state and city funding to New York City by $5.4 billion over the course of four years—more than twice the $1.93 billion total proposed increase that this Court endorsed in *CFE III*.[7]

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[6] *See also* N.Y. State Educ. Dep't (SED), *2014-15 State Aid Handbook* 7-13 (Feb. 2, 2015).

[7] *See, e.g.*, DOB, *2007-2008 Executive Budget Briefing Book*, *supra*, at 29-30. (*See also* R. 144-145 [¶¶ 39-41].)

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

After the 2008-2009 financial crisis, the State was forced to close a $20.1 billion budget gap—"the largest budget gap ever faced by the State"—in enacting the 2009-2010 state budget.[8] The Legislature closed that gap through a series of measures enacted in April 2009 as part of that year's budget that included tax increases and across-the-board spending cuts.[9]

Education spending was affected in several ways, including changes to the State's public-education funding formulas. For instance, the Legislature eliminated a planned Foundation Aid increase for the 2009-2010 school year and extended the phase-in period for Foundation Aid from four years to seven years—thus delaying the time at which school districts would receive their maximum per-pupil allocation of Foundation Aid. *See* Ch. 57, pt. A,

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

[9] DOB, *New York State 2009-10 Enacted Budget Financial Plan*, *supra*, at 12-16.

§ 13, 2009 N.Y. Laws 2657, 2663-64 (codified at Education Law § 3602(4)(b-1)).

The Legislature also enacted the Gap Elimination Adjustment (or GEA), a formula that apportioned reductions to formula-based aid among school districts according to certain district-specific factors, including relative wealth and student need. *See* Ch. 53, 2010 N.Y. Laws 1187, 1242-45; *see also* Education Law § 3602(1)(j)(17). The Gap Elimination Adjustment essentially revised the multiple formulas used to calculate total aid to school districts in a manner that, practically speaking, further reduced the amount of aid that school districts could expect to receive compared to the prior formulas enacted in 2007. The Legislature temporarily extended the Gap Elimination Adjustment after 2011, but finally phased it out altogether in 2016. *See* Ch. 53, 2016 N.Y. Laws (L.R.S.) at 172.

5. New York City's one-time ineligibility for specific funds due to its delay in implementing a revised evaluation system for teachers and principals

Additional circumstances also affected state aid for the New York City school district—specifically, as relevant here, the district's delayed implementation of a new annual professional performance review (APPR) system for teachers and principals.

In 2010, the Legislature mandated that all school districts put in place new, more rigorous APPR systems to rate teacher and principal effectiveness. *See* Ch. 103, § 1, 2010 N.Y. Laws 3987, 3987-89 (creating Education Law § 3012-c). As of 2012, however, the APPR mandate was largely unimplemented, threatening the State's eligibility for funds under the federal Race to the Top program.[10]

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[10] The Race to the Top program established an approximately $4 billion federal grant fund to be allocated in a multiphase competitive process among the States. *See Overview Information; Race to the Top Fund; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010*, 74 Fed. Reg. 59836, 59840 (Nov. 18, 2009). To qualify, state applicants were required to establish evaluation systems for teachers and principals. *Id.* at 59844. New York State's initial application for Race to the Top funds was

The Legislature thus enacted an "APPR Compliance Provision" in 2012 that conditioned certain state aid increases on a school district's having implemented a compliant APPR system. *See* Ch. 53, 2012 N.Y. Laws (L.R.S.) at 139-42; Ch. 57, pt. A, § 1, 2012 N.Y. Laws (L.R.S.) at 3-4. The APPR Compliance Provision led approximately 99 percent of school districts to adopt new APPR systems. But New York City still did not do so, making it ineligible for an approximate $290 million state-aid increase for the 2012-2013 school year alone (which would have been added to the nearly $7.5 billion in state aid the City received that year). (R. 13 [¶ 28], 17 [¶ 43].)

The state Commissioner of Education, under authority conferred by the Legislature, resolved New York City's noncompliance through binding arbitration on June 1, 2013 (R. 15

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rejected, in part because it did not include a plan for revising its evaluation system; but the State's second-round application, submitted shortly after the APPR system was enacted, resulted in a federal grant of nearly $700 million. *See, e.g.*, Jennifer Medina, *For New York, $700 Million in School Aid*, N.Y. Times, Aug. 25, 2010, at A1; Jennifer Medina, *New York Fails to Get Grant of $700 Million for Schools*, N.Y. Times, Mar. 30, 2010, at A22.

[¶ 34]), thereby removing the statutory bar to the City's receipt of state aid increases thereafter. *See* Ch. 57, pt. A, § 7-a, 2013 N.Y. Laws (L.R.S.) at 9-10. Accordingly, the sole impact of the APPR Compliance Provision in New York City was a one-time-only failure to qualify for a specific state aid increase in a single school year.

B. The Present Actions

1. The *NYSER* action[11]

The *NYSER* action was brought by a statewide education advocacy organization and parents of students attending public schools in nine separate school districts across the State. They purport to bring claims for relief in every school district in the State. They assert four causes of action.

In their first cause of action, the *NYSER* plaintiffs claim that the State has violated the Education Article by not providing New

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[11] While the *Aristy-Farer* action was filed first, this section begins with the *NYSER* action because the *NYSER* plaintiffs challenge a far broader set of public-education funding measures. An overview of the *NYSER* plaintiffs' claims thus helps to provide context for understanding the comparatively narrow challenge raised in *Aristy-Farer*.

York City's public schools "the minimum constitutional level of operational funding mandated by the Court of Appeals in *CFE III*." (R. 190 [¶ 191(a)].) But the *NYSER* plaintiffs do not allege that the New York City school district receives less than the additional $1.93 billion in overall operating funds that this Court endorsed in *CFE III*. Rather, they claim that the State violated *CFE III* by failing to fund Foundation Aid at the level that was originally proposed when that program was created in 2007—a claim premised on the Legislature's subsequent adoption of the GEA, APPR Compliance Provision, and other statutory adjustments described above. (R. 190-191 [¶ 191].)

The second cause of action also relates to Foundation Aid. The *NYSER* plaintiffs claim that the level of aid proposed when the Foundation Aid program was created constitutes a constitutional floor of minimum funding needed to provide students throughout the State with a sound basic education. (R. 143-146 [¶¶ 38-44].) The *NYSER* plaintiffs claim that the State has violated the Education Article in every school district throughout the State by reducing the

Foundation Aid program below the level originally enacted by the Legislature. (R. 191-193 [¶ 193].)

The third cause of action claims that the State violated the Education Article by (i) failing to implement an adequate "system of accountability" to ensure that state aid is sufficient to provide students with the opportunity for a sound basic education, and (ii) failing to provide school districts "information" and "guidance" about courses and materials that students must receive to ensure that they are afforded the opportunity for a sound basic education. (R. 193-194 [¶ 195].)

The fourth cause of action alleges more generally that the State has violated the Education Article by failing—in each of the nearly 700 school districts across the State—to provide students with the opportunity to obtain a sound basic education. (R. 194 [¶ 197].) This claim is based predominantly on allegations of deficient educational inputs and outputs in the New York City school district, including allegations of inadequate numbers of teachers and other education professionals (R. 164-165 [¶¶ 95-96]); deficient educational services for at-risk students, English

language learners, and students requiring special education programs (R. 166 [¶¶ 101-104], 167-170 [¶ 107-115]); overly crowded classes in inadequate classroom facilities using outdated and deficient teaching supplies (R. 170-173 [¶¶ 116-120, 122-126]); and resulting low achievement on proficiency measures and high school graduation rates (R. 175 [¶¶ 132-133]). The *NYSER* complaint further contains four additional paragraphs about educational inputs and outputs in the Buffalo, Rochester, and Yonkers school districts (R. 176-177 [¶¶ 136-139]), and a handful of additional paragraphs about Syracuse (R. 160-163 [¶¶ 85-92]). There are no allegations at all about the educational services in any of the almost 700 other school districts for which the *NYSER* plaintiffs purport to bring their Education Article claim.

2. The *Aristy-Farer* action

The *Aristy-Farer* action involves the APPR Compliance Provision alone. The *Aristy-Farer* plaintiffs are parents of students attending public schools in the New York City school district. In their operative complaint, the *Aristy-Farer* plaintiffs claim that the State's one-time "withholding" of state aid increases from New York

City pursuant to the APPR Compliance Provision deprived students in that school district of the opportunity for a sound basic education in violation of the Education Article.[12] (R. 28 [¶¶ 84-85].)

The *Aristy-Farer* plaintiffs do not allege any facts about educational services at schools in the New York City school district. There is no allegation about the number of teachers, the quality of physical facilities, or the supply of textbooks and other materials available in that district. There is no allegation that those educational services are so deficient at schools throughout the district that they effectively deprive students in the entire district of the opportunity to obtain a sound basic education. And there is no factual allegation showing that any deficiency in educational inputs or outputs is caused by the New York City school district's one-time ineligibility, pursuant to the APPR Compliance Provision,

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[12] The *Aristy-Farer* plaintiffs also claim that the APPR Compliance Provision violates the due process and equal protection clauses of the New York Constitution, although those claims were dismissed by the First Department, and plaintiffs have not cross-appealed.

for a state aid increase making up a small fraction of its overall annual budget.[13]

C. Proceedings in Supreme Court

The *Aristy-Farer* plaintiffs commenced their action in Supreme Court, New York County, in February 2013 and filed their second amended complaint—the pleading operative here—in July 2013. The State moved to dismiss the *Aristy-Farer* complaint in September 2013 (R. 33-34), arguing that the complaint failed to allege that the New York City school district was providing students with deficient education services—an essential element of an Education Article claim (R. 53-57). Supreme Court (Mendez, J.) denied the motion in an April 2014 order (R. 4-7), and the State timely appealed (R. 2-3).

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[13] For the 2014 fiscal year, the New York City Department of Education, which administers the New York City school district, reported a total budget of approximately $24.9 billion. *See* Council of the City of New York, Hearing on the Fiscal Year 2014 Executive Budget for the Department of Education at 6 (June 4, 2013). The state aid increase for which the City was ineligible due to the APPR Compliance Provision is less than 1.5 percent of the reported total budget of $24.9 billion.

Meanwhile, the *NYSER* plaintiffs had commenced their action in February 2014, and filed an amended complaint in March 2014. The State moved to dismiss the amended *NYSER* complaint in May 2014 (R. 199-200) and, while that motion was pending, the *NYSER* plaintiffs moved to consolidate their action with *Aristy-Farer*. The consolidation motion was granted and, in November 2014, Supreme Court (Mendez, J.) denied the State's motion to dismiss the *NYSER* action.[14] (R. 126-130.) The State timely appealed. (R. 124-125.)

[14] The City of Yonkers moved to intervene in the *NYSER* action before it was consolidated with the *Aristy-Farer* action. After the two actions were consolidated, Supreme Court (Mendez, J.), granted Yonkers' motion to intervene, but the Appellate Division reversed that order and denied Yonkers' intervention motion (R. 389-390). Yonkers did not seek leave to appeal, and thus the Appellate Division's order denying Yonkers' intervention motion is not before the Court.

D. The First Department's Decision

The State's two appeals were resolved in a single order issued by the First Department on September 8, 2016.[15] The First Department's order affirmed the denial of the State's motions to dismiss in most respects.

First, the First Department held that the *NYSER* plaintiffs adequately stated an Education Article claim based on the State's alleged failure to comply with the funding level endorsed by this Court in *CFE III*. (R. 378-379.) The court rejected the State's argument that such a claim must be limited to "New York City only." (R. 376.) Although *CFE III* was expressly limited to the New York City school district, *see CFE III*, 8 N.Y.3d at 27, the court nevertheless held that *CFE III*'s requirement of additional education aid applied "by extension" to every other school district in the State. (R. 378.) Accordingly, the court held that plaintiffs could pursue an Education Article claim based on their allegation

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[15] The order also disposed of the State's appeal from the trial court's decision granting Yonkers's motion to intervene. See *supra* at 26 n.14.

that state education aid fell below the "CFE minimum" (R. 379), which required the State to provide a funding increase of "at least $1.93 billion . . . for the City of New York (and, by extension, at least $2.45 billion statewide)" (R. 378).[16]

Second, the First Department held that the *NYSER* plaintiffs stated a viable Education Article claim by alleging "systemic district-wide educational deficiencies that are attributable to a lack of funding by the State." (R. 379-380.) Specifically, the court held sufficient the plaintiffs' allegations of deficient educational inputs and outputs for the New York City and Syracuse school districts. (R. 383.) The court acknowledged that the *NYSER* complaint contained no comparable allegations about other school districts—it included only a few scant allegations about Buffalo, Rochester, and Yonkers, and nothing at all about every other school district. The court nonetheless declined to dismiss the plaintiffs' Education Article claims "insofar as they relate to the hundreds of districts as

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[16] The Appellate Division also concluded, wrongly, that this Court in *CFE III* left standing a requirement that the State implement the needed funding increases over four years. (R. 378.)

to which there are no particularized pleadings." (R. 383.) The court reasoned that the *NYSER* plaintiffs could seek relief for every school district based solely on "alleged systemic deficiencies in at least one or two districts" (R. 384) because as a "practical matter, actionable deficits identified in one district will require modification of the formula, necessarily affecting calculation of funding for all districts" (R. 383).

Third, the First Department sustained part of the *NYSER* plaintiffs' claim for additional accountability mechanisms. Although the court recognized that the State's accountability measures had been approved in *CFE III* (see *supra* at 12 n.3), the court concluded that the *NYSER* plaintiffs should be entitled to "explor[e] the adequacy of [those] accountability mechanisms" in light of the "significant funding adjustments over the 10 years since *CFE III* was handed down." (R. 384-385.) The court, however, rejected the *NYSER* plaintiffs' claims insofar as they required the State to provide information because that request was "not sufficiently related to the State's funding duty" under the Education Article. (R. 385.)

Finally, the First Department sustained the *Aristy-Farer* plaintiffs' Education Article claim. (R. 388-389.) This conclusion was not based on the sufficiency of the allegations in the *Aristy-Farer* complaint; the court did not conclude, for instance, that that pleading set forth adequate factual allegations of deficiencies in educational inputs or outputs caused by insufficient state education aid for New York City. Instead, the court permitted the *Aristy-Farer* plaintiffs to proceed to discovery on their Education Article claim because the *Aristy-Farer* action and the *NYSER* action involved the same "nucleus of operative facts" and had been consolidated; under those circumstances, the court did not "find it appropriate to permit one to go forward without the other." (R. 388-389.)

The First Department granted the State's separate motions in the *Aristy-Farer* action and the *NYSER* action for leave to appeal to this Court.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under C.P.L.R. 5602(b)(1) because the Appellate Division granted appellants' motions for leave to appeal in *NYSER* and *Aristy-Farer* on December 15, 2016. (R. 391-392.) The questions raised were decided by Supreme Court (R. 4-7, 126-130) and the Appellate Division (R. 368-369, 378, 380-386, 388-390), and are preserved for this Court's review by appellants' arguments in support of their motions to dismiss the complaints (*see* R. 6, 129) and on appeal (*see* R. 375, 379, 383-385).

ARGUMENT

Point I

The *NYSER* Plaintiffs' Education Article Claims Must Be Dismissed as to the Hundreds of School Districts for which the Complaint Contains No Specific Allegations

The First Department recognized that the *NYSER* plaintiffs identified systemic educational deficiencies in only two school districts (New York City and Syracuse). Nonetheless, and despite well-established precedent to the contrary, the First Department permitted plaintiffs to proceed with their Education Article claims

against all of the other nearly 700 school districts in the State. (R. 383.) This Court should reverse. As this Court has made clear, allegations about specific educational deficiencies in particular school districts are the irreducible predicate for relief under the Education Article. The *NYSER* plaintiffs' failure to comply with this well-established pleading requirement requires the dismissal of all of their Education Article claims as to all school districts for which the complaint contains no (or essentially no) allegations.[17]

[17] As previously noted (see *supra* at 1 n.1), the State does not ask this Court to review the Appellate Division's determination that the *NYSER* plaintiffs adequately identified educational deficiencies in New York City and Syracuse, but reserves its right to contest the adequacy of plaintiffs' allegations and evidence as to these districts in future phases of this litigation. Moreover, as explained *infra* in Point II, certain of plaintiffs' theories of liability fail as a matter of law even as to New York City and Syracuse notwithstanding plaintiffs' allegations of educational deficiencies in those districts.

A. This Court's Precedents Mandate That Educational Deficiencies Be Pleaded on a District-Specific Basis.

This Court has consistently required specific allegations and proof of inadequate educational services *in the particular school district where relief is sought*. In its earliest decisions construing the scope of the State's duty under the Education Article, for instance, this Court held that allegations (and proof) of unequal educational services throughout the State could not support a claim for relief. *See Reform Educ. Financing Inequities Today (R.E.F.I.T.) v. Cuomo* ("*R.E.F.I.T.*"), 86 N.Y.2d 279, 283-84 (1995); *Levittown*, 57 N.Y.2d at 36-38. The Court explained that minimally adequate educational services are "all that [students] are guaranteed by our Constitution," *R.E.F.I.T.*, 86 N.Y.2d at 285, and that an entitlement to relief thus arises only where "the educational facilities or services provided in the school districts" are inadequate, *Levittown*, 57 N.Y.2d at 38.

The same principle—that a plaintiff's entitlement to relief under the Education Article arises from allegations of inadequate educational services in a school district—animated the Court's

decision to dismiss the claims in *Paynter v. State*, 100 N.Y.2d 434 (2003). There, the plaintiffs did not allege "any deficiency in teaching, facilities or instrumentalities of learning" in their school district. *Id. at* 440. This Court thus squarely confronted and rejected the contention that a plaintiff is not "required to allege inadequate educational services to state a claim" for relief under the Education Article. *Id.* at 441 (quotation marks omitted). Instead, the Court made clear that "allegations that the State somehow fails in its obligation to provide minimally acceptable educational services" were required to state a claim for relief under the Education Article. *Id.*

Most recently in *New York Civil Liberties Union v. State* ("*NYCLU*"), 4 N.Y.3d 175 (2005), this Court again confirmed the principle that inadequate educational services in a particular school district are the necessary predicate for relief under the Education Article. There, the plaintiffs sought relief for alleged inadequate educational services, not in their school districts, but in individual schools within their districts. *Id.* at 178, 181-82. In rejecting those claims, this Court observed that a plaintiff is only

entitled to relief under the Education Article based on "district-wide" failures. *Id.* at 181. The district-specific scope of the State's obligation under the Education Article, this Court explained, derived from the tradition of "local control and participation in education" embedded in the Constitution. *Id.* (quotation marks omitted). The Education Article reflects this tradition of local control by making the State "responsible for providing sufficient funding to school districts," as the local units constitutionally entitled to "make the basic decisions on funding and operating their own schools." *Id.* at 182. And because the State's obligation under the Education Article runs to school districts, the plaintiffs were not entitled to relief where they did not allege inadequate educational services by a school district. *See id.* at 181 ("In identifying individual schools that do not meet minimum standards, plaintiffs do not allege any district-wide failure.").

Relying on this Court's decision in *NYCLU*, the Third Department dismissed Education Article claims under circumstances materially identical to those presented by the *NYSER* action. *See N.Y. State Ass'n of Small City School Dists., Inc.*

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

B. Only District-Specific Allegations Can Satisfy This Court's Requirement That Plaintiffs Concretely Identify Educational Deficiencies and Causes Attributable to the State.

The First Department's conclusion that the *NYSER* plaintiffs could proceed with Education Article claims against every school district in the State despite the absence of any allegations as to the overwhelming majority of those districts cannot be squared with this Court's well-established pleading requirements for Education Article claims.

As this Court has held, a cause of action under the Education Article has two essential elements: "the deprivation of a sound basic education, and causes attributable to the State." *NYCLU*, 4 N.Y.3d at 178-79. The first element recognizes the State's obligation to afford students the opportunity to achieve the "basic literacy, calculating, and verbal skills" that are needed to function "productively as civic participants." *CFE I*, 86 N.Y.2d at 316. This Court has provided a "template" of relevant facts that a court "must consider"—and that a plaintiff accordingly must plead—in evaluating whether a school district provides constitutionally adequate educational services. *Id.* at 317-18.

This template includes the identification of "gross and glaring" (as opposed to isolated or sporadic) deficiencies in essential educational *inputs*—such as "minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn"; "minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks"; and "minimally adequate teaching of reasonably up-to-date basic curricula . . . by sufficient personnel adequately trained to teach those subject areas." *CFE II*, 100 N.Y.2d at 907 (quotation marks omitted); *see also Levittown*, 57 N.Y.2d at 48. In addition, a plaintiff must plead deficient educational *outputs* in the form of inadequate student outcomes, such as low test scores or poor results on other measures of student achievement. *See Paynter*, 100 N.Y.2d at 440; *see also CFE II*, 100 N.Y.2d at 914-19.

The second element of an Education Article claim is causation. "[E]ven gross educational inadequacies are not, standing alone, enough to state a claim under the Education Article." *NYCLU*, 4 N.Y.3d at 178-79. Instead, a plaintiff must also demonstrate a "causal link" between the deprivation of adequate

educational opportunities and some failure by the State. *CFE I*, 86 N.Y.2d at 318; *see also Paynter*, 100 N.Y.2d at 441. Causation is critical to any Education Article claim because, as this Court has recognized, "there are a myriad of factors which have a causal bearing" on poor educational outputs, *CFE I*, 86 N.Y.2d at 317, and "causes of academic failure may be manifold, including such factors as the lack of family supports and health care," *Paynter*, 100 N.Y.2d at 441.

These pleading requirements are premised on the fundamental understanding that plaintiffs bringing claims for increased education funding under the Education Article must make specific allegations about particular school districts as a threshold matter. Indeed, as this Court explained in *NYCLU*, "a claim under the Education Article requires that a district-wide failure be pleaded" because districts "are the local units responsible for receiving and using state funding, and the State is responsible for providing sufficient funding to school districts." 4 N.Y.3d at 182. Only through district-specific allegations can a plaintiff establish—and a court meaningfully evaluate—the concrete deficiencies in

educational inputs and outputs, and the causal connection to some failure by the State, that are critical to stating an Education Article claim.

C. The *NYSER* Complaint Fails to Meet These Standards as to All School Districts for Which It Alleges No (or Nearly No) Facts.

Accordingly, the First Department erred by effectively exempting the *NYSER* plaintiffs from well-established pleading requirements for hundreds of school districts about which their complaint is wholly (or nearly) silent. For instance, named plaintiff Kathryn Barnett seeks relief from the State in the form of additional funding for the Wyoming Central School District, but the *NYSER* complaint does not allege that the schools in that district have ever failed to provide Barnett's children with constitutionally adequate educational services. (R. 137 [¶ 8].) Plaintiff Rolando Garita likewise claims an entitlement to relief, but he does not allege that the Truman Moon Elementary School, where his daughter is allegedly a student, or any other school in the Middletown City School District fails to provide students with the opportunity for a sound basic education. (R. 137 [¶ 13].) The same

is true for the plaintiffs seeking relief on behalf of the William Floyd School District (R. 138 [¶ 15]), the Spencer-Van Etten Central School District (R. 138 [¶ 17]), and the Hermon-DeKalb Central School District (R. 139 [¶ 22]). None of these plaintiffs has alleged in any way the critical element giving rise to the State's obligation under the Education Article—namely, that the "educational inputs locally" are constitutionally inadequate. *Paynter*, 100 N.Y.2d at 442.

As a matter of basic pleading law, therefore, the failure by each of these plaintiffs to allege facts which, if true, would entitle them to relief requires that their Education Article claims be dismissed. That is, the State's motions to dismiss as to these plaintiffs—and as to every school district in the *NYSER* action as to which there is no allegation of deficient educational services—should have been granted because the facts alleged in the *NYSER* complaint are not "sufficient to state all the necessary elements of a cognizable cause of action," *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976); *see also* John R. Higgitt, Practice Commentaries to C.P.L.R. 3211, 7B McKinney's Consol. Laws of

N.Y. at 48 (2016) (dismissal required where complaint "has identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action").

To be sure, the *NYSER* complaint briefly mentions three other school districts besides New York City and Syracuse—Buffalo, Rochester and Yonkers. But the First Department correctly declined to treat the allegations about these three school districts as sufficient, instead relying on the erroneous principle, discussed below, that allegations against New York City can support claims concerning every district in the State. The complaint devotes just five wholly inadequate paragraphs in total to these three districts. None of those paragraphs contains a single factual allegation concerning the educational inputs specific to those districts—i.e., teaching, curricula, facilities, classrooms, or instrumentalities of learning. Moreover, the complaint's scant assertions concerning student performance in Buffalo, Rochester, and Yonkers—consisting of scoring statistics from language arts testing and high school graduation rates from a single year—do not make up for the paucity of other allegations, especially given that "causes of academic failure may be manifold," *Paynter*,

100 N.Y.2d at 441. These allegations are wholly inadequate to satisfy this Court's strict pleading standards for Education Article claims.

D. Allegations of Educational Deficiencies in One or Two Districts Cannot Support a Claim as to Any Other District.

The First Department acknowledged that the *NYSER* plaintiffs had made no specific allegations concerning hundreds of school districts, but nonetheless excused that pleading failure by essentially inferring educational deficiencies in every school district in the State the *NYSER* plaintiffs' allegations of "systemic deficiencies in at least one or two districts" (R. 384). This inference fails as a matter of simple common sense: numerous considerations—such as demographics, district management, relative wealth, student need, geographic concentration, and a host of other factors—make the experience of one school district unique from others. There is thus no justification for presuming, for instance, that the experience in the New York City school district, which serves well over one million students, is the same as or even remotely comparable to the experience of the Hermon-DeKalb

Central School District, a rural upstate district serving fewer than four hundred students—including plaintiff Andy Willard's children (R. 139 [¶ 22]).

Indeed, in the *CFE* litigation, this Court rejected the very inference that the First Department effectively drew here. After finding that the *CFE* plaintiffs had proved an Education Article violation as to the New York City school district, this Court refused to require a statewide remedy. *See CFE II*, 100 N.Y.2d at 928. The Court observed that the plaintiffs there had prevailed "owing to a unique combination of circumstances" and that other plaintiffs "in other districts who cannot demonstrate a similar combination may find tougher going in the courts." *Id.* at 932.

Inferring deficiencies in one school district from deficiencies in another is also deeply suspect in light of the fact that school districts are subject to substantial local control and administration that may vary widely from one district to another. The framers of the Education Article largely preserved the long-standing system under which local school districts were the principal organ providing educational services in the State. *See Paynter*, 100 N.Y.2d

at 442; *R.E.F.I.T.*, 86 N.Y.2d at 284; *Levittown*, 57 N.Y.2d at 47-48. Local control reflects important constitutional values: "the residents of such districts have the right to participate in the governance of their own schools," while the State's duty is focused on "provid[ing] funding sufficient to bring the educational inputs locally available up to a minimum standard." *Paynter*, 100 N.Y.2d at 442. Given the importance and centrality of local control, there is no basis for the First Department's inference that educational deficiencies in one school district may automatically be imputed to another.

"[J]urisprudential constraints" also counsel against the inference drawn by the First Department. *CFE II*, 100 N.Y.2d at 928. The primary responsibility for implementing the Education Article lies with the executive and legislative branches, especially with respect to public school financing. The "determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous practical and political complexity." *Levittown*, 57 N.Y.2d at 38. Judicial involvement in decisions about spending

on public education is therefore "normally . . . inappropriate." *Id.* at 39. Such involvement is justified only in the extraordinary circumstance where deficiencies are so acute, and the State's responsibility so clear, that it is appropriate for a court to intrude into a sensitive policy area generally reserved for the other branches of government. Requiring Education Article plaintiffs to supply concrete allegations of district-specific deficiencies severe enough to entitle them to the drastic remedy of judicial intervention in this sensitive area is critical to keeping the judiciary's role within the narrow bounds that this Court has repeatedly emphasized as an essential matter of public policy.

Finally, there is no merit to the First Department's reasoning that the *NYSER* plaintiffs' challenge to a statewide funding formula exempted them from the well-established requirement to plead district-specific deficiencies. The First Department concluded that plaintiffs in school districts with no alleged constitutional injury could proceed with claims so long as there was at least one plaintiff in a school district who did allege a constitutional injury, because "actionable deficits identified in one district will require

modification of the formula, necessarily affecting calculation of funding for all districts." (R. 383.)

But the First Department's conclusion rests on a faulty premise. The mere fact that the State's funding formulas may be inadequate as to one particular school district does not suggest that they will be inadequate as to other districts. To the contrary, the defect may arise from the State's failure to tailor its funding formulas to the specific district in question—thus allowing the State to remedy the defect by adjusting its funding of a specific district while leaving other districts alone. Moreover, the State could respond to any proven educational deficiencies by taking other measures to remedy the specific defects identified in particular school districts—for instance, by providing targeted aid or grants that are not part of the funding formula, or by passing legislation or implementing regulatory reforms to ameliorate the school district's operations in some respect. There is no basis for the First Department's assumption that only one remedy would be available here.

* * *

Thus, the courts below should have dismissed all of the *NYSER* plaintiffs' Education Article claims as to school districts for which the complaint contains no (or nearly no) specific factual allegations. Specifically, the first, second, and fourth causes of action should be dismissed as to these school districts because they directly challenge state funding decisions and thus plainly implicate this Court's pleading requirements for education-funding claims. Moreover, the third cause of action—challenging the State's "education funding accountability mechanisms"—should likewise be dismissed (except for those portions not dismissed by the First Department, as to New York City and Syracuse) because the adequacy of those mechanisms "is directly related to the State's funding duty," as the First Department recognized (R. 385-386), and it would make no sense to impose a mandate to adopt accountability mechanisms if there is no viable underlying funding claim.

POINT II

The *NYSER* Plaintiffs' Theories of Liability Premised on Foundation Aid and *CFE III*

Fail as a Matter of Law and Should Be Rejected

Even setting aside plaintiffs' pleading deficiencies, the First Department also erred in allowing the *NYSER* plaintiffs to proceed on their first and second causes of action because those claims rest on fundamentally flawed theories of constitutional liability. This Court should accordingly dismiss the first and second causes of action in their entirety.

A. The *NYSER* Plaintiffs' Claim Based on the State's Revisions to Foundation Aid Does Not Allege a Violation of the Constitution.

The *NYSER* plaintiffs' second cause of action is premised on the assumption that the Foundation Aid program, as originally proposed in 2007, established a constitutional standard for the amount of state education aid required to provide students in the State with the opportunity for a sound basic education. (R. 143-146 [¶¶ 38-44].) By reducing the Foundation Aid program below the level originally proposed, the *NYSER* plaintiffs claim, the State fails to provide students with the opportunity for a sound basic

education in violation of the Education Article. (R. 191-193 [¶ 193].) This claim fails for numerous reasons.

First, the *NYSER* plaintiffs simply misinterpret the State's 2007 public-education funding statutes as the Legislature's establishment of a constitutional baseline that would tie its hands going forward, either as to New York City or as to the rest of the State. The Legislature created no such baseline—to the contrary, it far exceeded what this Court had approved the year before in *CFE III*.

As to New York City—the only school district at issue in the *CFE* litigation—the Court in *CFE III* explicitly pointed out that proposed funding increases above the State's $1.93 billion estimate would be a "policy choice to *exceed the constitutional minimum*." 8 N.Y.3d at 27 (describing Governor Pataki's proposed operating funding increase of $4.7 billion for New York City) (emphasis added). The Foundation Aid program, which was part of a project to provide New York City with more than *twice* the funding increase approved by this Court (see *supra* at 13-15), was just such a policy choice.

Indeed, by plaintiffs' own allegations, the State's 2007 statutes provided for funding increases that were more generous than both the $1.93 billion estimate approved by CFE III as to New York City and the $2.45 billion statewide estimate calculated using the same methodology. As the *NYSER* plaintiffs themselves allege, the fiscal analysis underlying the 2007 legislation's funding formulas incorporated a number of weightings that were higher than those utilized by the analysis approved of in *CFE III*. (R. 143-144 [¶ 38]). The 2007 legislation thus did not set a constitutional standard; it exceeded—by billions of dollars—the funding estimate that this Court had already found constitutionally acceptable. Indeed, then-Governor Spitzer said of the school aid funding provisions he proposed, and later signed into law in 2007, that they would provide not the constitutional minimum, but rather "*more than sufficient funds* to address the school funding needs highlighted by the *Campaign for Fiscal Equity* Lawsuit."[18]

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

Moreover, fundamental constitutional principles are in substantial tension with plaintiffs' theory that the funding statutes enacted in 2007 operated to define the level of funding required by the New York Constitution's Education Article. Under separation-of-powers principles, the courts, and not the political branches, are the arbiters of the scope of a constitutional right, and the political branches cannot preempt such judicial review merely by enacting legislation. *CFE II*, 100 N.Y.2d at 925; *see also Matter of Aliessa v. Novello*, 96 N.Y.2d 418, 432 n.14 (2001) ("Given our system of separation of powers, a lawmaking body may not legislatively declare that a statute meets constitutional criteria."). Thus, legislation—even if adopted for the purpose of carrying out constitutional responsibilities—does not set a constitutional norm binding on future lawmakers.

To the contrary, *all* acts of the Legislature—including the post-2007 statutes challenged here—are entitled to a strong presumption of constitutionality. *See, e.g.*, *People v. Knox*, 12 N.Y.3d 60, 69 (2009). That presumption applies equally to the statutory scheme enacted in 2007 and to the public-education

funding statutes the State has adopted in 2008 and subsequently. *See id.* at 69 (presumption of constitutionality attaches to legislation that amends earlier legislation).

Second, the *NYSER* plaintiffs' challenge to reductions in Foundation Aid fails because a plaintiff cannot adequately allege a claim under the Education Article merely by alleging deficiencies in funding—and only one component of state funding, at that. The level of state funding by itself cannot establish an Education Article claim absent allegations that the funding has a causal connection to a particular school district's failure to provide a sound basic education. *See, e.g.*, *NYCLU*, 4 N.Y.3d at 178-79. Moreover, state aid is just part of the billions of dollars of funding that school districts receive annually from all sources, including a "combination of local, state and federal sources." *CFE II*, 100 N.Y.2d at 904. See also *infra* at 60-61 (discussing increased operating aid to New York City school district from all sources following *CFE III*). Federal and local funds together accounted for some $35 billion of the $60 billion spent by the State's public schools in 2013-2014. *See* SED, Fiscal Analysis & Research Unit (FARU), Master File for 2013-14 (row

676). See *infra* at 60 n.20. Thus, allegations that the State has not provided funding in a given amount cannot establish a *per se* failure to provide the educational opportunities the Constitution requires, without consideration of (a) whether the level of funding has caused a deficiency in educational services, and (b) whether funding from other sources may combine with state funding to satisfy the constitutional requirement.

B. The *NYSER* Plaintiffs' Claim That the State Has Not Complied with This Court's Decisions in *CFE* Also Fails.

The *NYSER* plaintiffs' first cause of action—that the State has not complied with this Court's directive in *CFE* and therefore must increase public-education funding on a statewide basis—is likewise fatally flawed and should be dismissed.

1. Plaintiffs' claim that the State has violated statewide funding obligations under *CFE* fails because *CFE* imposed no such obligations.

a. The *CFE* litigation was limited to New York City only.

The First Department mistakenly held that the *NYSER* plaintiffs could survive dismissal merely by alleging that the State

has failed to comply with statewide funding obligations supposedly created by this Court's decision in *CFE III*. The first major flaw in that reasoning is that *CFE III* did *not* create statewide funding obligations: it did not involve any school district other than New York City, and accordingly did not result in any determination of the adequacy of educational funding or resources as to any other district.

This Court's language throughout the *CFE* litigation was clear on this point. In *CFE II*, it explained that "the case presented to us, and consequently the remedy, is *limited to the adequacy of education financing for the New York City public schools*, though the State may of course address statewide issues if it chooses." 100 N.Y.2d at 928 (emphasis added). To be sure, as this Court made clear, the State was free to respond to the *CFE* decisions by implementing statewide reforms. But the Court's statement that the State "may . . . address statewide issues if it chooses," *id.*, means exactly what it says: because no statewide violations were found, the State was free to address statewide reform as a policy matter, but was not compelled to do so. The *NYSER* plaintiffs' claim that

CFE somehow created a constitutional duty to increase educational funds statewide is thus utterly lacking in support.

b. As to New York City, this Court issued only a narrow, declaratory ruling endorsing a specific proposed funding increase.

The First Department further misstated (R. 378; *see also* R. 142-143 [¶¶ 35-37]) the nature of this Court's ultimate remedial holding in *CFE III*. Contrary to its conclusion, this Court did not direct the Legislature to appropriate a specific sum of money, or to consider a range of acceptable funding increases and select a figure within that range, or to phase in the selected funding increase over a particular period of time. Nor did it require the Legislature to revisit the adequacy of its estimate in future years by undertaking subsequent cost studies or applying inflationary adjustments in perpetuity.

Rather, the Court issued a declaration endorsing the State's estimate of increased operating funding as a reasonable determination of "the constitutionally required funding for the New York City School District." *CFE III*, 8 N.Y.3d at 27. The limited form

of this Court's remedial order was no accident. In *CFE II*, the Court rejected as "problematic" the request for an order "issuing guidelines to the Legislature for restructuring the system and directing—with strict timetables—that the necessary resources be provided." *CFE II*, 100 N.Y.2d at 925. Such an order, the Court noted, would require judicial intrusion into "matters of policymaking" as to which courts have "neither the authority, nor the ability, nor the will, to micromanage." *Id.* Rather, the Court in *CFE II* merely directed the State to "ascertain the actual costs of providing a sound basic education in districts around the State." *Id.* at 930 (quotation marks omitted). The Court's decision in *CFE III* to issue a declaration endorsing the State's estimate of that "actual cost" was thus a model of judicial restraint in sensitive areas of fiscal policy appropriately left to the legislative and executive branches. And, as we explain below, there is no merit to plaintiffs' assertion that those branches failed to respond appropriately.

2. The complaint alleges facts showing that New York City's public schools have received increased funds well exceeding the remedial estimate this Court endorsed in *CFE III*.

In *CFE III*, this Court found constitutionally sufficient a proposal to increase "funding for the New York City School District . . . in the amount of $1.93 billion, adjusted with reference to the latest version of the GCEI and inflation since 2004." 8 N.Y.3d at 31. The necessary adjustments increased this amount by $0.37 billion, to $2.3 billion above a baseline funding level of $12.62 billion for the New York City public schools during the 2002-2003 school year.[19] *See* Record on Appeal at 4875, 5833, *CFE III*, 8 N.Y.3d 14 (Index No. 111070/93).

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[19] As noted above (see *supra* at 11 n.2), the State agreed to a pair of one-time-only adjustments to the $1.93 billion figure, to account for a regional cost index called the GCEI, and to adjust for inflation to reflect 2004-2005 dollars. *See Campaign for Fiscal Equity, Inc. v. State*, 29 A.D.3d 175, 180-81, 184 (1st Dep't 2006); State Br., *supra*, at 26 & n.6. A panel of referees appointed by the trial court estimated that these two adjustments would require increasing the State's estimate by just $0.37 billion. *See* Record on Appeal at 5852-5853, *CFE III*, 8 N.Y.3d 14 (Index No. 111070/93).

The New York City school district indisputably has received far more funding than the estimate endorsed in *CFE III*. In fact, the *NYSER* complaint affirmatively pleads that operating funds for the New York City school district exceed that estimate. The *NYSER* plaintiffs allege that, in 2013, $1.993 billion represented 11.4 percent of the New York City school district's "operating expenditures," and that $2.707 billion represented 15.4 percent of the district's "total operating budget." (R. 156-157 [¶ 74].) Extrapolating from these allegations, the *NYSER* plaintiffs allege that the New York City school district's "operating budget" in 2013 was at least $17.464 billion—that is, at least $4.84 billion more than the district received in 2002-2003, and at least $2.54 billion more than the funding increase this Court endorsed in *CFE III*. And in the First Department, the *NYSER* plaintiffs similarly conceded that education aid for the New York City school district has "increased by more than $1.93 billion since 2007-2008." Br. for Pls.-Resp'ts at 55, *NYSER v. State*, 143 A.D.3d 101 (Index Nos. 100274/13, 650450/14). The *NYSER* plaintiffs' own allegations and

statement in this proceeding thus require that their first cause of action be dismissed.

Public records maintained by SED further confirm that state funding of the New York City school district has exceeded *CFE III* levels. Those records, which are published on SED's website, set forth the operating funds available to each school district in the State, including the New York City school district. *See* SED, FARU, The Fiscal Profile Reporting System;[20] *see also Matter of Markowitz v. Serio*, 11 N.Y.3d 43, 52 (2008) ("A public record, in ordinary speech, refers to a record that any member of the public can look at and copy."). Those data reveal that, in 2013-2014, operating funds for the New York City school district were more than $21.7 billion—that is, $9.08 billion more than the district received in 2002-2003,

[20] SED publishes detailed financial data in Microsoft Excel files, in which each school district occupies a row and the columns correspond to various categories of revenues and expenditures, including total state revenue (column H), local revenue (column I), federal revenue (column J), and total revenue (column K). SED, FARU, Column Headings in Each Spread Sheet; *see also* SED, FARU, A Guide to the Headings of the Fiscal Profile.

and $6.78 billion more than the estimate this Court endorsed in *CFE III*.[21]

The First Department refused to dismiss the *NYSER* plaintiffs' first cause of action because, in the court's view, SED's figures could not be considered at this procedural posture, and there was a live dispute over whether "the net effect" of measures enacted after *CFE III* "has been to reduce educational aid below the $1.93 billion floor" endorsed in *CFE III* (R. 377). But there is no such dispute. By their own pleading, the *NYSER* plaintiffs have conceded the fact that cannot be disputed: that operating aid for the New York City school district far exceeds the "$1.93 billion floor" endorsed in *CFE III*. The Court thus need not rely on SED's figures.

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[21] Row 323 of the SED fiscal profile spreadsheet for 2013-2014 contains data for the New York City school district. Cell AG323 in that spreadsheet contains the City's total expenditures of approximately $23.7 billion for 2013-2014. When amounts for transportation (approximately $1.1 billion, *see* cell AD323) and debt service (approximately $0.9 billion, *see* cells AE323, AF323) are removed, the remaining sum is approximately $21.7 billion. *See* SED, FARU, Master File for 2013-14; *see also* SED, FARU, Column Headings in Each Spread Sheet.

In any event, SED's figures may be considered here. As uncontroverted matters of public record, the First Department could "of course" take judicial notice of SED's figures. *Matter of Siwek v. Mahoney*, 39 N.Y.2d 159, 163 n.2 (1976) ("Data culled from public records is, of course, a proper subject of judicial notice."); *see also Affronti v. Crosson*, 95 N.Y.2d 713, 720 (2001). Indeed, the *NYSER* plaintiffs have never challenged the accuracy of these "incontrovertible" figures, so it would be "idle to send the case back for a new trial for the sole purpose of admitting" them. *Dunham v. Townshend*, 118 N.Y. 281, 286 (1890). And since SED's figures "establish conclusively" that the *NYSER* plaintiffs' first cause of action must be dismissed, they may be considered at this posture despite not being explicitly alleged in the *NYSER* complaint. *Rovello*, 40 N.Y.2d at 636; *see also Godfrey v. Spano*, 13 N.Y.3d 358, 374 (2009).

POINT III

The *Aristy-Farer* Plaintiffs Fail to State a Claim under the Education Article

The *Aristy-Farer* plaintiffs fail to allege either of the essential elements of a claim under the Education Article for many of the reasons discussed above.[22] *First*, they do not allege any specific shortcomings in the educational services provided by the New York City school district—the only district as to which the *Aristy-Farer* plaintiffs seek relief. The complaint therefore fails to allege any deficiency in educational inputs,[23] which alone requires dismissal. *See*, *e.g.*, *Paynter*, 100 N.Y.2d at 440-41.

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[22] The *Aristy-Farer* complaint asserts only one cause of action—i.e., that the State's one-time "withholding" of state aid increases from New York City pursuant to the APPR Compliance Provision deprived students in that school district of the opportunity for a sound basic education in violation of the Education Article. (R. 28 [¶¶ 84-85].) To the extent that the *Aristy-Farer* plaintiffs' claim relies on the same theories advanced in the *NYSER* complaint, the claim fails for the reasons explained above.

[23] This failure is especially conspicuous when compared with the *Aristy-Farer* plaintiffs' earlier pleadings in this case: those complaints, while also failing to state a claim, included at least some attempt to identify educational inputs that plaintiffs claimed would be reduced due to the APPR Compliance Provision. (*See* Initial Complaint ¶ 31; Amended Complaint ¶ 40.) The current pleading makes no such effort.

Instead, the *Aristy-Farer* complaint contains allegations only of poor student test results: in four paragraphs, it alleges that about twenty percent of New York City public school students (including those who drop out before ninth grade) graduate from high school "college and career ready," as that term is defined by the Board of Regents. (R. 26-27 [¶¶ 77-79].) But the "college and career ready" standard plaintiffs cite "exceed[s] notions of a minimally adequate or sound basic education" that the Constitution guarantees. *CFE I*, 86 N.Y.2d at 317; *see also CFE II*, 100 N.Y.2d at 907-08 (adopting Regents' standards, however ambitious, as definition of a sound basic education would improperly "cede to a state agency the power to define a constitutional right"). The record shows that plaintiffs seek a standard that "'correlates with success in first-year college courses'" and is higher than the score needed to graduate and earn a high school diploma (R. 26 [¶ 76] (complaint equating "college and career ready" with scores of at least 75 on the Regents Examination in English and at least 80 on the Regents Examination in Mathematics)); *cf.* 8 N.Y.C.R.R. § 100.5(b)(7)(ix) (requiring scores of 65 on Regents Examinations to earn a diploma). This Court has

rejected the claim that the constitutional right to a sound basic education is measured by performance at that level. *See CFE II*, 100 N.Y.2d at 907-08.

Second, the *Aristy-Farer* plaintiffs make no effort to attribute any causal link between the one-time denial of an increase in state aid due to the APPR Compliance Provision and any inadequacy in educational services. The *Aristy-Farer* plaintiffs fail to identify any mechanism by which this temporary pause in state funding resulted in concrete reductions in the New York City school district's educational services. And they fail to explain why that district's funding is inadequate, when overall funding—including local revenues which have increased substantially in recent years—have gone up by more than $6 billion between 2003-2004 and 2012-2013. See *supra* Pt. II.B.2. In addition, plaintiffs' limited allegations concerning educational outcomes date from June 2012 (R. 26 [¶ 77]), but the APPR Compliance Provision did not have any effect on New York City funding before June 2013. Student performance data from a year earlier cannot support a causal connection between the APPR Compliance Provision and any supposed

educational deficiencies purportedly reflected in the performance data.

The First Department did not conclude that the *Aristy-Farer* complaint adequately alleged an Education Article claim. Rather, the court essentially treated the *Aristy-Farer* action as if it were governed by the separate pleading in the *NYSER* action. (R. 388-389) But the *Aristy-Farer* plaintiffs—who are represented by the same counsel representing the *NYSER* plaintiffs—were given multiple opportunities to amend their pleadings; they have never filed a pleading with allegations or claims like those asserted in the *NYSER* action.

A pleading is not an empty formality. *See*, *e.g.*, *Valley Cadillac Corp. v. Dick*, 238 A.D.2d 894, 894 (4th Dep't 1997) (claim must be dismissed where pleading is defective and no motion is made to conform pleadings to proof at trial); *Dufur v. Lavin*, 101 A.D.2d 319, 324 (3d Dep't 1984), *aff'd*, 65 N.Y.2d 830 (1985) (same). Rather, pleadings serve crucial purposes, including apprising parties of the factual and legal bases of the pleader's claims and preventing surprise. *See*, *e.g.*, *Cole v. Mandell Food Stores, Inc.*, 93 N.Y.2d 34,

40 (1999); *see also*, *e.g.*, *Mavroudis v. State Wide Ins. Co.*, 102 A.D.2d 864, 864 (2d Dep't 1984) (issues framed by pleadings determine scope of discovery). Those purposes would be seriously undermined if the *Aristy-Farer* plaintiffs could proceed with their claims for relief without actually alleging that they are legally entitled to that relief.

The First Department was seemingly influenced by the view (R. 388-389) that it would be unfair to dismiss the *Aristy-Farer* claims while permitting the *NYSER* claims to proceed, but that view is mistaken. Any differential treatment is fully justified by the plaintiffs' respective decisions to file separate pleadings, based on different allegations of fact and asserting distinct claims for relief. And in any event, any relief that is awarded in the *NYSER* action with respect to the New York City school district will accrue to the benefit of the *Aristy-Farer* plaintiffs. This Court should not fundamentally distort its Education Article jurisprudence to sustain the sufficiency of the *Aristy-Farer* claims under these circumstances.

CONCLUSION

All of the claims in the *Aristy-Farer* complaint should be dismissed; the first and second causes of action in the *NYSER* complaint should be dismissed in their entirety; and the third and fourth causes of action in the *NYSER* complaint should be dismissed to the extent they relate to school districts other than New York City and Syracuse.

Dated: New York, NY
March 15, 2017

Respectfully submitted,

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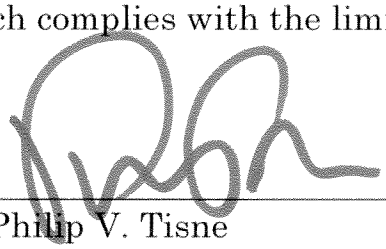
AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Philip V. Tisne, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 11,952 words, which complies with the limitations stated in § 500.13(c)(1).



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