

To be argued by  
ROBERT E. BIGGERSTAFF, ESQ.  
Time requested: 20 minutes

Albany County Index No. 8997-08

SUPREME COURT STATE OF NEW YORK  
APPELLATE DIVISION THIRD DEPARTMENT

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LARRY J. AND MARY FRANCES MAISTO, JULIE RODRIGUEZ, LORI J. COBB, THOMAS POPE, MARK AND JENNIFER PANEBIANCO, GRACE G. JOHNSON, Parents of Students in the Jamestown City School District as Representatives of Their Minor Children, CHRISTOPHER J. FARRELL, Parent of a Student in the Kingston City School District as Representative of His Minor Child, CURTIS L. BREWINGTON, SR., Parents of Students in the Mt. Vernon City School District as Representative of His Minor Children, NELLIE STEWART, ROBIN JOHNSON, EDWARD POPPITI, DAWN FUCHECK, PAMELA R. RESCH, SHARON CURRIE, LEONA M. FREE, ELIZABETH ROBINSON, ZSA ZSA HOLMES, TANISHA JACKSON, ALMETRA MURDOCK, TONIA PARKER, Parents of Students in the Newburgh Enlarged City School District as Representatives of Their Minor Children, DAWN RALPH, Parent of a Student in the Niagara Falls City School District as Representative of Her Minor Child, KELLY DECKER, Parent of a Student in the Port Jervis City School District as Representative of Her Minor Child, SAKIMA A.G. BROWN, Parent of a Student in the Poughkeepsie School District as Representative of Her Minor Child, ALESIA McDANIEL, RHONDA ANGRILLI-RUSSELL, ZULIA MARTIN, Parents of Students in the Utica City School District as Representatives of Their Minor Children,

*PLAINTIFFS-APPELLANTS,*

- AGAINST -

STATE OF NEW YORK,

*DEFENDANT-RESPONDENT.*

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**REPLY BRIEF FOR PLAINTIFFS-APPELLANTS**  
**APPELLATE DIVISION NO. 524625**

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DAVID F. KUNZ  
GEORGE J. SZARY  
*DeGraff, Foy & Kunz, LLP*  
41 State Street Albany, NY 12207  
518-462-5300

GREGORY. G. LITTLE  
LAURA J. GARR  
*White & Case*  
1155 Avenue of the Americas  
New York, NY 10036  
212-819-8200

ROBERT E. BIGGERSTAFF  
LAURA K. BIGGERSTAFF  
*The Biggerstaff Law Firm, L.L.P.*  
1280 New Scotland Road  
Slingerlands, NY 12159  
(518) 475-9500

DAVID G. SCIARRA  
WENDY LECKER  
*Education Law Center*  
60 Park Place, Suite 300  
Newark, NJ 07102  
973-624-1815

RICHARD E. CASAGRANDE  
MEGAN M. MERCY  
*NYS United Teachers*  
800 Troy-Schenectady Road  
Latham, NY 12210  
518-213-6000

Attorneys for Plaintiffs-Appellants

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## PRELIMINARY STATEMENT

The Appellate Division will decide this appeal by determining if the issue before the Trial Court was, as stated in the plaintiffs' Complaint (i), were the pupils in the eight small city school districts comprising the plaintiffs denied the opportunity to have a sound basic education which the State is obligated to provide them or, (ii), if the plaintiffs were challenging the Executive and Legislative statewide education funding reforms enacted after the Campaign For Fiscal Equity ("*CFE*") decisions as patently irrational as found by the lower court and as argued to this Court by the State.

This Court must reverse the lower Court decision, and confirm that the issue the lower Court should have decided was whether the students in the plaintiff school districts were deprived of the opportunity to obtain a sound basic education. Upon holding the issue to be determined is the constitutional right to a sound basic education, the Court must apply the *CFE* templet of determining if the evidence supports a finding of inadequate inputs, inadequate outputs and a causal link to the level of State funding for these particular school districts. Based on the exhaustive and over-whelming proof in favor of appellants' argument, which the State's Brief does not even challenge, it is submitted this Court must declare that the State has violated and continues to violate its constitutional duty to provide the pupils of these eight small city school districts the opportunity to obtain a sound basic

education as is its obligation under the Education Article of the New York State Constitution, Article XI, Section 1.

**POINT ONE**

**THE LOWER COURT AND STATE IMPROPERLY DEFINED  
THE ISSUE TO BE DETERMINED IN THIS CASE**

The State frames the issue presented by plaintiffs' case as a challenge to New York's statewide school aid funding beginning with the enactment of Foundation Aid in 2007 to the present (Respondent's Brief pp. 5-6). This is a misstatement made to avoid addressing plaintiffs' claims.

The State begins by refusing to acknowledge the relief sought in plaintiffs' complaint. That Complaint clearly seeks a judgment declaring the State's failure to appropriate adequate funds permitting each of the plaintiffs' districts to provide sufficient educational services to all their children insuring them opportunities to meet or exceed the statewide standards of educational quality and quantity and to obtain a sound basic education which violates the Education Article of the New York State Constitution. (R-82). Judge O'Connor in her lower court decision noted:

“that plaintiffs, representatives of children in eight small city school districts in the State of New York, have brought this action against the State for declaratory and injunctive relief, alleging that the schoolchildren in these school districts are being deprived of the opportunity for a sound basic education, required by Article XI, § 1 of the New York State Constitution...”

In the prior motion to dismiss, Justice Devine stated:

“Plaintiffs commenced the instant action for a declaratory judgment seeking a determination and declaration that 11 small city school districts are so substantially underfunded that they are unable to provide a sound basic education to the plaintiffs’ children as required by Article XI, § 1 of the New York Constitution.” (R-229).

Justice Stein writing for this Court when this case was previously before it stated:

“Plaintiffs—the parents of minor students in 11 different school districts outside the City of New York—commenced this declaratory judgment action in March 2009, alleging that their children are being deprived of the opportunity of a sound basic education, in violation of NY Constitution, Article XI § 1, because the school districts where the students attend school are substantially underfunded.” (R-234).

The Court of Appeals affirmed this Court’s earlier decision in this case. (R-239).

Judge Ciparik in her concurring opinion, concluded:

“To be sure, ‘[i]t is the responsibility of the State to offer the opportunity of a sound basic education, and it is the responsibility of this Court to determine whether the State is fulfilling its responsibility to the plaintiffs’ (*CFE II*, 100 NY2d at 940 [Smith, G.B. J., concurring]).”

In seeking dismissal of the Complaint, the State argued that enacting Foundation Aid in 2007 in response to the *CFE* cases, rendered the claims of the plaintiffs here moot, in essence saying it was now an executive/legislative issue in which the Courts could not be involved. This position was rejected by every court in the said prior motion to dismiss, with the message sent that the Constitutional

claim must be decided on the merits. This clear directive notwithstanding, the Trial Court, ignored the directives from this Court and the Court of Appeals and erroneously adopted the State's discredited argument in dismissing the Complaint.

The lower court began its decision acknowledging plaintiffs were seeking a determination that the State funding of the plaintiff school districts was so inadequate that the students were being deprived of their constitutional right to a sound basic education similar to the claim in the *CFE* cases (R-8, 10-11). Judge O'Connor avoided determining this issue by recharacterizing the case, erecting a strawman, and thereafter knocking it down by holding plaintiffs, rather than seeking adjudication of the constitutional claim were instead seeking full funding of the Foundation Aid Formula. Judge O'Connor stated:

“However, picking up where *CFE* left off, these plaintiffs contend that the education funding levels created by the enactment of Foundation Aid over the four-year period established in the 2007-2008 enacted State budget provides a constitutional minimum or floor, and the reductions in the enacted budgets in the years that followed violate the New York State Constitution.” (R-15).

• • •

“The fundamental question, then, before this Court is whether the State can alter or adjust the education reform plan that was put into place by changing the levels of funding for each school district based upon the fluctuation of the State's fiscal condition, the needs of the school districts, the level of local contribution and federal funding for the school districts, and other competing



issues that are considered in the development of the New York State budget, and still deliver on its obligation to ensure that schoolchildren are provided the opportunity for a sound basic education. The answer to that question is yes.” (R-18).

Plaintiffs bring the same claim for their eight small city school districts as was made in *CFE* for the students in the New York City School District. Nevertheless, it is submitted both the lower court and the State have purposefully ignored and misrepresented plaintiffs request for a declaratory judgment on whether the students in plaintiffs’ eight school districts were being denied their constitutional right to a sound basic education caused in part by a lack of adequate state funding.

## **POINT TWO**

### **THE LAW OF THE CASE**

It is the law of this case that plaintiffs have stated a valid claim for a judgment declaring that the students in their school districts have been denied their constitutional right to a sound basic education. (R-229-251). The plaintiffs, during the trial, submitted extensive proof to support their claim. The lower court and this Court are bound by the prior determination in this case to rule on this issue. As this Court noted when reviewing the denial of the State’s motion to dismiss:

“Although, as defendant argues, defendant may be able to demonstrate that the 2007 legislation will ameliorate the defects and discrepancies that plaintiffs allege exist, it is also possible, as indicated above, that plaintiffs will

successfully demonstrate, based on available data, that even the planned increases in aid are not sufficient to enable the school districts to provide a constitutionally-guaranteed sound basic education (compare Matter of Global Tel\*Link v. State of N.Y. Dept. of Correctional Servs., 68 AD3d 1599, 1600-1601 [2009]). Inasmuch as plaintiffs' rights will be directly affected by a determination of their claims, such claims are not moot (*see Matter of Hearst Corp. v. Clyne*, 50 NY2d 707, 713 [1980]; *Winner v Cuomo*, 176 AD2d 60, 62-63 [1992]; *cf. Mallinckrodt v Barnes*, 272 AD2d 651, 652-653 [2000]). Accordingly, while we are cognizant of the need to act with restraint in reviewing state financing plans while providing redress for violations of rights under the NY Constitution (*see Campaign for Fiscal Equity, Inc. v State of New York*, 8 NY3d at 28), in light of the determination of the Court of Appeals that students and parents may sue defendant over school funding (*see generally Campaign for Fiscal Equity v State of New York*, 86 NY2d 307 [1995], *supra*), we conclude that Supreme Court properly denied defendant's motion to dismiss the complaint and the case should proceed to a review of the merits (*see Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]). {\*\* Ad3d at 138}. (R-237-238).

The State, after improperly changing the claim made by the plaintiffs to a challenge to the right of the Executive and Legislative branches to enact state-wide educational funding rather than the educational opportunity offered the students in plaintiffs' eight school districts, argues plaintiffs' law of the case argument does not apply because the issues before the court are different. The reality is this Court in its previous review of this case held plaintiffs had a right to a determination on the merits of whether the State failed to provide the plaintiff school district

students their constitutional right to a sound basic education. It did so in the face of the same argument made herein by the State and erroneously adopted by the Trial Court. The issue before this Court is the same issue previously held by this Court as requiring a determination, and plaintiffs' law of the case argument is applicable.

### **POINT THREE**

#### **THE TRIAL EVIDENCE REQUIRES A DECLARATION THAT PLAINTIFFS' STUDENTS HAVE BEEN DENIED THEIR CONSTITUTIONAL RIGHT TO A SOUND BASIC EDUCATION**

In the trial of this case, both the plaintiffs and the defendant State submitted extensive, factual and expert proof on the issue of whether the students at the eight small city school districts were receiving a sound basic education as required by the Constitution of the State of New York. The Court of Appeals in *CFE I* (86 NY2d 307) and *CFE II* (100 NY2d 893) set forth the templet to be applied to determine if there has been a violation of the constitutional duty to provide a sound basic education. There must be an evaluation of the 'inputs' children receive (teaching, facilities and instrumentalities of learning) and their resulting 'outputs' such as test results and graduation and dropout rates and if these are found deficient, that said failure is in part causally related to the lack of State funding.

#### **Inputs. Outputs. Causation.**

Those are the three essential elements that must be addressed to determine whether the State is discharging its constitutional obligation to provide the opportunity for a sound basic education for the students in the plaintiffs' districts. Those are the three essential elements that were addressed by the Plaintiffs and the State at trial on a daily basis. And those were the three essential elements relied upon by the Trial Court when it denied the State's motion for a directed verdict at the close of the Plaintiffs' case:

“[B]ased on the three elements that we've heard ad nauseum in this case, inputs, outputs, and the causal link that's required . . . I believe that there is . . . enough evidence before the Court, so I am going to deny the motion.” (R-3614)

The reason the Trial Court referenced hearing "ad nauseum" about inputs, outputs and causation is that virtually every witness during the two month trial discussed at least one of the factors and most of the witnesses discussed all three factors. Superintendents and teachers for each of the eight Maisto districts testified in detail about the appalling conditions and lack of resources in their schools as a result of the draconian cuts to State school aid funding. They testified about the high poverty and high needs of most of their students. They testified about horrific test scores and graduation rates and they testified about the causal link between the lack of resources and the terrible test scores and graduation rates. And as set forth in detail in the Plaintiffs opening brief, that trial evidence overwhelmingly proved

each of the elements of the *CFE* templet: deficient inputs, inadequate outputs, and causation, a link between deficient inputs and inadequate outputs. The State essentially conceded the outputs were woefully inadequate. While the State did call former superintendents from wealthier school districts to testify that the resources at these high need schools were sufficient, they conceded that additional resources would improve the test scores and graduation rates of the Maisto districts.

After the trial, the State agreed completely the inputs, outputs, and causation were the dispositive issues in the case:

"[B]efore any judicial intervention is warranted, the Court of Appeals requires plaintiffs asserting claims of insufficient public school funding to prove both detailed evidence of gross and glaring deficiencies in educational inputs and outputs throughout the schools in a particular district and a causal link between the State funding system and any proven failure to provide the opportunity for a sound basic education." State's Post-Trial Memorandum at p.2.

Despite conducting the trial with the clear understanding that these three elements were the deciding factors in the case, despite the parties submitting post trial briefs that recognized these were the three critical elements, and despite the Trial Court earlier acknowledging these were the three critical elements required by the Court of Appeals in *CFE*, the Trial Court chose not to address those elements in rendering a final decision. The failure to do so is reversible error.

The recent decision by the Court of Appeals in *Aristy-Farer v. State/NYSER v. State* (“*NYSER*”), 2017 WL 2742205 (Court of Appeals, June 27, 2017), a copy of which is an Addendum hereto, confirms that the Trial Court’s refusal to adjudicate inputs, outputs and causation, as well as the reasoning for refusing to do so, is reversible error. The Trial Court expressly declined to conduct an analysis of the evidence of inputs, outputs and causation because “the State has already taken steps to address the concerns raised in the *CFE* case, and fundamentally changed the structure and methodology of education funding in the State of New York, and has also increased the funding levels.” (R-17). Thus, the Trial Court held that the plaintiffs could not establish their claim under the Education Article because the State had put in place a system designed to provide a sound basic education.

The Court of Appeals in *NYSER* firmly rejected this approach, holding that “[o]ur *CFE* decisions can be understood as a way to bring a challenge under the Education Article **even if the State’s system overall is designed to provide a sound basic education**, but such challenges must be brought on a school district level.” (emphasis added). (*NYSER* p. 12). The Maisto plaintiffs were entitled to an examination by the Trial Court of inputs, outputs and causation on a district-by-district basis, as *NYSER* clearly requires.

The Maisto plaintiffs followed the *CFE* framework, presenting specific evidence, district by district, of inadequate inputs, inadequate outputs and a causal

link between the failure to provide a sound basic education and State funding levels. As *NYSER* makes clear, the Trial Court committed plain error in failing to adjudicate the case according to the well-established *CFE* framework.

In its 70 page Response, the State completely ignores its earlier understanding of the significance of inputs, outputs, and causation for the first 66 pages. Instead, the State attempts to shift the focus completely away from the evidence presented at trial on inputs, outputs, and causation and instead recast the issue as to whether the State acted "rationally" in response to the budgetary concerns.

But the State concedes (as it must) that "a fiscal crisis cannot trump constitutional rights." (Respondents Brief at 61). So regardless of the financial hardship suffered by the State, the dispositive issue remains as follows: Whether the State is satisfying its constitutional obligation to provide every student with the opportunity for a sound basic education as measured by inputs, outputs, and causation.

The State makes no serious attempt in its Brief to argue that inputs and outputs were adequate for the students in the plaintiffs' districts. Nor do they argue that there were no causal links between the inputs and outputs.

There is simply no factual basis in the record to suggest that any increases in funding over the past several years has cured the deficiencies in inputs or outputs.

There is also no basis for relying upon any “facts” that occurred after this case was closed at trial. And it is baseless to suggest that no purpose would be served by this Court finding that the students in the plaintiffs’ districts have not received their constitutional right to an opportunity for a sound basic education. A declaration by this Court that there has been a constitutional violation by the State will have a profound and immediate impact on these students.

As eloquently articulated by Judge Kaye in *CFE II*:

“[Courts] are . . . well situated to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government - not in order to make policy but in order to assure the protection of constitutional rights. That is what we have been called upon to do by litigants seeking to enforce the State Constitution's Education Article.” (*CFE II*, 100 N.Y.2d 893, 931).

The plaintiff students are asking this Court to assure the protection of their constitutional right to an opportunity for a sound basic education. The Trial Court abdicated its responsibility to safeguard those rights by failing to make a finding on whether Plaintiffs established a violation by proving inadequate inputs, inadequate outputs, and a causal link between the two. This Court must remedy that error by reversing the lower court decision and make findings based on the evidentiary record that the State has violated the plaintiff students' constitutional right to an opportunity for a sound basic education.



Before this Court are eight of the poorest and most overburdened school districts in the State. They represent only a small fraction of the State's public school students unlike New York City in the *CFE* cases who represented the largest and, in total assessed value, the richest school district in the State. The courts of New York will not be measured by how well they treat the rich and powerful but by the justice they provide to the poorest and weakest of this State. At many points during their eight year battle against the State, these eight small city school districts have been tempted to quit because of the burden of bringing this case. Justice demands that this Court weigh the constitutional claim that these students have been denied their constitutional right to a sound basic education and render a decision on the merits.

Plaintiffs ask no more than that and they deserve no less.

#### **POINT FOUR**

#### **PLAINTIFFS' DECLARATORY JUDGMENT CLAIM SHOULD BE GRANTED**

Both plaintiffs and respondent State agree all of the necessary facts are before this Court to determine if the students in the plaintiff school districts were denied a sound basic education because of inadequate inputs, inadequate outputs that were caused in part by a lack of funding by the State of New York. (Plaintiffs' Brief p. 60; Respondent's Brief p. 67). The lower court incorporated, as part of its decision, the stipulated facts. (R-27.1 – 27.202). These statistics alone support a

finding of inadequate inputs and outputs as discussed in plaintiffs' brief (pp. 20-33; 67-68). It is well within the power of this court to review this record, de novo, and issue the Decision on the merits the Trial Court failed to. *Bernardine v. City of New York*, 294 N.Y. 361, 366-67 (1945).

This is not a case seeking to declare the state-wide public education funding enacted by the Legislative and Executive from the enactment of Foundation Aid in 2007 to the present unconstitutional. The instant case was limited to the very specific issue of whether in these eight particular school districts the inputs were inadequate, the outputs were inadequate and these inadequate results were caused in part by a lack of funding to these districts by the State of New York. It is the same issue presented in *CFE I* and *CFE II* with respect to these eight small city school districts.

In a final attempt to avoid a determination on the merits of plaintiffs' claim, the State argues that to find a violation of the State's obligations to provide a sound basic education in these eight school districts for the years 2006-07 to 2013-14 would serve no adjudicative purpose because it is now two years old. This case was tried in the beginning of 2015 and the school year of 2013-2014 represented the most recent data available at the time of trial. If the State's argument is accepted, plaintiffs would never be able to bring this type of case because the data always lags a school year behind.

A determination in the plaintiffs' favor would serve an important adjudicative purpose. Such a finding would require the Court to direct the Executive and Legislative branches to adopt a plan to meet the funding needs of these eight districts. (*See CFE II and CFE III*). These underfunded and underperforming districts deserve the same protection and rights given the New York City school district.

### **CONCLUSION**

These plaintiffs have waited long enough for justice and it is now incumbent upon this Court to award it. For all the foregoing reasons, and the reasons set forth in their initial brief, plaintiffs respectfully request that this Court reverse the Trial Court Decision, and on the overwhelming proof in the record find that these districts have been deprived of the constitutionally guaranteed right to an opportunity to receive a sound basic education, and then referring the matter for appropriate proceedings to develop a remedy.

Dated: August 24, 2017  
Albany, New York

DeGRAFF, FOY & KUNZ, LLP

By: \_\_\_\_\_  
David F. Kunz, Esq.  
41 State Street, Suite 901  
Albany, New York 12207  
518-462-5300

WHITE & CASE

By: \_\_\_\_\_  
Gregory G. Little, Esq.  
1155 Avenue of the Americas  
New York, New York 10036  
212-819-8200

**THE BIGGERSTAFF LAW FIRM, LLP**

By: \_\_\_\_\_  
Robert E. Biggerstaff, Esq.  
1280 New Scotland Road  
Slingerlands, New York 12159  
518-475-9500