

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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LARRY J. AND MARY FRANCES MAISTO, *et al.*,

Plaintiffs,

-against-

Index No. 8997-08

STATE OF NEW YORK,

Defendant.

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DEFENDANT'S PRETRIAL MEMORANDUM

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PRELIMINARY STATEMENT

Plaintiffs bring this action challenging New York State's funding of education in eight small city school districts -- Jamestown, Kingston, Mount Vernon, Newburgh, Niagara Falls, Port Jervis, Poughkeepsie, and Utica ("the plaintiff districts"). Plaintiffs seek the extraordinary remedy of judicial intervention into the State's budget determinations despite the fact that they will be unable to meet their burden of offering proof of deficiencies in educational inputs as required by the Court of Appeals. Nor will plaintiffs be able to show a causal link between any claimed deficiencies and the education funding system. Given the lack of proof, together with the exceptionally stringent requirements for establishing a violation of the Education Article of the New York Constitution (Article XI §1), plaintiffs cannot prevail on their claims.

BACKGROUND

In Campaign for Fiscal Equity v. State, the plaintiffs claimed that the State's educational financing scheme failed to provide public school students in New York City with the opportunity to obtain a sound basic education. In its first of three decisions in the case ("CFE I"), the Court of Appeals held that the Education Article of the State Constitution requires the State "to offer all children the opportunity of a sound basic education.... Such an education should consist of the

basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." Campaign for Fiscal Equity v. State, 86 N.Y.2d 307, 316 (1995).¹ The court held that plaintiffs' cause of action under the Education Article survived a motion to dismiss, reminding plaintiffs that they would "have to establish a causal link between the present funding system and any proven failure to provide a sound basic education to New York City School Children." Id. at 318.

In its second decision in the case ("CFE II"), the Court of Appeals defined sound basic education more exactly as the "opportunity for a meaningful high school education, one which prepares [children] to function productively as civic participants." Campaign for Fiscal Equity v. State, 100 N.Y.2d 893, 908 (2003). In determining whether New York City schools in fact delivered the opportunity for a sound basic education, the court considered the inputs children received -- teaching (referencing teacher quality indicators such as teacher certification, test performance, and experience); school

¹The Court of Appeals had previously acknowledged the existence of "significant inequalities in the availability of financial support for local school districts, ranging from minor discrepancies to major differences, resulting in significant unevenness in the educational opportunities offered." Board of Education, Levittown Union Free School District v. Nyquist, 57 N.Y.2d 27, 38 (1982). Nevertheless, such evenness of educational opportunity did not render the school funding system constitutionally infirm unless it could be shown that the system's funding inequities resulted in the deprivation of the opportunity for a sound basic education. Id. at 47-48.

facilities and classrooms (which provide enough light, space, heat, and air to permit children to learn); and instrumentalities of learning (including classroom supplies, textbooks, libraries, and computers) -- and their resulting outputs -- such as test results and graduation rates -- and whether plaintiffs had established a causal link between the present funding system and any proven failure to provide a sound basic education. 100 N.Y.2d at 908-19.

After determining that New York City schoolchildren were not receiving the opportunity for a sound basic education, the Court of Appeals directed the State to ascertain the actual cost of providing a sound basic education in New York City and invited the State to ascertain the cost of providing the opportunity for a sound basic education statewide. Id. at 928-30. The court noted that it was mindful of its responsibility to "defer to the Legislature in matters of policymaking, particularly in a matter so vital as education financing, which has as well a core element of local control. We have neither the authority, nor the ability, nor the will, to micromanage education financing." Id. at 925.

In response to the court's directive, Governor Pataki created the New York State Commission on Education Reform ("the Zarb Commission") and charged it with recommending to the executive and the Legislature education financing and other

reforms that would ensure that all children in New York State have an opportunity to obtain a sound basic education. The Zarb Commission retained Standard and Poor's Evaluation Services ("S&P") to calculate the additional spending required to provide the opportunity for a sound basic education. After S&P identified certain spending gaps, the Zarb Commission recommended a five year phase-in of a statewide amount ranging from \$2.5 to \$5.6 billion from state, local, and federal sources.

In August 2004, Governor Pataki submitted his Education Reform Plan in which he concluded that \$2.5 billion in additional revenues statewide (\$1.9 billion in New York City) was a valid determination of the cost of providing the opportunity for a sound basic education in New York City. In November 2006, in its third decision in the CFE case ("CFE III"), the Court of Appeals concluded that this estimate and the methodology used to calculate it were reasonable. Campaign for Fiscal Equity v. State, 8 N.Y.3d 14, 30 (2006).

In 2007, under the newly elected Governor Spitzer and with pre-recession revenues, the Legislature enacted the Budget and Reform Act, which, as part of a comprehensive educational reform initiative, called for significantly more education funding than what the Court of Appeals had held was needed for a sound basic

education.² A principal component of the 2007 Budget and Reform Act was the establishment of Foundation Aid, which was abundantly more generous than the amounts recommended in Governor Pataki's Education Reform Plan which the Court of Appeals found to be reasonable in CFE III. Specifically, as compared to a \$2.5 billion increase in total revenues (i.e., state aid, federal aid, and local contribution) over five years, Foundation Aid, as originally enacted, would have resulted in a total statewide increase in just state aid of approximately \$5.5 billion over four years. As noted by Governor Spitzer in his press release announcing the Foundation Aid proposal in his executive budget, "[t]he Budget provides more than sufficient funds to address the school funding needs highlighted by the [CFE] lawsuit...." (emphasis added).

The State began phasing in Foundation Aid in 2007-08 and 2008-09, anticipating full implementation after four years. However, in 2009, the State began to face severe financial

²In fact, the CFE court anticipated that the Legislature would enact legislation surpassing the constitutional minimum. See CFE III, 8 N.Y.3d at 33 (Rosenblatt, J., concurring) ("That does not mean that the State is limited to the minimum, or 'floor,' of what it takes to provide a sound basic education. Judging by Governor Pataki's higher budgeting and the similarly heartening indications that Governor-elect Spitzer will continue in a direction higher than the minimum, there is every indication that the amounts dedicated will be well above the constitutional floor.... How much more it can and should spend, however, is a matter for the political branches, which will be free to avail themselves of the valuable work performed by the distinguished panel of referees.").

circumstances due to the economic crisis afflicting New York State and the Nation which resulted in a multi-billion dollar gap between planned spending commitments and the receipts available to pay for them.³ In response to this economic crisis, New York, like the majority of the States, was required to take unprecedented actions to reduce spending, such as furloughs of State employees and padlocking of State parks.

In order to close the largest budget gap ever faced by New York State, the Legislature enacted significant recurring reductions in planned spending for, among other things, payments to healthcare providers, property tax relief for homeowners, and State agency operations, and eliminated cost of living increases to human services providers. As part of the legislative response to the catastrophic financial backlash of the Great Recession, the Legislature also extended the time for implementation of Foundation Aid as contemplated in 2007 and enacted reductions in State education aid. The State aid reductions, however, were largely offset by federal stimulus funding.

³Congress termed the fallout from the 2008 financial crisis the "Great Recession" because it has been "the deepest and most protracted recession since the Great Depression. The financial crisis that began in the fall of 2008 had enduring effects on economic performance." <http://www.jec.senate.gov/public/index.cfm?p=GreatRecession>. New York was hit particularly hard by the Great Recession due to the economic importance of the financial services and real estate industries to employment and State revenues.

However, in the last three budgets (2012-13, 2013-14, and 2014-15), the Legislature has enacted increases in State education aid totaling \$2.9 billion statewide and New York's total State aid for education is at an all time high. Thus, even without the full implementation of the increases contemplated by the 2007 Budget and Reform Act, total school funding throughout the State has increased dramatically since 2007 and New York's per pupil education spending surpasses all other States and is more than 80 percent above the national average. In fact, per pupil education spending in the plaintiff districts is between approximately 30 and 110 percent above the national average.

Nonetheless, in this action, parents of students in the plaintiff districts seek a declaration that the State's education aid is inadequate to allow the plaintiff districts to provide their students with the opportunity for a sound basic education, as required by the Education Article of the State Constitution.

By stipulation & order dated July 28, 2014, the court (McNamara, A.J.S.C.) directed the parties to submit to the court the direct testimony of their expert witnesses in the form of written reports and affidavits. In accordance with this order, plaintiffs have provided defendants with reports prepared by Peggy Wozniak, Stephen Uebbing, Bruce Fraser, Bruce Baker,

Deborah Cunningham, Frank Mauro, and Laurence Spring.⁴ In addition to these expert witnesses, plaintiffs also intend to call the Superintendent of each of the plaintiff districts, and one or more of his or her assistants, presumably to assert that their districts lack the resources necessary to provide the opportunity for a sound basic education. The State will call nine expert witnesses -- Gregory Aidala, Roger Gorham, Thomas Coseo, Jeffery McLellan, John McGuire, Gregory Scott Hunter, Robert Moje, David Armor, and Eric Hanushek -- as well as numerous state employees.

As will be shown below, once the court has heard all of the evidence, it will find that plaintiffs have failed to satisfy their burden of establishing: (1) inadequate inputs, (2) inadequate outputs, and (3) a causal link between the present funding system and any proven failure to provide the opportunity for a sound basic education.

DISCUSSION

Plaintiffs bear a heavy burden of showing that the State is violating its constitutional obligation to provide students with the opportunity for a sound basic education. In order to state such a claim, plaintiffs must demonstrate "gross and glaring" inadequacies in their education which deprive them of the

⁴In accordance with paragraph 9(c) of the stipulation & order dated October 9, 2014, defendant is separately filing its objections to plaintiffs' experts' reports.

opportunity to receive a sound basic education. New York State Association of Small City School Districts, Inc. v. State of New York, 42 A.D.3d 648, 651 (3d Dept. 1984). See also CFE I, 86 N.Y.2d at 318-19 (finding plaintiffs stated a claim where they asserted "fact-based claims" supported by specific allegations of "inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books, etc."); CFE III, 100 N.Y.2d at 932 (noting that plaintiffs prevailed because of "a unique combination of circumstances: New York [City] schools have the most student need in the state and the highest local costs yet receive some of the lowest per-student funding and have some of the worst results. Plaintiffs in other districts who cannot demonstrate a similar combination may find tougher going in the courts."). Plaintiffs must show "first, that the State fails to provide them a sound basic education in that it provides deficient inputs -- teaching, facilities and instrumentalities of learning -- which lead to deficient outputs such as test results and graduation rates; and, second, that this failure is causally connected to the funding system." Paynter v. State of New York, 100 N.Y.2d 434, 440 (2003).

At the outset, plaintiffs' case rests on the misconception that, when the Legislature enacted Foundation Aid in 2007, it determined that such funding was the minimum required to provide the opportunity for a sound basic education. See, e.g., Bruce Baker's October 3, 2013 report p. 10 ("The foundation aid formula *IS* the state's own definition of its constitutional responsibility to provide for local public school districts to achieve sufficient spending levels to produce adequate education outcomes.");⁵ Deborah Cunningham's report dated November 12, 2014 p. 8 ("In 2007, the State enacted the Foundation Aid formula to, as described above, provide school districts the minimally

⁵At his examination before trial ("EBT"), when asked the basis for his assertion that Foundation Aid was the State's determination of the minimum funding required to provide the opportunity for a sound basic education, Dr. Baker testified as follows:

That is in part my conclusion based on my understanding from the field in which I work about under what terms, for what purpose do we lay out a Foundation Aid Formula, and also then derived from the language that I reviewed along the way. I am certainly not the one to make the ultimate constitutional judgment here. But it's my opinion that this formula was enacted to meet a particular standard. All the information I reviewed suggests to me that the standard in question was the standard required under CFE.

Q. Can you point me to any particular documents that cause you to reach that conclusion?

A. Off the top of my head, no.

adequate funding needed for a sound basic education.");⁶ report of Frank Mauro dated November 12, 2014.⁷ Based on this flawed premise, plaintiffs incorrectly conclude that the State is not meeting its constitutional obligation to provide the opportunity for a sound basic education since the increases contemplated by the 2007 Budget Reform Act have not been fully realized.

In fact, Foundation Aid is not and cannot be the minimum funding required by the Education Article for the simple reason that, as demonstrated above, Foundation Aid, as originally enacted, was substantially more generous than the amounts recommended in Governor Pataki's Education Reform Plan which the

⁶At her EBT, when asked to identify the basis for her assertion that, when Foundation Aid was enacted, either the Governor or the Legislature intended to equate such funding with the minimum amount needed to provide the opportunity for a sound basic education, Dr. Cunningham made reference to Governor Spitzer's memorandum in support of the 2007 Budget and Reform Act. However, the statement to which Dr. Cunningham referred simply stated that the bill "implements the Court of Appeals' [CFE] decision, and furthers compliance with the mandates of federal education law, including the 'No Child Left behind Act.'" (emphasis added). Moreover, this quote appeared in a section of the memorandum that was related to programmatic and accountability reforms, not the new Foundation Aid formula.

⁷Unlike Drs. Baker and Cunningham, Frank Mauro does not expressly assert that Foundation Aid is the minimum funding required under the Education Article. Mr. Mauro merely states that Foundation Aid was intended to fund the opportunity for a sound basic education and is capable of doing so.

Court of Appeals found to satisfy the Education Article.⁸ The 2007 Foundation Aid formula was not a revised calculation of the cost of providing the opportunity for a sound basic education. Rather, the formula sought to go beyond what was recommended by the Zarb Commission and accepted as reasonable in CFE III.

Further, while Foundation Aid is a significant portion of the total funding provided to school districts, it is by no means the only funding. In recent school years, Foundation Aid has represented less than 30 percent of the total funds appropriated for education by federal, State, and local sources. As part of its total school aid package, New York State annually provides billions of dollars in State aid over and above Foundation Aid.

⁸Plaintiffs' own expert seems to concede that the amounts aspired to by the 2007 Budget and Reform Act were a policy choice rather than a calculation of the cost of providing the opportunity for a sound basic education as a constitutional matter. At her EBT, Dr. Cunningham was asked how she reconciles her assertion that Foundation Aid was the State's determination of the minimum funding required to provide the opportunity for a sound basic education with the fact that the far less generous funding recommended by the Zarb Commission was found to be adequate by the Court of Appeals. In response, Dr. Cunningham stated:

The Court of Appeals ruled that the lower level of the Zarb Commission recommendation was adequate, but the Regents didn't agree with that. The Regents had a job to recommend funding proposals based on the needs of school districts, and they recommended a higher amount. So I think you're looking at it from a legal point of view and I'm looking at it from a policy point of view.

Having disposed of plaintiffs' baseless assertion that Foundation Aid constitutes the minimum funding required by the Constitution, we now turn to the real issue in the case -- whether plaintiffs can meet their burden of establishing: (1) inadequate inputs, (2) inadequate outputs, and (3) a causal link between the present funding system and any proven failure to provide the opportunity for a sound basic education. The State submits that they cannot.

The reports of plaintiffs' education experts -- Peggy Wozniak, Stephen Uebbing, and Bruce Fraser -- focus almost entirely on outputs and contain little more than conclusory assertions that the inputs for a sound basic education must be lacking since the outputs are so poor. However, without factual proof of inadequate inputs, plaintiffs cannot prevail. Further, their circular reasoning does not establish the causal link necessary for plaintiffs to meet their burden.

Indeed, the State strongly disputes the assertion that any poor outputs in the plaintiff districts are causally related to inadequate funding. The State's education experts -- Gregory Aidala, Roger Gorham, Thomas Coseo, Jeffrey McLellan, John McGuire, and Gregory Scott Hunter -- have conducted detailed studies of the plaintiff districts and opined that each has adequate resources to provide the opportunity for a sound basic

education.⁹ The inputs are adequate; the necessary resources are present. This is in stark contrast to plaintiffs' failure to submit any factual data or expert analysis showing gross and glaring inadequacies in inputs.

Although the State has no burden of disproving causation, the reports prepared by the State's education experts establish that the outputs in the plaintiff districts are not the result of inadequate funding, but derive from internal shortcomings, such as insufficient attention to improving and monitoring the teaching and learning process in all classrooms and failure to fully implement the recommendations made by intervention teams charged with reviewing data, visiting the schools, and making recommendations to improve student performance with targeted strategies. As noted in such reports, strong leadership and a collaborative effort are essential to improving test scores and raising graduation rates.

The well-documented opinions of the State's experts, which are based on a strong factual analysis, are in stark contrast to the conclusory assertions rendered by plaintiffs' experts. The State's education experts' opinions are based upon an exhaustive review of all available data and extensive school visitations including thorough observations of classroom instruction and

⁹The reports of the State's architect, Robert Moje, establish that the physical facilities at the plaintiff districts are adequate to provide the opportunity for a sound basic education.

available resources. To say that the basis for the opinions rendered by plaintiffs' education experts is more limited is an understatement. In fact, after a careful reading of the reports prepared by Drs. Wozniak, Uebbing, and Fraser, it is difficult to discern what they based their opinions on other than simply asking district personnel to identify what they believe to be inadequacies in their available resources.¹⁰

Further, the plaintiffs' education experts recommend providing the plaintiff districts with certain additional resources and Laurence Spring makes such recommendations specifically with respect to resources purportedly needed by economically disadvantaged students. However, none of the recommended programs or services are necessary to provide the opportunity for a sound basic education. Thus, they merely serve as a distraction from the real issue to be tried in this case, on which plaintiffs bear the heavy burden, namely whether the plaintiff districts have the constitutionally adequate inputs to provide their students with the opportunity for a sound basic education. The evidence will establish that they do.

¹⁰In its separately filed objections to portions of plaintiffs' experts' reports, defendant objects to hearsay statements made by personnel of the plaintiff districts to the education experts that are conclusory rather than simply factual.

Finally, and perhaps most critically, the reports of the State's two causation experts, Eric Hanushek and David Armor, establish that providing more educational resources for the plaintiff districts is unlikely to have any meaningful impact on their educational outputs. Rather, how money is spent is much more important than how much is spent. This is fatal to plaintiffs' claim that any deficiencies in outputs are a direct result of the State's financing scheme and that more money is necessary to meet the State's constitutional obligation.

CONCLUSION

The evidence will establish that the plaintiff districts have an adequate number of sufficiently qualified teachers; school facilities and classrooms which provide enough light, space, heat, and air to permit children to learn; and adequate instrumentalities of learning such as classroom supplies, textbooks, libraries, and computers to provide their students with the opportunity for a sound basic education. Thus, the proof will show that the inputs are constitutionally adequate, mandating the dismissal of plaintiffs' Education Article challenge. Further, plaintiffs will not be able to meet their burden of establishing that any proven deficiencies in outputs

in their districts are the result of inadequate funding.

Therefore, the third amended complaint should be dismissed.

Dated: Albany, New York
January 15, 2015

Yours, etc.,

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By:

A handwritten signature in cursive script, appearing to read "R. Lombardo", written over a horizontal line.

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