SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

LARRY J. AND MARY FRANCES MAISTO, et al.,	:	
Plaintiffs,	:	Index No. 8997-08 Hon. Kimberly A. O'Connor
- against -	:	
STATE OF NEW YORK,	:	
Defendant.	:	

PLAINTIFFS' REPLY TO DEFENDANT'S POST-TRIAL MEMORANDUM

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Pursuant to this Court's March 12, 2015 stipulation and order, and in response to Defendant's Post-Trial Memorandum dated January 25, 2016 (the "Reply"), counsel for Plaintiffs submit this Post-Trial Brief in further support of Plaintiffs' June 2, 2011 Amended (Third) Complaint for Declaratory and Injunctive Relief.[1]

PRELIMINARY STATEMENT

In opening statements, Plaintiffs promised this Court that they would prove the Defendant State of New York (the "State") has denied the students in the Maisto Districts their constitutional right to an opportunity for a sound basic education and they would do so by presenting overwhelming evidence regarding inadequate outputs, deficient inputs, and a causal link between lack of resources and inadequate outputs. Over the course of a two month trial, Plaintiffs delivered on that promise. The test scores and graduation rates of the Maisto Districts are appallingly low. $1.1 billion in spending cuts over the past five years have forced these Districts to make massive cuts in teachers, support staff, and essential resources. And virtually every witness, including all but one of the State's experts, agreed that additional spending on teachers, support staff and resources would help improve test scores and graduation results.

In short, the Plaintiffs have proven that the State is failing its constitutional obligation to the Plaintiffs. Because the State cannot overcome the overwhelming evidence, in its 106 page-Reply the State chose to simply ignore key undisputed facts that were established at the trial, largely through the testimony of the State's own witnesses. Nonetheless, the record is clear. Plaintiffs have established the three elements necessary for a determination that the State is not

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in Plaintiff's Post-Trial Conclusions of Law dated November 25, 2015. The State's Reply is cited herein as "Def. Br. at ___." Plaintiff's Conclusions of Law is cited herein as "Pl. Br. at __."

affording the students in the Maisto Districts with the opportunity for a constitutional sound basic education:

Outputs: There is no dispute that the student outcomes in the Maisto Districts, as measured by school completion and test results, weigh in favor of judicial intervention. The State does not even address the element of outputs in its Reply, and for good reason. Student outcomes in Maisto Districts, in the words of the State's own witnesses, are "inadequate," "absolutely unacceptable," and, as an assistant commissioner in the New York State Education Department (SED) put it, "more than tragic for sure." It was undisputed at trial—and it is undisputed in the State's post-trial memorandum—that outcomes in the Maisto Districts are in crisis. This is a crisis for the children themselves: at least 40%, and in some cases substantially more, of the children in grades 3 through 8 in these Districts are not on track to graduate high school, according to the State's own measures. And it is a crisis for society as a whole, as the State's own experts acknowledged.

Inputs: Plaintiffs have shown that the resources available, particularly those for at-risk students, are "palpably inadequate." Hussein v. State, 19 N.Y.3d 899, 906 (2012) (J. Ciparick, concurring). The eight Maisto Districts received $1.1 *billion* less over five years than they would have had the State not cut school funding beginning in 2010-11. The State does not challenge the fact that the cuts of over one billion dollars in State aid to the Maisto Districts resulted in the loss of hundreds of teachers and support staff and a deficit in programs and services for the most vulnerable student populations. In fact, the State's experts admitted that these staggering cuts in funding "have had an effect that no one would want," and were "dramatic" and "detrimental."[2] The State acknowledges that districts like the Maisto Districts,

[2] See, e.g., T. 3580 (Roger Gorham agreeing that staff cuts in the Districts have had an effect that

because of their "concentrations of children from poverty backgrounds, have a greater educational burden to bear, resulting in a greater need to fund programs that provide extra time and help to educate students." D.X. X-1. Yet the State's dramatic cuts in aid forced all eight of the Districts to cut over ten percent of their staff in just a few years. Jamestown and Utica had to cut just under *one quarter* of their staff, and Mount Vernon cut a staggering 30% -- 350 employees in four years. These cuts have caused a deficit in the expanded platform of services for at-risk and high-need students identified in CFE as necessary for a sound basic education. In its Reply, the State enumerated several of the CFE input categories but wholly omitted the very categories of CFE inputs designed to address the needs of at-risk students and students with extraordinary needs.[3]

The State tries to justify the cuts because of the "Great Recession" and its impact on the budget. But such "justification" does not provide a defense for the State.[4] The New York

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no one would want); T. 3896 (Thomas Coseo admitting the higher the percentage of the school district's reliance on state aid, the more dramatic the impact on that school from cuts in funding); T. 3609 (Roger Gorham admitting that the gap elimination adjustment had detrimental effect on Poughkeepsie).

[3] In its Reply, the State omitted (i) the expanded platform of programs recognized by the court to help at-risk students (CFE Trial Ct., 187 Misc.2d at 76), and (ii) the necessity for adequate resources for students with extraordinary needs, including ELL students and students with disabilities. (Id. at 21-23, 27, 115). The CFE trial court recognized that at-risk students "need specially tailored programs and more time spent on all aspects of academic endeavor," including "pre-kindergarten programs, summer programs, and increased hours at school via after-school and Saturday programs." Id. at 76. It is precisely these types of programs that are most necessary for the student population in the Maisto Districts.

[4] An economic downturn cannot excuse nonperformance of a constitutional obligation. Klosterman v Cuomo, 61 N.Y.2d 525,537 (1984) (rejecting the State's argument that it cannot afford to provide services, noting that such defense is "particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights."). In Washington State's school funding case, the State also attempted to assert that the recent economic recession justified cutting state education funding. The court rejected that argument, holding that "the legislature may not eliminate an offering from the basic education program for reasons unrelated to educational policy, such as fiscal crisis or mere expediency." McCleary v. Washington, 269 P.3d. 227, 252 (2012). As noted at trial by Dr. Stephen Uebbing, the State has

Constitution requires the State to provide every student with the opportunity for a sound basic education, irrespective of a budget surplus, a "Great Recession," or any other budgetary restraint.

The State also tries to defend the cuts of over one billion dollars by arguing that the 2007 Foundation Aid Formula is "irrelevant to determining whether the State has satisfied its obligation to provide students with the opportunity for a sound basic education." Def. Br. at 7. In making that argument, the State ignores its own statement in its August 19, 2011 letter brief to the Court of Appeals in this case in which it conceded: "the long-term formulaic changes embodied in the 2007 legislation [ ] were enacted to reflect the estimated cost of providing a constitutionally adequate education in this State…"[5] The fact that the State has now cut over $1.1 billion from that estimated cost for the Maisto Districts is not just relevant, it is essentially dispositive of the inputs issue.

Causation: The Plaintiffs have proven that the current lack of sufficient funding is *a cause* of the appallingly low outcomes.[6] Witness after witness for the State conceded the plain fact that, just as massive cuts in funding have been "detrimental," increased funding would improve the currently "tragic" results for these children. As State expert Gregory Aidala acknowledged at trial, "*only a fool* would suggest that additional resources aren't helpful, aren't beneficial. Of course they are." T. 3467-3468 (emphasis added). Eric Hanushek, the Stanford

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never provided an educational basis for the dramatic cuts. T. 2668.

[5] See Addendum p. 8. In that August 2011 letter-brief, the State acknowledged that the "2007 legislation [was] enacted in response to the Court's decisions in the *CFE* litigation." Id. Even if the State had not made these concessions, the overwhelming evidence at trial demonstrates that the current funding level is insufficient to provide the staff and programs necessary to ensure all students in the Maisto Districts have the opportunity for the constitutional promise of a sound basic education.

[6] Plaintiffs' burden was only to "establish a causal link between the present funding system and any proven failure, not to eliminate any possibility that other causes contribute to that failure." CFE II, 100 N.Y.2d at 923 (internal citation omitted).

expert the State hired to testify, called it a "tautolog[y]" that "if the Maisto [D]istricts had additional funds and they spent those funds wisely . . . it would ultimately lead to improved performance." T. 4358. Hanushek added simply: "I believe it is useful to try to provide extra funds." T. 4429. Because the State's own witnesses have conceded increased funding can provide for improved inputs and increased student performance, Plaintiffs have established the causation element of their claim.[7]

Indeed the only State expert who completely rejected that conclusion, David Armor, is a well-known defender of segregation who testified that increased spending cannot help African American students improve their test scores and graduation rates. See T. 4747 ("African American is a socio-economic characteristic and that is what's [sic] drives test scores"); T. 4749 ("[S]ocio-economic differences between African Americans and whites make it" "unlikely" "to eliminate the achievement gap"). Such testimony was offensive, baseless, and should be completely rejected by this Court, just as it has been rejected by the State's own witnesses, this State's highest court, and numerous other courts throughout the country.[8]

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[7] The Court of Appeals stated, "plaintiffs had established the causation element of their claim by showing that increased funding can provide better teachers, facilities and instrumentalities of learning, and that such improved inputs in turn yield better student performance." 8 N.Y.3d at 21.

[8] See, e.g., T. 3362-3362, 3375, 3383 (Gregory Aidala); T. 3597-3598 (Roger Gorham); T. 3734 (Gregory Hunter); T. 3778 (John McGuire); T. 3896, 3901-3902 (Thomas Coseo); T. 4594, 4618 (Jeffrey McLellan); CFE II, 100 N.Y.2d at 919 n.8 ("[T]he trial court found Dr. Armor's testimony 'not persuasive,' a finding the Appellate Division did not contradict." (internal citation omitted)); CFE Trial Ct., 187 Misc.2d at 71-72 ("Dr. Armor's analyses are not persuasive. . . . The court also finds that all of Dr. Armor's results are skewed by his decision to 'level the playing field' by adjusting test scores to account for socioeconomic characteristics of at-risk students. This decision rests on the premise that was not established at trial: that at-risk students' educational potential is immutably shaped by their backgrounds. This is not the position of SED or the Regents, and is contrary to the evidence at trial.")

Remedy: Where, as here, Plaintiffs have shown the Maisto Districts lack the resources necessary to provide the opportunity for a sound basic education, student outcomes are unacceptable in all the Districts, and inadequate state funding is a cause of the lack of inputs and resultant low outcomes, judicial intervention is warranted. The State wrongly asserts that there is no remedy available to this Court, citing CFE's language regarding legislative deference. But, it is the role of the court to adjudicate the nature of the State's constitutional duty and to declare when there has been a dereliction thereof. And, unlike at the time of CFE, the legislature has enacted legislation to remedy this violation. It is precisely that legislation which should be afforded deference. Foundation Aid remains, to this date, the funding system established by this State to ensure constitutionally adequate funding.[9] Unfortunately, the State has failed to follow its own formula, resulting in the tragically damaging effects seen in the Maisto Districts.[10] This Court can and should (i) enter a declaratory judgment that the State is not affording Maisto Districts students the opportunity to receive a sound basic education, in violation of their rights under Article XI, Section 1 of the New York Constitution, and (ii) order a remedial directive to the State to fully fund the Foundation Aid formula over the next four years in the Maisto Districts.

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[9] See T. 4200 (State witness, Cechnicki noting The Foundation Aid formula is still legally in existence in Education Law § 3602(4).)

[10] Notably, in 2011, when the massive cuts in state funding had only just begun, the State asked the Court of Appeals to dismiss this case as moot, arguing that Foundation Aid, enacted to "provid[e] a constitutionally adequate education," mooted this lawsuit. See Addendum. Five years later, having cut Foundation Aid to the Maisto districts by a cumulative $1.1 billion, the state still somehow argues that no more funding is needed. The State's violation of the Plaintiffs' constitutional rights is clear, plain, and indeed tragic.

ARGUMENT

Plaintiffs have proven that the students' performance ("outputs") in the Maisto Districts are unacceptable by any measure, that the resources available ("inputs") are palpably inadequate, and that the State's failure to ensure adequate funding has deprived large portions of Maisto District students of the opportunity of a sound basic education, as guaranteed under the New York Constitution. In its Reply, the State asks this Court to give "limited weight" to the Plaintiffs' experts. Def. Br. at 42. Though we disagree and believe Plaintiffs' experts should be afforded abundant weight,[11] this Court need look no further than the State's own witnesses to find in favor of Plaintiffs on each element.

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[11] The State's Reply argues that the findings by Plaintiffs' experts were "based on what the district personnel told the experts about alleged inadequacies in their available resources." Def. Br. at 35. But, in addition to conducting interviews with the people who knew their districts best, Plaintiffs' experts also based their opinions on their direct observations as well as their years of experience working with high-need, at-risk students—experience that State experts admitted they lacked. See, e.g., Tr. 3557:15-17; 3559-3560 (Roger Gorham admits he never served as an administrator in a small city school district or worked in a district with extreme economic hardship or a high percentage of minority students); Tr. 3397:11-16 (Gregory Aidala admits he was superintendent of a city with a drastically lower percentage of economically disadvantaged students); Tr. 3858:6-3859:13 (Thomas Coseo was superintendent of low or average need districts with overwhelmingly high percentages of non-minority students); T. 3783:17-19 (John McGuire was superintendent of school district which he agreed did not demographically compare to Mt. Vernon); T. 4359:3-17 (Eric Hanushek admits he has not taught in a district with a high poverty level or taught special education at any level from K-12). The State seemingly faults Plaintiffs' experts for communicating with the people who know their districts from the ground up and implies the Plaintiffs' experts simply repeated the "alleged inadequacies" that the superintendents and education professionals reported. Def. Br. at 35. In fact, it was the State's experts who, by their own admissions, wrote reports in concert and copied wholesale from each other in formulating conclusions. See Tr. at 3717:14-22, 3719:13-25 (Gregory Hunter admits that his report was similar to Roger Gorham's report and that "there was a great deal of collaboration" among the State's experts); Tr. at 4611:5 – 4613:10 (Jeffrey McLellan agreed his report, including the conclusion, was similar "word-for-word" to Gregory Hunter's report and also admitted he was not sure who actually wrote some of the language used). Given the small amount of time each State expert spent observing classrooms, and the

I. Defendants' Experts Repeatedly Conceded that Outputs in all Eight Districts are Unacceptable and Indeed Tragic

In CFE, the Court of Appeals ruled that, in evaluating student outcomes in the context of whether students are being afforded a sound basic education, it is appropriate to examine data "such as test results and graduation and dropout rates." Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 908 (2003) ("CFE II"). The State does not and cannot dispute the overwhelming data showing the abysmal test results, low graduation rates, and high dropout rates in the Maisto Districts.[12] The appalling level of outcomes is evidenced by the State's own reports and evaluations of district performance, and by the testimony of State witnesses at trial.

Two representatives of the New York SED who were called to testify as witnesses by the State agreed that districtwide student outputs—including scores on State tests and graduation rates— in the Maisto Districts are unacceptable. Ira Schwartz, Assistant Commissioner for

sizeable compensation received, limited weight should be afforded to the State's experts, not Plaintiffs'. See, e.g., Ct. Ex. 44 at 15 (Roger Gorham claims to have visited a whopping 77 classes in 5 days); T. 3603 (Gorham due to be paid over $150,000 for two districts); T. 4622 (McLellan due to be paid $40,000 for one district); T. 3836 (McGuire due to be paid nearly $70,000); T. 3741 (Hunter due to be paid approximately $110,000); T. 4687 (David Armor due to be paid approximately $70,000).

[12] Not only are high school graduation rates unacceptably low in all eight districts (72% in Jamestown, 76% in Kingston, 48% in Mt. Vernon, 67% in Newburgh, 60% in Niagara Falls, 75% in Port Jervis, 57% in Poughkeepsie, and 58% in Utica for the 2013-14 school year (Stip. FOF, Appendix F; see also FOF ¶¶ 844-866)), and dropout rates are unacceptably high (16% in Jamestown, 13% in Kingston, 10% in Mt. Vernon, 11% in Newburgh, 22% in Niagara Falls, 15% in Port Jervis, 24% in Poughkeepsie, and 15% in Utica; Stip. FOF, Appendix G; see also FOF ¶ 867) but, as the charts herein demonstrate, in 2013-14, a staggering 43%-60% of students in Grades 3-8 in the eight districts (47% in Jamestown, 43% in Kingston, 47% in Mount Vernon, 47% in Newburgh, 46% in Niagara Falls, 45% in Port Jervis, 60% in Poughkeepsie, and 53% in Utica) were well below proficient and not on track to graduate from high school based on their level one scores on State ELA exams. P.X. 1-3, 45, 50, 56, 74, 79. In addition, an appalling 40%-68% of students in Grades 3-8 in all eight of the districts (47% in Jamestown, 40% in Kingston, 53% in Mount Vernon, 49% in Newburgh, 47% in Niagara Falls, 43% in Port Jervis, 68% in Poughkeepsie, and 50% in Utica) were not on track to graduate from high school based on their level one scores on 2013-14 State math exams. P.X. 1-3, 45, 50, 56, 74, 79.

Accountability at the SED, testified that the outputs "in all eight" of the Districts "are not adequate." T. 4761-62, 4802. Julia Rafal-Baer, Assistant Commissioner of the SED, summarized that all eight districts "are under the State average," which "is not acceptable and [the SED] believe[s] needs to be improved." T. 4865, 5010.

A. High Numbers of Students in Grades 3-8 Scoring Level One on ELA and Math Exams in Each of the Eight Districts are Well Below Proficient and Not on Track to Graduate from High School

Both Schwartz and Rafal-Baer testified that a student receiving a level one score on a state exam is "well below proficient" and "not on track" to graduate from high school. T. 4852, 5027.[13] In fact, the SED has looked to fourth grade data as "a strong indicator of whether students had or had not acquired a sufficiently strong educational foundation to insure that high school graduation requirements were likely to be met." P.X. 112; see also T. 3878-79.[14] Thus, according to New York SED standards, the following percentages of students in the eight districts (in grades 3-8) were well below proficient and not on track to graduate in the 2013-14 school year (the last year in the record at the time of trial):

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[13] The State's district-specific experts also confirmed that the New York SED ascribes both of these classifications (well below proficient and not on track to graduate from high school) to students receiving level one scores. See, e.g., T. 3506 (Gregory Aidala); T. 3802-3803 (John McGuire); T. 3873, 3878-3879 (Thomas Coseo); T. 4580 (Jeffrey McLellan).

[14] This is further supported by Kenneth Hamilton (Mt. Vernon), who stated "[e]verything we know about education tells us that students who are not able to demonstrate language arts proficiency, being able to demonstrate reading comprehension, writing skills and fluency by the time they're in third or fourth grade, we're never able to close those gaps." T. 2327.

Percentage of Grades 3-8 Students Well Below Proficient and Not on Track to Graduate, 2013-14
All Students

	ELA	Math
Jamestown	47%	47%
Kingston	43%	40%
Mount Vernon	47%	53%
Newburgh	47%	49%
Niagara Falls	46%	47%
Port Jervis	45%	43%
Poughkeepsie	60%	68%
Utica	53%	50%

Percentage of Grades 3-8 Students Well Below Proficient and Not on Track to Graduate, 2013-14
Students with Disabilities

	ELA	Math
Jamestown	92%	94%
Kingston	78%	72%
Mount Vernon	80%	80%
Newburgh	87%	84%
Niagara Falls	84%	77%
Port Jervis	88%	83%
Poughkeepsie	94%	95%
Utica	89%	80%

Percentage of Grades 3-8 Students Well Below Proficient and Not on Track to Graduate, 2013-14
Economically Disadvantaged Students

	ELA	Math
Jamestown	54%	54%
Kingston	54%	53%
Mount Vernon	50%	55%
Newburgh	55%	56%
Niagara Falls	53%	53%
Port Jervis	55%	53%
Poughkeepsie	62%	70%
Utica	57%	52%

Percentage of Grades 3-8 Students Well Below Proficient and Not on Track to Graduate, 2013-14
Limited English Proficient Students

	ELA	Math
Jamestown	95%	95%
Kingston	93%	83%
Mount Vernon	69%	69%
Newburgh	78%	72%
Niagara Falls	71%	63%
Port Jervis	N/A	43%
Poughkeepsie	90%	90%

Utica	87%	80%

P.X. 1-3, 45, 50, 56, 74, 79; see also Plaintiffs' Proposed Findings of Fact ("FOF") ¶¶ 907-08, 925-26, 946-47, 966-67, 984-85, 1003-04, 1022-23, 1044-45.

Though the State seeks to misdirect this Court with its characterizations of the appropriate standard for a constitutionally adequate education,[15] there can be no question that the alarmingly high number of students in the Maisto Districts who are not on track to graduate are being deprived of their constitutionally protected right to the opportunity for a sound basic education. This holds equally true for the appallingly high number of students who are failing to perform at the level required to obtain a Regents diploma.

As noted by the Court of Appeals in CFE II, "education is cumulative" and "significant evidence [shows] that . . . schoolchildren begin to accumulate learning deficits well before high school." CFE II, 100 N.Y.2d at 915 (quoting Campaign for Fiscal Equity, Inc. v. State, 187 Misc. 2d 1, 63 (Sup. Ct. N.Y. Cnty. 2001) ("CFE Trial Ct.")). It is therefore notable and most tragic that it is the Maisto Districts' current grade school students who have borne the largest damaging effects of insufficient funding and budget cuts over the last half decade. The current

[15] Rather than address the evidence of low outcomes, the State claims that the Plaintiffs equate SED's standards for test proficiency—e.g., 80% of students scoring at level 3 or above on state ELA and Math tests—with the constitutional standard for the opportunity for a sound basic education in CFE. Def. Br. at 85-86. Similarly, the State contends that SED's benchmark of an 80% graduation rate to assess district performance is not proof of a constitutionally adequate education. Def. Br. at 86-87. Contrary to the State's assertions, Plaintiffs' do not seek a determination that a constitutional sound basic education is equivalent to a specific percentage passage rate on state assessments, or any particular graduation rate. Rather, in line with the CFE inquiry, Plaintiffs submit that the percentage of students scoring proficient in the Maisto Districts is highly relevant evidence of inadequate student outcomes. It is appropriate for the Court to use state proficiency standards as a guide in determining whether student outcomes are acceptable. In addition, the distances of the Maisto students' graduation rates from state standards and the state average are highly probative.

dropout rates and low graduation levels in the Maisto Districts, which are already appalling, do not yet reflect the true impact of the State's constitutional violation.

B. The State's District-Specific Experts Admitted Repeatedly that the Educational Results for Students in Each of the Eight Districts Are Inadequate and Unacceptable

The State's district-specific experts uniformly conceded that student outputs in each of the eight districts are inadequate.

Jamestown: Gregory Scott Hunter testified that "Jamestown's outputs as a district are inadequate." T. 3712. He acknowledged Jamestown is not achieving adequate outputs. T. 3714, 3721. He also stated that the 2014 graduation rate in Jamestown is "lower than [he] would like it to be" and the 2014 dropout rate is "very high." T. 3713-14, 3729.

Kingston: Gregory Aidala found that "too many Kingston students are not graduating from high school and too many children did poorly on New York state assessments." T. 3501, 3503. Forty-three percent (43%) of the Kingston student population in grades three through eight was not on track to graduate high school in 2013-14 based on 2014 ELA exam results. T. 3506-07.

Mount Vernon: John McGuire testified that in Mt. Vernon, the graduation rates and test scores district-wide "are unacceptable" and "[t]here's a large gap between where [Mt. Vernon is] right now and the minimum level" of performance. T. 3759, 3799. There are "unacceptable levels of graduation" in Mt. Vernon and the graduation rate was getting even worse in 2013-14. T. 3768, 3770. The fact that 47% of students in Mt. Vernon scored at level 1 in ELA in 2013-14 "is just absolutely unacceptable." T. 3794-95. The Cecil H. Parker Elementary School math results – 8% proficient in 2013-14 – are "completely unacceptable" and the school is "not meeting basic proficiency." T. 3801-02. According to McGuire, the Parker

School's 2013-14 ELA results "are also completely unacceptable." T. 3819. Dr. Hanushek added that the 95% of students who are not passing ELA at the Parker school "are not receiving the education that they should be receiving." T. 4402.

Newburgh: Gregory Aidala described the student outcomes in Newburgh as "poor," "disappointing," and "very weak." T. 3376-77. Proficiency levels in grade 3 ELA are "absolutely unacceptable." T. 3377-78. He noted that "too many Newburgh students are not graduating from high school and too many children did poorly on New York state assessments." T. 3400. He testified that the graduation rate is "not acceptable" T. 3439. He considered the percentage of proficiency in ELA for certain grades and subgroups to be "absolutely unacceptable," "[p]oor results" and "a failure." T. 3378-80. Overall, he acknowledged "across the board generally for the district outputs are unacceptable." T. 3462.

Niagara Falls: Thomas Coseo testified that "the outputs for a sound, basic education continue to be less than acceptable in Niagara Falls City School District" and "the results are not acceptable by state standards." T. 3861. Niagara Falls's 60% graduation rate is not adequate. T. 3863. Its 22% dropout rate is similarly not acceptable. T. 3864.

Port Jervis: According to Jeffery McLellan, Port Jervis's overall 15% dropout rate is "not acceptable" and its 24% dropout rate for students with disabilities and 22% dropout rate for economically disadvantaged students are "unacceptably high." T. 4572-73. Student achievement at the Port Jervis Middle and High School was consistently below the state average. T. 4573. The percentages of students scoring proficient in Port Jervis in grades 3 through 8 "are not acceptable." T. 4580.

Poughkpeesie: Roger Gorham stated that the outputs for students in Poughkeepsie are "unsatisfactory," "not what they should be," and "not acceptable." T. 3567.

Dr. Gorham "would prefer a higher graduation rate as would anyone else." T. 3570. The graduation rates "need to improve." T. 3570-71. The Poughkeepsie dropout rate is not acceptable. T. 3572. "[A]ll elementary schools in Poughkeepsie . . . fell significantly below New York state expectations." T. 3572. "Poughkeepsie does not have acceptable academic achievement." T. 3574.

Utica: Roger Gorham also testified that Utica "has unacceptable outputs." T. 3622.

C. The State Education Department's Own Assistant Commissioner Admitted the Extreme Inadequacy of the Outputs

According to Assistant SED Commissioner Rafal-Baer, Jamestown's score of 20% of grades 3-8 students proficient in ELA in 2013-14 is "not adequate." T. 5000-01. Jamestown's 72% graduation rate is "not adequate." T. 5001. Kingston's 22% proficient on grades 3-8 ELA and 24% on grades 3-8 math are "not adequate." T. 5001. Kingston's 76% graduation rate is "not adequate." T. 5001-02. Mount Vernon's 12% proficient in grades 3-8 ELA and 15% proficient in grades 3-8 math are "definitely not adequate." T. 5002. Mt. Vernon's 48% graduation rate is "[t]ragic." T. 5002. "The whole system in Mt. Vernon" is "[d]efinitely not" adequate, and the kids there are "not getting the opportunity that they need to get." T. 5003. At Cecil H. Parker Elementary School in Mt. Vernon, the score of 5 percent proficient in grades 3-8 is "more than tragic for sure" and not what those "kids are entitled to, in terms of an education." T. 5026.

D. Defendants' Experts Repeatedly Conceded the Dramatic and Lasting Negative Effect Such Inadequate Outputs Have on Students and on Society

In CFE, and as recognized by the State in its Reply, the Court of Appeals defined sound basic education as the "opportunity for a meaningful high school education, one which prepares

[children] to function productively as civic participants." CFE II, 100 N.Y.2d at 908; Def. Br. at 5, 21, 87.[16] In elaborating on this standard, the Court noted that "[w]hile a sound basic education need only prepare students to compete for jobs that enable them to support themselves, the record establishes that for this purpose a high school level education is now *all but indispensable*." CFE II, 100 N.Y.2d at 906 (emphasis added). Consistent with the Court of Appeals' finding, the State's own witnesses have acknowledged that students who do not receive a high school diploma are generally not prepared to function as civic participants, and thus have been deprived of the opportunity for a sound basic education as defined by the Court of Appeals.

Gregory Aidala testified that in today's world, those who do not have a high school diploma "don't have good prospects for employment"; not having a high school diploma is "a barrier" to a forging "a productive career path." T. 3511. Similarly, Thomas Coseo stated, both through his testimony and in his expert report, that "[i]n today's information/technological economy, the need for a high school diploma and in many cases continued post-secondary education is critical." C.X. 49 at 31; see also T. 3865. Roger Gorham likewise opined that those who do not graduate from high school have "limited opportunity." T. 3571. Jeffrey McLellan agreed, testifying that a child "without a high school diploma is going to have a very difficult time . . . having a successful career." T. 4572. He also acknowledged that the State tests administered in Grades 3-8, on which 43%-60% of students in the Maisto Districts scored level one in ELA and 40%-68% of students scored level one in math, "are based on the knowledge and skills necessary for 21st century college and careers." T. 4580. According to Aidala, when a

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[16] The Court of Appeals discussed two aspects of civic participation in particular, recognizing that "a sound basic education should leave students 'capable of voting and serving on a jury'" and that "an employment component was implicit in the standard [for a sound basic education] we outlined in CFE." CFE II, 100 N.Y.2d at 905-06 (quoting Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 316 (1995) ("CFE I")).

child departs from the school system and does not have either of these avenues—college or a productive career path—open to him or her, it "places a burden not only on that child but on society as a whole." T. 3511-12.[17]

Based on the overwhelming—and undisputed—evidence of the shockingly low student outcome data in the Maisto Districts, this Court can easily determine that Plaintiffs have met their burden of proving the outcome prong of the CFE inquiry. The grossly inadequate results for students in the Maisto Districts demonstrate that the State is failing thousands of these children every year. Without court intervention, these students will continue to be deprived of the necessary programs and services to assist them achieve academic improvement.

II. The State has Failed to Refute the Compelling Evidence of Resource Deficiencies in all Eight Maisto Districts

Plaintiffs have established gross and systemic deficiencies of inputs in each of the eight Maisto Districts as a result of massive cuts in state funding and shortages in essential resources. The funding shortfalls have caused the reduction or elimination of necessary staff and programs, particularly in resources that at-risk children need to succeed in school. The input deficiencies are evidenced by the State's own data, the testimony of witnesses who work every day in the Maisto Districts, and from Plaintiff and State experts who visited the Districts' schools. Evidence before this Court details not only the lack of necessary resources, but also how such lack of resources hinders the Maisto Districts' ability to adequately serve their students.

[17] In addition to the inadequate graduation rates and test scores in the Maisto Districts, the high dropout rates in all eight districts deprive students of a sound basic education. The Court of Appeals in CFE II found that "it may, as a practical matter, be presumed that a dropout has not received a sound basic education" and that "the evidence was unrebutted that dropouts typically are not prepared for productive citizenship." CFE II 100 N.Y.2d at 914. At trial, Coseo agreed that high school dropouts typically are not prepared for productive citizenship. T. 3868. Further, and consistent with the CFE court's conclusion, McLellan opined "a dropout has not received a sound, basic education." T. 4571.

Because the State cannot refute Plaintiffs' compelling evidence of severe deficiencies in educational resources, in its Reply the State attempted to downplay the cuts in funding and the negative consequences of such cuts on the Maisto Districts. The State also omitted entire CFE categories unfavorable to the State and improperly characterized certain resources as superfluous though such resources were identified by the CFE court as necessary for a sound basic education. Notwithstanding the State's attempts, in light of the totality of the evidence,[18] Plaintiffs have shown the State has not provided the necessary funding to afford the opportunity for a meaningful high school education.

A. The Record Showed Massive Cuts in State Funding in All Maisto Districts

Between 2010-11 and 2014-15, the Maisto Districts received a cumulative $1.1 billion less in aid than they would have if the State had not frozen Foundation Aid and cut funding through the Gap Elimination Adjustment. As stipulated at trial, these gaps were as follows:

Jamestown:	$109,392,220
Kingston:	$80,233,685
Mt. Vernon:	$116,562,168
Newburgh:	$238,906,846
Niagara Falls:	$128,976,854
Port Jervis:	$67,380,908
Poughkeepsie:	$79,910,738
Utica:	$290,211,261
TOTAL:	**$1,111,574,680**

P.X. 113-120.

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[18] In its Reply, the State mischaracterizes the requirements for proving this element of Plaintiffs' claim. In assessing whether there are systemic input deficiencies in the Maisto Districts, the court must assess the totality of the evidence. CFE II, 100 N.Y.2d at 913-14 (court based conclusion on "[consideration of] all of the inputs").

The State Board of Regents noted that by the 2012-13 school year, "State support for public schools" had been cut to "below 2008-09 levels." P.X. 130 at 8-9.[19] As the State itself admits, the Gap Elimination Adjustment – which was responsible for a significant portion of these cuts – "reduced State Aid . . . in such a way that high need and average need school districts experienced the greatest per pupil cuts." Id. at 11.

In addition to the funding shortfalls, the state data establishes significant spending shortfalls in all eight Maisto Districts. In CFE II, the Court ordered that the state determine the actual cost of providing a sound basic education. That cost included both state and local funding. CFE II, 100 N.Y. 2d at 930 (noting that once the state determines the cost of providing a sound basic education, the state can then address how the burden would be distributed between the State and New York City). As Dr. Baker explained in both his report and his testimony, every year, the State, using the parameters set forth in the Foundation Aid Formula, establishes the cost of providing a sound basic education (an amount he called the "Sound Basic Education (SBE) Spending Target"). C.X. 20 at 27, Table 7; C.X. 21, at ¶¶5, 6, 25, id. at 23, Table 3; T. 3203.[20] The gap between the SBE Spending Target amount and the actual spending amount is highly relevant as it demonstrates that the District cannot make up for the shortfall in Foundation Aid with local or other sources of revenue, and therefore cannot spend at the level required, as

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[19] This is particularly relevant since the pre-2008 levels were already well below the levels needed for an adequate education, as acknowledged by the State with its enactment of Foundation Aid.

[20] The State erroneously contends that Dr. Baker's "SBE target" is merely another name for the amount the districts would have received in Foundation Aid had the formula operated as enacted, and therefore the evidence regarding this target is irrelevant to the proofs in this case. Def. Br. at 23-24. However, the SBE target represents the entire amount a district must spend to deliver a sound basic education (what the State must provide in Foundation Aid, i.e. the state share, plus what the district must spend, i.e the local share). Therefore, the gaps between the SBE target and actual spending are highly relevant.

determined by the State, to provide a sound basic education. In the Maisto Districts, the median spending shortfalls, between 2011-12 and 2013-14 ranged from 21% to 39% of the Districts' spending targets. Pl. Br. at 17. It is clear, therefore, that the shortfalls in Foundation Aid were so large as to prevent the Districts from spending the amount necessary to provide a sound basic education to all students.[21]

B. The State's Witnesses Admitted the Magnitude of the Aid Cuts, the Harsh Impact of the Cuts on the Maisto Districts and Their Particularly Heavy Impact on High-Need, At-Risk Children

As a general matter, the State was forced to concede the harsh impact these cuts have had on all school districts. As Thomas Coseo testified, "New York State decreased its financial commitment [to school districts] over this period resulting in personnel and program reductions." T. 3897. Yet personnel, salary, and benefit costs, which make up 70-75% of a school district's budget, increased every year during this period. T. 3905. Coseo noted that the 2011-12 budget was "the most arduous budget [he] had to work on in 30 years of education" and also "the most emotionally demanding and draining because of the extent of the layoffs" required. T. 3897.[22] Coseo added that "[t]he higher the percentage of [a] school district's reliance on state aid . . . the more dramatic the impact" of state aid cuts; Niagara Falls, for example, is a district with a high percentage of dependence on state aid. T. 3896.

[21] The State attempts to claim that the proper inquiry is total spending rather GEIE spending. The GEIE is pegged to the Foundation Aid Formula. T. 3203; C.X. 20 at 26-27. However, total spending includes spending on items which Foundation Aid does not fund, and which the districts cannot use Foundation aid to support, such as capital expenditures. Thus it is inappropriate to use total spending to determine whether spending is sufficient or whether the levels of foundation aid provided by the state are adequate.

[22] This testimony, among a great deal of other evidence, shows the falsehood of the State's assertion that it "has dramatically increased education spending over the past decade." Def. Br. at 3. The State cites no support for this assertion, and appears to be referring to the period "between 2000 and 2011" (Def. Br. at 91) – thus conveniently ignoring the more recent period in which the "dramatic" and "detrimental" cuts in State aid actually occurred.

As Roger Gorham testified, "as local districts attempt to meet higher academic standards, they're required to do so with significantly fewer resources" and that "state aid to schools [has] *declined precipitously* with the advent of the gap elimination adjustment." T. 3591 (emphasis added). Gorham added: "[A]ll of this comes at a time when expenses such as mandated contributions to the state retirement systems and district contributions to healthcare plans have continued to increase." T. 3591-3592.[23]

Such cuts have particularly devastating consequences for high needs districts like the Maisto Districts. State expert David Armor acknowledged that "[a] school district serving concentrat[ions of] children from poverty backgrounds ha[s] a greater educational burden to bear." T. 4657. SED assistant commissioner Ira Schwartz testified that all eight Districts are "high need" and "serve concentrations of children from poverty backgrounds" and that when "resources are cut it creates additional challenges for districts." T. 4803, 4862. Yet, as Plaintiffs' expert Dr. Uebbing testified, the State's

> "freeze [of] foundation aid . . . makes [state aid] much, much more regressive because the high wealth districts are not getting that much foundation aid anyways. So when you freeze foundation aid you are freezing the aid that is supposed to go to low wealth districts. GEA . . . is really more difficult for the low wealth districts than the high wealth districts. Then, of course, categorical aids are regressive because they aid everybody the same amount.
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> So every year the State aid formula has gotten more and more . . . . regressive and more and more damaging to low wealth, high need districts. Especially considering these low wealth high need districts are accepting more and more students who are not English speakers and dealing with more and more kids moving up the RTI ladder into special education."

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[23] SED's Ira Schwartz confirmed that all eight of the Maisto Districts had budget gaps during this time period. T. 4822.

T. 2675-2676. [24]

Unsurprisingly, the massive cuts in education funding have devastated the ability of the Maisto Districts to provide all students with the necessary resources for a sound basic education. And the State witnesses at trial admitted as much for each of the Districts.

Gregory Hunter, the State's expert for Jamestown, admitted that the district lost 24.1% of its total professional staff, even while student enrollment remained flat at about 4900 students. He said the loss of staff "very well could have contributed to a lack of ability to affect student improvement." T. 3735-3739, 3740. Similarly, Gregory Aidala admitted that Kingston lost 11.5% of its staff in four years, and further said that a decrease in state aid was a factor contributing to that loss. T. 3513. Aidala testified that Kingston had to make both staff and programming cuts in each academic year from 2011-2012 through 2014-2015. T. 3513; 3515-3517. In Newburgh, Aidala agreed that the reduction in state aid had an adverse impact with respect to the staff cuts that needed to be made. T. 3451. He agreed that Newburgh had to cut 1/6 of its staff in three years, and that reduction in aid had a negative impact on both Newburgh and Kingston. T. 3453-54, 3524-25.

Jeffrey McLellan noted that Port Jervis continues to face difficult financial challenges. T. 4588. He testified that Port Jervis lost over 10% of its staff in one year, and that Port Jervis spends approximately $1,000 (or 5%) less per student than the state average. T. 4602, 4590. McLellan also agreed that Port Jervis has had increasing special education needs over the last

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[24] The Board of Regents similarly noted that the "Foundation Aid formula . . . provided for a more equitable approach to distributing State Aid." P.X. 130 at 8. The Gap Elimination Adjustment, which the State now champions as being constitutionally appropriate, "reduced aid" regressively, that is, "in such a way that high need and average need school districts experienced the greatest per pupil cuts." P. X. 130 at 11.

five years. T. 4568-69. Thomas Coseo, the State's expert for Niagara Falls, admitted that the district is the highest-need district in Niagara County and that 110 additional teachers would need to be hired to bring the student-teacher ratio in line with its region. T. 3909, 3910-11. Similarly, John McGuire, the State's expert for Mt. Vernon, recognized that a district with greater need, like Mt. Vernon, should be given additional resources, and that the amount of money Mt. Vernon was due to receive under Foundation Aid, $116.5 million, was a "huge amount" that would have benefited the district. T. 3778, 3837.

Roger Gorham, the State's expert for both Poughkeepsie and Utica, acknowledged input cuts and shortcomings in both districts. He agreed that Poughkeepsie had the highest needs population of any district in Dutchess county, and that the district lost 11% of its teachers from 2007-08 to 2011-12. T. 3582-83, 3580. Gorham testified that Poughkeepsie lost this staff as a result of budget cuts, and that the student-teacher ratio went up over time, even as student needs were increasing. T. 3586, 3588. Perhaps most candidly, he said that staff cuts "have had an effect that no one would want. . . . [D]o [the cuts] hurt? *Certainly they do. No question about it.*" T. 3580 (emphasis added).

For Utica, Gorham said that Utica's average kindergarten class size of 28.5 students was more than he would want, as well as that "resources are becoming an issue in Utica." T. 3672-73, 3623. Gorham called the cut of 11% of Utica's staff "dramatic" and "detrimental," and said that the cut of 70 elementary school teachers over five years was a "dramatic number." T. 3664-3666. Gorham said that in Utica, the issue of resources "has become more critical" and that both Poughkeepsie and Utica "have significantly reduced the level of services and the number of employees due to the budgetary constraints." T. 3669, 3593.

Even in its Post Trial Memorandum, the State acknowledges that drastic cuts have been made in the Districts. The State admits that the Maisto Districts had to eliminate or reduce some thirty-five different programs ranging from pre-kindergarten and full-day kindergarten to music, art, foreign languages, physical education, extended day, summer school, and violence prevention. Def. Br. at 81 n.65, 83. All of this evidence and testimony illustrates that the State—through its own words and experts—acknowledges the severe shortcomings in inputs within the Maisto Districts.

C. Plaintiffs Presented Compelling Evidence of Severe Deficiencies in Resource Categories that the State Cannot Refute By Improperly Narrowing the Input Categories

Notwithstanding the irrefutable and devastatingly large cuts in funding to the Maisto Districts, the State argues that the Maisto Districts have "adequate" resources. To make such an unsupportable assertion, the State relies on a highly selective and misleading presentation of the evidence. It also improperly attempts to narrow the type of evidence required to prove input deficiencies under CFE to those deficits most prevalent in New York City Schools at the time of the CFE ruling.[25] The Court of Appeals made clear, however, that the definition of a sound basic

[25] For example, the State focuses on the issue of facilities and teaching certification, as though Plaintiffs must match NYC issues and prove overwhelming evidence of deficiency in every input category. Yet, the court in CFE III acknowledged plaintiffs did not establish that all inputs were deficient, but nonetheless made a sufficient showing of a systemic failure. CFE III, 8 N.Y. 3d at 21 ("Whether measured by 'inputs' or 'outputs,' i.e. school completion rates and test results, New York City schoolchildren, we determined, were not receiving the opportunity for a sound basic education.") The State further attempts to dismiss the overwhelming record evidence of the reductions and lack of social workers, guidance counselors, nurses, administrators and other support staff by asserting that, because these staff and the vital functions they perform weren't included in the Court of Appeals analysis in the CFE litigation, they are "outside the scope" of resources essential for a sound basic education in the Maisto Districts. Def. Br. at 51. But Plaintiffs are not beholden to any particular input categories in CFE. The Court of Appeals in CFE II referred to the particular needs of students in New York City schools because those were the issues in the districts in that case. The Court thus evaluated the sufficiency of educational resources against those facts. Although the State concedes Plaintiffs' evidence showing the

education, including the "template" of essential resources, is not fixed by the evidentiary record developed for New York City schools in the CFE case. Rather, the definition and template are "dynamic," and must "evolve" to "serve the future as well as the case now before us." CFE II 100 N.Y.2d at 931, 950-51. Indeed the Court of Appeals has recognized the importance of allowing courts to determine whether violations of the Education Article exist in other districts in New York State that necessarily will have different populations and different factual contexts. Hussein v. State, 19 N.Y.3d 899 (2012) (Ciparik, J., concurring). Accordingly, the State's attempts to narrowly construe the requirements for proving this element of the claim are improper.

Yet even under the issues most prevalent in CFE, Plaintiffs presented overwhelming evidence of systemic resource deficiencies in all eight Maisto Districts. For example, the Plaintiffs demonstrated devastating deficits in teachers and other staff.[26] The Districts had to make drastic cuts in staff over the relevant period, as acknowledged by the State's own expert reports and report cards: [27]

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particular demographics and specific needs of students in the Maisto Districts (see Pl. Br. at 9-11), the State ignores the essential principle established in CFE that the sufficiency of educational resources should be evaluated against the needs of the students being educated. Thus the mere fact that the Maisto Districts may have emphasized severe deficiencies in different resources within the CFE template than were emphasized in CFE cannot defeat a finding of systemic resource gaps in each District.

[26] There is no basis for the State's conclusory assertion that the Maisto Districts have "adequate" teachers. Def. Br. at 47. The State does not dispute the overwhelming evidence that the Maisto Districts substantially reduced the number of classroom teachers from 2008-09 through 2012-13. Pl. Br. at 19. Moreover, the State ignores the evidence that the loss of teaching staff not only impacted regular instruction, but also the ability of the Districts to provide additional academic intervention and other supports for struggling students. State attempts to distinguish between teachers, staff and programs that Maisto Districts were forced to cut and those the districts could not afford to provide in the first place are equally immaterial for purposes of evaluating deficiencies in essential resources.

[27] See C.X. 64, p. 22, C.X. 65, p. 8; C.X. 34, p. 30, C.X. 37, p. 15; C.X. 56, p. 21, C.X. 58, p. 8; C.X. 28, p. 27, C.X. 31, p. 10; P.X. 56 (2007-08 report card at p. 4; 2012-13 report card, teacher

Jamestown	Cut 196 staff (23.9%) from 2008-09 to 2012-13
Kingston	Cut 158 staff (16.3%) from 2007-08 to 2012-13
Mount Vernon	Cut 350 staff (30.0%) from 2008-09 to 2012-13
Newburgh	Cut 234 staff (16.3%) from 2008-09 to 2012-13
Niagara Falls	Cut 155 staff (16.6%) from 2007-08 to 2012-13
Port Jervis	Cut 36 staff (10.7%) from 2010-11 to 2012-13
Poughkeepsie	Cut 92 staff (16.9%) from 2008-09 to 2012-13
Utica	Cut 292 staff (23.7%) from 2007-08 to 2012-13

These massive cuts in staff impeded the Maisto Districts' ability to serve the increasing educational needs of students in the districts in a myriad of ways. See, e.g., Pl. Br. at 19-22.

The Plaintiffs' proof also established that class sizes in the Maisto Districts are much too high for the high-need, at-risk student population. As the State acknowledges, the Court of Appeals in CFE II found that "federal and state programs seek to promote classes of 20 or fewer, particularly in the earliest years." 100 N.Y.2d at 912. In light of this finding, and particularly in light of the fact that so many of the students in the Maisto Districts are high-need and at-risk, the class sizes in the Maisto Districts are far too high. In 2013-14 (the last year of data available at trial), class sizes in kindergarten and early grades exceeded accepted levels for high risk student population in every Maisto District, and in some cases were well in excess of that level. See P.X. 12 (showing that in 2013-14, Kingston, Newburgh; Niagara Falls Port Jervis and Poughkeepsie had kindergarten and early grade class sizes ranging from above 20 to 24, and Utica had kindergarten classes at 28.5 and early grades classes at 26.3). Similarly, in 2013-14, the Maisto Districts, despite having much higher need populations than neighboring districts, repeatedly had larger class sizes than the average for their county and region – when in fact they need significantly *smaller* classes to successfully educate their population.[28] As the State's own

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qualifications and staff counts); C.X. 53, p. 28, C.X. 54, p. 13; C.X. 44, p. 22, C.X. 46, p. 5; C.X. 40, p. 21, C.X. 42, p. 6.

[28] In its Reply, the State rejects any comparisons made between Maisto Districts and neighboring or affluent districts. See, e.g., Def. Br. at 39 n. 30, 81 n. 65. Plaintiffs agree that such

experts testified, smaller, reasonable class sizes are "critically important" for primary grades in all districts, but especially so for the high need Maisto Districts. T. 3919 (Coseo); see also T. 3584 (Gorham concluding that "there are inherent benefits to smaller class sizes"); T. 3519-3520 (Aidala noting that "teaching and learning in any school district is a function of the size of the professional and support staff as well as the allocation of resources").

In other categories, the State attempted to present a misleading account of resources. For example, the State presents an artificially narrow view of the resources required to ensure a safe and orderly environment. After positing that Plaintiffs presented only two pieces of evidence related to physical building security (Def. Br. at 64-66), the State later admits that the Maisto Districts have had to cut programs such as Newburgh's violence prevention and safe room programs (Def. Br. at 81 n.65), and ignores Plaintiffs' evidence about reductions in programs designed to reduce suspensions and school staff tasked with safety monitoring (Pl. Br. at 21, 23-24 and cites to FOF therein).

D. The State's Brief Ignores Entire Categories of Resource Deficiencies

Finally, and most importantly, the State only addresses certain categories of essential resources within the CFE template, while wholly ignoring two input categories essential in the high-need Maisto Districts. In its selective presentation of the input categories, the State conspicuously omitted two categories, the expanded platform of programs to help at-risk students by giving them "more time on task," and adequate services for students with extraordinary needs. CFE Trial Ct., 187 Misc.2d at 115. It is in these categories of services and

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comparisons are imperfect since the Maisto Districts require far greater resources than many of the neighboring and more affluent districts given their student population. Notably, it was the State Education Department that created the reports comparing each district with its county and region, thus acknowledging that these are the most pertinent comparisons.

programs, those that serve students at risk of academic failure, that the Maisto Districts have suffered the most devastating deficiencies. Perhaps for this reason, the State aims to draw this Court's attention away from the compelling evidence demonstrating these deficiencies in the Maisto Districts. However, providing adequate resources to serve the most vulnerable students is a key component of Foundation Aid and CFE that cannot be ignored.[29]

In its Reply, the State lists several examples of expanded platform programs, such as early education and kindergarten, extended day, and summer programs, which it concedes Plaintiffs' demonstrated were cut from the Maisto Districts to the detriment of their students. See Def. Br. at 81. However, the State makes the unsupported assertion that these programs are not necessary to provide the opportunity for a sound basic education under CFE. Id. Such claim is directly belied by CFE, which explained that the "expanded platform of programs" should "help at-risk students by giving them 'more time on task.'" CFE Trial Ct., 187 Misc.2d at 115.

The State also conveniently ignores the category of "[a]dequate resources for students with extraordinary needs," another input category specifically enumerated in CFE, and crucial in the Maisto Districts. Id. In the context of this input category, the CFE trial court considered the

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[29] The resources to support at-risk students are an integral component of providing the opportunity for a sound basic education. The CFE court held that students who "are said to be at-risk of doing poorly in school because of socio-economic disadvantages, including poverty, race and limited English proficiency . . . need more help than others in order to meet educational goals, such as extended school programs, remedial instruction, and support services." CFE II, 100 N.Y.2d at 942. The Regents developed the Foundation Aid Formula with this understanding in mind. See, e.g., FOF ¶ 254 (2004-05 Regents State Aid Proposal noted that students living in high poverty districts "are more likely to need extra instructional time, tutoring, and assistance from social service agencies, yet are less likely to receive those services"). The Regents included the Pupil Need Index in their Foundation Aid Formula proposal to explicitly account for the added costs of providing the extra time and help required to give high-need students the opportunity to succeed. FOF ¶ 255. The Regents also recognized that school districts with higher concentrations of poverty have a higher need for additional services but less ability to pay for those services and thus the Regents proposal called for more than 80% of the increase in overall state aid to be driven to high need districts, including the Maisto Districts. FOF ¶ 255.

additional needs of "at-risk" pupils such as children living in poverty, English language learners and students with disabilities as well as the resources required to overcome those barriers to academic success. Id. at 21-23, 27. Plaintiffs presented extensive evidence of the Maisto Districts' inability to meet the needs of such student subgroups.[30]

In fact, in presenting its case at trial, the State ignored these categories. The State experts did not examine the level of resources available for the expanded platform of programs or for programs and services for students with extraordinary needs. Neither their reports nor their testimony contain any investigation into these critical resources. Several witnesses admitted outright that they ignored those resources and supports so important for at-risk students. For example, when asked whether he examined "student social and emotional development health, and family and community engagement" in his review of the Newburgh school district, defense expert Gregory Aidala admitted he did not focus on those areas. T. 3448-50. When asked about Academic Intervention Services available in Niagara Falls, defense witness Thomas Coseo admitted, "I didn't look at tools to remediate the issues" in the district. T. 3876. Nonetheless, the defense witnesses admitted that supports for students at-risk of failure could improve outcomes. For instance, both Dr. Aidala and defense witness Roger Gorham acknowledged that extended learning time could improve outcomes. (T. 3528, 3621)

Academic Intervention Services, social workers, counseling, before and after-school and summer school programs, tutoring, nurses and a broad array of other services and programs for at-risk students and students with extraordinary needs are essential for the opportunity for a sound basic education for these students. The evidence at trial demonstrated that it was precisely

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[30] See Pl. Br. at 24-27.

these essential resources that the Maisto Districts could either no longer afford or could not obtain as a result of underfunding of the Foundation Aid Formula. See, e.g., Pl. Br. at 24-27.

Although the State of New York has consistently supported the fact that all children can learn and that children living in poverty and other at-risk students need additional services, time and supports to succeed, the State's Reply seemingly rejects these tenets and attempts to characterize programs designed to meet the needs of at-risk and high-need students as ancillary to the provision of a sound basic education. See, e.g., Def. Br. at 81. This is contrary to the findings of CFE that these children are capable of academic success and that schools are obligated to provide the resources necessary to help them overcome barriers to a sound basic education. See, e.g., CFE Trial Court, 187 Misc.2d at 23 ("The court finds that the City's at-risk children are capable of seizing the opportunity for a sound basic education if they are given sufficient resources."); CFE II, 100 N.Y.2d at 920-21.

III. Plaintiffs have Shown and the State has Admitted that a Lack of Adequate Funding is a Cause of Maisto District Failures and Additional Funding, if Applied Wisely, Would Improve Outputs for Students in the Eight Districts

The Court of Appeals held: "to prevail plaintiffs must 'establish a correlation between funding and educational opportunity… a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children.' The trial court reasoned that the necessary 'causal link' between the present funding system and the poor performance of City schools could be established by a showing that increased funding can provide better teachers, facilities, and instrumentalities of learning. We agree that this showing, together with evidence that such improved inputs yield better student performance, constituted plaintiffs' prima facie case, which plaintiffs established." CFE II, 100 N.Y.2d at 919 (internal citations omitted). Plaintiffs have satisfied their burden of establishing a causal link between the

funding levels for the Maisto Districts and the Districts' academic failures.[31] The evidence confirms that the State's denial of adequate funding is depriving students in the Maisto Districts with the opportunity for a sound basic education and nearly every State witness admitted that additional funding, wisely spent, would improve student outcomes in the Maisto Disticts. But though there is near unanimous consensus on this causal element, in its Reply the State asks this court to reject this established link and instead find that the appallingly low outcome levels in the Maisto Districts cannot be improved with adequate levels of funding. To adopt such a finding, this Court must abandon the principles at the heart of CFE, the legislature's Foundation Aid, and the Education Article of the New York State Constitution.

A. Children in the Maisto Districts are Capable of Learning

To deny the causal link is to accept the State's reprehensible notion that certain children are ineducable, and it is therefore not worth providing them with additional services. The State once again asks a court to find that increased school funding does not improve student achievement due to the effect of "individual student characteristics, such as poverty, English language proficiency, and special education" on performance.[32] Def. Br. at 91. In support of

[31] The Court of Appeals in CFE made clear that plaintiffs need only show that an inadequate funding system is a cause of the district failures, not the sole cause. Specifically, the Court found that plaintiffs' burden was only to "establish a causal link between the present funding system and any proven failure, not to eliminate any possibility that other causes contribute to that failure." CFE II, 100 N.Y.2d at 923 (internal citations omitted). The Court further ruled that causation is established when Plaintiffs show that increased funding can provide more resources and that improved inputs can improve student outcomes. CFE III, 8 N.Y.3d at 21.

[32] The State relies upon the testimony of Drs. Hanushek and Armor. Contrary to the State's contention, the CFE court expressly rejected the position that school resources have little or no effect on student achievement when these witnesses espoused it in CFE. See CFE Trial Ct., 187 Misc. 2d at 75 (holding that "[c]ontrary to defendants' argument, increased educational resources, if properly deployed, can have a significant and lasting effect on student performance. There is a causal link between funding and educational opportunity.") Dr. Hanushek conceded that he did not examine the spending in any of the Maisto Districts, and could only name two of the Districts during questioning at trial. T. 4360-4361. Dr. Armor relied on abhorrent

this claim, the State relies on the opinions of Drs. Armor and Hanushek that spending on children living in poverty, English Language Learners and students with disabilities would have no effect on their learning. Def. Br, at 90-91. This argument has been rejected by other State experts. See, e.g., T. 3653:21 – 3654:5 (Roger Gorham testifying that one cannot give up on a child and that any child can learn in the proper environment). It has been rejected by the courts in CFE. CFE II, 100 N.Y.2d at 920 (rejecting the State's argument that poor student performance is caused by socioeconomic conditions independent of the quality of the schools); CFE Trial Court, 187 Misc.2d at 71-72 (rejecting State contention that academic outcomes are determined mainly by students' socioeconomic backgrounds, and not the quality of the education provided in the school, and rejecting Dr. Armor's premise "that at-risk students' educational potential is immutably shaped by their backgrounds"); CFE II, 100 N.Y.2d at 921 (rejecting "the premise that children come to the . . . schools uneducable, unfit to learn"). Indeed, the Court of Appeals noted that the testimony of Drs. Hanushek and Armor in that case was properly rejected. Even Dr. Hanushek rejected his own claim on cross examination, when he admitted that additional money, spent wisely, would improve student outcomes. T. 4358.

As acknowledged by State expert, Gregory Aidala, all children can learn and come to school motivated to do so. T. 3512. State expert, Roger Gorham, further agreed that, with the right environment, "any of these children can learn." T. 3654. This is consistent with the findings of this state's highest court and the Constitution. See CFE I, 86 N.Y.2d at 316 ("[The Education] Article requires the State to offer *all* children the opportunity of a sound basic education) (emphasis added); CFE II, 100 N.Y.2d at 915 (citing constitutional mandate "to

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generalizations about race. T. 4746-47 ("[I]f there's an increase in African American children in the school, the likely result would be a lower test score.")

provide schools wherein *all* children may be educated") (emphasis added); CFE III, 8 N.Y.3d at 20.

Students who are at-risk of poor academic performance because of socioeconomic disadvantages, including poverty, race, and limited English proficiency simply "need more help than others in order to meet educational goals, such as extended school programs, remedial instruction, and support services." CFE II, 100 N.Y.2d at 942 (Smith, J., concurring). The need for additional services and programs does not exclude these children from their constitutional right to the opportunity for a sound basic education. As noted by the Court of Appeals, such opportunity "must still 'be placed within the reach of all students,' including those who 'present with socioeconomic deficits.'" CFE II, 100 N.Y.2d at 915. It is the role of this Court to ensure the State adheres to its constitutional obligation to all students.

B. Additional Funding Would Improve Student Outcomes

The State asks this Court to find increased funding for the Maisto Districts would make little or no difference in improving student outcomes. Such a contention not only defies common sense and runs counter the explicit findings in CFE, it is contrary to the testimony of nearly all the State's own witnesses.

As State expert John McGuire testified, "[m]ore money is always beneficial" (T. 3767) and "those who need more should get more in the way of resources to help them meet a minimum standard" (T. 3778). McGuire has "spent a career" as an educator "advocating for more resources." T. 3804.

State expert Aidala agreed that "*only a fool* would suggest that additional resources aren't helpful, aren't beneficial. *Of course they are*." T. 3467-3468 (emphasis added). Aidala

continued: "[A]ll school districts in New York state would benefit if there was no gap elimination adjustment and full foundation aid were to take place." T. 3468-3469 (Aidala).

Aidala added that if "money was no object and I had control of all monies, I would give more funding for all schools" (T. 3531), but in doing so he "would take into account wealth and poverty" – just as Foundation Aid does. T. 3533.

State expert Gorham testified that "more resources are certainly good if they're applied well." T. 3597. Gorham, like Aidala, testified that "only a fool would suggest that additional resources aren't helpful and beneficial." T. 3603.

State expert Eric Hanushek testified that "if the Maisto districts had additional funds and they spent those funds wisely . . . it would ultimately lead to improved performance"; indeed, that is a "tautolog[y]." T. 4358. Hanushek added: "I believe it is useful to try to provide extra funds. Extra counselors, et cetera, that you want and extra reading specialists." T. 4429.

SED assistant commissioner Ira Schwartz testified that "additional resources used effectively and efficiently would likely help to improve student outcomes." T. 4819. Schwartz added that "[t]he Board of Regents typically requests additional funds . . . . [f]or educational services" because "[t]hey believe that providing additional resources if the districts use them effectively and efficiently [] will help to raise student performance in New York State." T. 4820.

The State experts acknowledged that additional resources would have a beneficial impact on student outcomes in the Maisto Districts, agreeing or conceding that:

Jamestown

- More Academic Intervention Services "would help" in Jamestown. T. 3726 (Hunter).

- As to the $109 million in Foundation Aid that Jamestown did not get: "they probably could have done some very good things with" the money, "things that would have improved the student outputs" if the money "were properly applied." T. 3734 (Hunter).

Kingston

- "[M]ore money for Kingston for extended learning times would have been a contributing factor towards improved outcomes." T. 3528 (Aidala).
- "[L]imited additional funding for increased staffing would not only help Kingston but for that matter all districts throughout New York state." T. 3530 (Aidala).
- "Kingston would benefit if there were no gap elimination adjustment and if there were full phase-in of foundation aid." T. 3534-3535 (Aidala).

Mount Vernon

- As to the $116.5 million in Foundation Aid Mt. Vernon did not receive: "That's a huge amount"; the district "would have benefited" if it had received that amount. T. 3837 (McGuire).

Newburgh

- "[C]ertainly [Newburgh] would benefit from additional funding." T. 3374 (Aidala).
- It is "more likely than not" that if Newburgh received "[m]ore money" it "would increase the likelihood of the students improving their test scores and improving the graduation rates." T. 3375 (Aidala).
- "More funding would help Newburgh students." T. 3383 (Aidala).
- "[I]t's not controversial" that "Newburgh students would be better served with additional funding." T. 3383 (Aidala).

- "[M]ore resources in Newburgh . . . if used properly, would help improve student outcomes." T. 3389 (Aidala).
- "Newburgh should be targeted" with resources "on a priority basis." T. 3393 (Aidala).
- When plaintiffs' expert Dr. Uebbing "advocates for more funding so that outputs can be improved," State expert Aidala agrees, if the funding is "used appropriately." T. 3400.
- "[S]ubstantial increases in funds and other resources . . . can have an impact on student outcomes together with changes in . . . student engagement and high-performing teachers and things of that nature." T. 3466 (Aidala).

Niagara Falls

- "[T]he intent of the [Foundation Aid] legislation . . . was to drive more state funds to those districts that needed it the most," and Niagara Falls is one of those districts. T. 3899 (Coseo). State expert Coseo thinks that purpose of Foundation Aid was "a good thing." *Id.*
- As to the $128,976,854 difference between what Niagara Falls would have received under Foundation Aid and what it actually received: "If the expenditures are made in the right ways, absolutely, that kind of money can make a significant difference" in outputs. T. 3902 (Coseo).
- If the state were to increase funding to Niagara Falls by $20.3 million, "[i]t would certainly afford the district much more money to . . . apply strategically to improve student outcomes." T. 3928 (Coseo).
- "Targeted, strategic placement of [additional] resources in . . . well-developed reading programs at the elementary level absolutely would help" students. T. 3936 (Coseo).

Port Jervis

- As to the $67 million Port Jervis did not receive under Foundation Aid, if that money "was used wisely," it "would have generated better outcomes for the students." T. 4594 (McLellan).
- Port Jervis "was using the resources it had efficiently and well." T. 4596-4597 (McLellan).
- "[T]he Effective Schools Correlates certainly would need adequate resources to implement." T. 4609 (McLellan).
- "[A]dditional funding, used wisely, would be an ingredient for future success." T. 4618 (McLellan).
- "Port Jervis would benefit from additional AIS funding" if "well spent." T. 4625 (McLellan).
- The fact that in Port Jervis 99% of students with disabilities in grades 3-8 are not scoring proficient in ELA "would suggest that they need more academic intervention"; the fact that 98% are scoring non-proficient in math suggests "that 98% would benefit from more academic intervention" as well. T. 4625-4626 (McLellan).

Poughkeepsie

- Gorham agreed he "would advocate for more resources for Poughkeepsie." T. 3597-3598.
- "If applied well," more resources "certainly would" "help to generate better outcomes for students in Poughkeepsie." T. 3598 (Gorham).
- "[I]f Poughkeepsie had more money, [it] would be able to save programs, [and] would be able to keep smaller class sizes." T. 3607-08 (Gorham).

- The gap elimination adjustment "had detrimental effects" on Poughkeepsie. T. 3609 (Gorham).
- "Poughkeepsie school district would be better off if it received more money than it is receiving now." T. 3610 (Gorham).
- "[M]ore money can make a difference in teaching skills," and "adequate funding is obviously part of the equation for bringing about . . . change" in Poughkeepsie. T. 3611 (Gorham).

Utica

- An additional $100 million "would have allowed Utica to be able to hire more teachers to bring student-teacher ratios down and that this would have been a better thing for providing students with an education." T. 3688-89 (Gorham).
- "[I]n addition to improving the quality of the teachers [and] improving the quality of the leadership . . . additional resources will be beneficial in" solving the problems in Utica. T. 3702 (Gorham).
- "[I]f that money is spent in the proper way, additional funds with respect to Utica would help children . . . improve their test scores and ultimately improve their graduation rates." T. 3654 (Gorham).
- "There is a need for additional support" in Utica and "certainly resources is a part of that." T. 3669-3670 (Gorham).

As acknowledged by the court in CFE, there is "a causal link between funding and educational opportunity." CFE Trial Ct., 187 Misc.2d at 75. Accordingly, the State claim that school resources have limited or no effect on student achievement must fail.

C. The State's Additional Defenses are Without Merit

The Court of Appeals in CFE ruled that causation is established when Plaintiffs show that increased funding can provide more resources and that improved inputs can improve student outcomes. CFE III, 8 N.Y.2d at 21. As discussed above, the State has conceded, through the testimony of its own witnesses, that increased funding in the Maisto Districts would improve student outcomes. Thus the State has conceded that inadequate funding is a cause of the low student outcomes in the Maisto Districts. Nonetheless, the State makes additional futile attempts to defeat causation by pointing to other factors that potentially influence student outcomes. As the Court of Appeals made clear, despite the existence of other possible explanations for low student outcomes, if inadequate funding is also a cause, causation cannot be defeated.

Even so, the State's additional defenses are without merit.

1) The State's Vague Claims about Internal District Factors Cannot Defeat Causation

The State claims, contrary to the testimony of its own witnesses, that abysmal student outcomes in the Maisto Districts are not the result of inadequate funding, but rather of "internal factors with respect to, among other things, the teaching or leadership decisions made locally by the plaintiff districts." Def. Br. at 93. The State does not specify the other "internal factors" to which it refers, nor does it point to any specific teaching and leadership decisions. At trial, the State put forth no credible proof that unacceptable student outcomes were the result of supposed incompetence on the part of administrators or teachers. Nowhere in the State's Reply or in the trial record is there a scintilla of evidence causally linking the supposed ineffectiveness of teachers and/or administrators with student outcomes. The State's claims about teacher ineffectiveness are contradicted by the State's own evidence. D.X. X-2 demonstrates that the State deemed the majority of teachers in each of the Maisto Districts to be either effective or

highly effective according to the State's own measures. The State also baldly claims that staff and administrator turnover in some of the Districts are the cause of low student outcomes, again without any proof establishing the causal link between turnover and student outcomes, and without accounting for the role lack of adequate funding plays in staff retention. See, e.g., Def. Br. at 93-94.

Even if there were credible evidence of mismanagement in the districts, the State itself admits that the districts are agents of the State and "the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights." Def. Br. at 93 n.7 (quoting CFE II, 100 N.Y. 2d at 922).[33]

Because the State has not shown that internal factors caused low outcomes in the Maisto Districts, and the State acknowledges that such district managerial failures, even if they did occur, cannot be a valid defense in a school funding case, the State's claim here must fail.

2) The State's Claims Regarding State Intervention in the Maisto Districts Cannot Defeat Causation

The State also attempts to defeat causation by claiming it recently imposed a program, the Diagnostic Tool for School and District Effectiveness ("DTSDE") that may, in the future, improve student outcomes. The State describes in detail how the DTSDE process is designed to work. Def. Br. at 95-98. However, the State's speculations regarding the potential success of this program are hypothetical and thus have no bearing on the outcome of this case. The State's brief, and the trial record, are devoid of any evidence that this program, or any of the state's interventions, have actually improved student outcomes in the Maisto Districts. In fact,

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[33] The State suggests that it will remedy the alleged district mismanagement with a receivership law passed in the 2015 legislative session after the conclusion of the trial in the instant case. The State cannot possibly prove that a law that was not in effect at the time of trial cured the constitutional violations existing at the time of trial. Def. Br. at 93.

Plaintiffs' proofs at trial took into account all current conditions in the Districts in demonstrating the lack of a constitutionally adequate opportunity for a sound basic education.

Mere promises of future improvement are insufficient to avoid a ruling of a constitutional violation based on current resources and outcomes. Cf. Hussein v. State, Sup. Ct, Albany Country, July 21, 2009, Devine, J., Index No. 8997/08, aff'd, 81 A.D.3d 132 (3d Dep't 2011), aff'd 19 N.Y.3d 899 (2012) (holding that plaintiffs' complaint is properly "based upon past and current actual conditions" and rejecting defendants' reliance on a "possible future contingency"). The State has been intervening in the Plaintiff districts for years. P.X. 27. The State's intervention tactics have not increased essential resources nor improved student outcomes to ameliorate the existing violation of the Maisto District students' constitutional right to a sound basic education. Without proof, the State's promises that "new and improved" state interventions such as DTSDE will either increase the level of essential resources or improve student outcomes are as empty as the promises it no doubt made about earlier, ineffectual interventions.[34]

The evidence makes clear that the interventions upon which the State attempts to rely have not obviated the ongoing violation in the Maisto Districts of the constitutional right to a sound basic education, and speculation about promised future improvements is irrelevant to the resolution of this case.

3) The State's Claims about Other Potential Sources of Revenue Must Also Fail

The State contends that "the districts have failed to avail themselves of numerous opportunities to apply for, receive, or use millions of dollars in additional state and federal grant

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[34] In fact, defendant's witness, Assistant Commissioner of Education Ira Schwartz, admitted that the DTSDE program is irrelevant to determining whether districts have adequate funding to provide a sound basic education. He testified, "It is not the focus of the DTSDE visit to speculate on whether additional resources for the district would be helpful or not." T. 4824.

monies." Def. Br. at 99. As several witnesses testified, applying for grants requires personnel and time, resources that many of these districts do not have. See, e.g., FOF ¶232. Indeed, there was ample testimony that owing to severe staff cuts in the districts, administrators' time is consumed with tasks that would ordinarily fall to other staff members, leaving little time for duties an administrator would normally undertake. See, e.g., FOF ¶¶ 504, 603, 673, 676. Moreover, as demonstrated at trial, grants are not guaranteed. See, e.g., FOF ¶232; see also T. 1558-59, noting that Niagara Falls applied for grants it did not receive. Grants are also time-limited. See, e.g., FOF ¶¶ 232, 664, 669. In addition, over the past few years, available grant money has dwindled. See, e.g., FOF ¶ 215. Grants also often contain restrictions on their use. For example, state witness John Delaney explained that most federal grants mandate that districts use the funds only to supplement and not to supplant activities that State aid should fund. FOF ¶¶496-97; P.X. 26; T. 4301-02.

Furthermore, Foundation Aid is intended to be the amount the State must provide to fund the essential resources necessary for a sound basic education: those resources enumerated in the CFE template. The State cannot escape its responsibility to pay for those essential resources by claiming there might be funds available for some of those resources from other sources. The spending gaps discussed above demonstrate that the Maisto Districts were unable to spend what the State determined is necessary to provide a sound basic education. The yawning gaps in spending were caused by the State's refusal to fund Foundation Aid at the proper levels.

In sum, the State's defenses to causation are without merit. Plaintiffs established, and the State's witnesses conceded, that inadequate State funding was a cause of the low student outcomes.

IV. Foundation Aid is the Minimum Funding Necessary to give all Children in the State the Opportunity for a Sound Basic Education

A. The State Admits that Foundation Aid Provides the Minimum Funding for a Sound Basic Education

The State asserts there is no "merit" to Plaintiffs' contention that the Foundation Aid formula "represents the minimum spending necessary to provide students . . . with the opportunity for a sound basic education." Def. Br. at 7. But in fact, the State has repeatedly said the opposite.

As the State Board of Regents has said, "[t]he Foundation Aid formula" has several goals including *adequate funding for a sound basic education in response to the Campaign for Fiscal Equity decision* . . . ." P.X. 130 at 10 (emphasis added).

The SED has similarly said that the "Foundation Aid formula . . . *distributes funds to school districts based on the cost of providing an adequate education*, adjusted to reflect regional costs and concentrations of pupils who need extra time and help in each district. . . ." D.X. X-1 at 22 (emphasis added).

On motion to dismiss in this case, the State represented to the Court of Appeals that Foundation Aid was enacted state-wide "in response to *Campaign for Fiscal Equity v. State of New York*" and that Foundation Aid consists of "long-term formulaic changes . . . that were enacted to reflect the estimated cost of providing a constitutionally adequate education in this State." Addendum at 8. The State also explained that "the Foundation Aid formula, "with minor variations, tracks the formula that th[e] Court [of Appeals] found rational in *CFE III"* and that "factors and weightings" in Foundation Aid "track the formula the State proposed in *CFE III*." Addendum at 2,11. The State further acknowledged that the "need-based Foundation Aid

formula remains the law of the State and is ensconced in the Education Law at § 3602(1) and (4)." Addendum at 12.[35]

B. Recognition of Foundation Aid as the Constitutional Minimum is Consistent with Law

The State's contention that an "adequate education" is a different, and higher, standard than a "sound basic education" is simply absurd. Def. Br. at 20-21. To the CFE Court, "adequate education" and "sound basic education" are identical, and the terms are used interchangeably. See CFE I, 86 N.Y.2d at 317 ("notions of a minimally adequate or sound basic education"), at 320 (plaintiffs' claim was that "the State's funding methodology deprives New York City school children of a 'minimum adequate education'"); see also CFE II, 100 N.Y.2d at 909 ("'the constitutional history of the Education Article shows that the objective was to 'make[ ] it imperative on the State to provide adequate free common schools for the education of all of the children of the State'") (quoting from the concurrence of Judge Levine in CFE I).

Indeed, courts across the country employ the term "adequate" to signify the constitutional minimum. For example, in CCJEF. v. Rell, the Connecticut Supreme Court reviewed school funding cases from across the country, including CFE. It concluded "our research has revealed that those state courts that have reached the merits of the issue overwhelmingly have held that there is a floor with respect to the adequacy of the education provided pursuant to their states' education clauses; that education must be in some way ''minimally adequate'' or ''soundly basic". CCJEF. v. Rell, 295 Conn. 240, 308-09, n 55 (2010).[36]

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[35] The State's previous admissions on this point are further supported by expert testimony at trial. Frank Mauro testified "the CFE case was an adequacy case so the term sound basic education is used to – as an equivalent to adequacy" while referring specifically to P.X. 112. T. 3138. Mauro also testified that Foundation Aid "is designed to provide the minimum for a sound basic education." T. 3053.

[36] In its Reply, the State confuses the Regents' academic standards with the Regents'

V. Judicial Intervention and Remedial Action is Warranted

The State has stated that "before 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 education 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." Def. Br. at 2. Even under this misstated standard,[37] judicial intervention is warranted in this case.

Plaintiffs have proven the Maisto District students' constitutional right to a sound basic education has been violated. Plaintiffs have demonstrated that the constitutional violation is directly attributable to the State's failure to ensure adequate funding. Such proven constitutional

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methodology for determining the minimum funding level required for a sound basic education. Def. Br. at 20-21. However, the inquiry into proof of a violation based on academic standards is distinct from the determination of the minimum level of funding necessary to provide a sound basic education. In approving the State's methodology for determining the amount of funding necessary for a constitutionally adequate education, the Court approved of the Regents use of the successful schools analysis, which the State adopted in Foundation Aid. CFE III, 8 N.Y.3d at 30 ("In particular, we do not find irrational the Governor's acceptance of the Board of Regents approach to identifying successful schools"). The Court found that, by using the "efficiency filter" in its successful schools analysis, the State properly arrived at the minimum amount. CFE III, 8 N.Y.3d at 30. ("The essential premise of the cost-effectiveness filter is that the higher-spending half of the successful districts is spending more than the constitutional minimum… The State, in adopting [this] approach, implicitly concluded that New York City could attain minimal constitutional standards while spending less than this higher-spending group of successful districts.") Therefore, according to the law of New York State, the level of funding the State calculated to provide an "adequate" education is the constitutional minimum.

[37] Plaintiffs do not have the burden of showing gross and glaring deficiencies throughout all schools in each district. As held by the court in CFE II, "There are certainly City schools where the inadequacy is not 'gross and glaring' (Levittown, 57 NY2d at 48). Some of these schools may even be excellent. But tens of thousands of students are placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment. The number of children in these straits is large enough to represent a systemic failure. A showing of good test results and graduation rates among these students -- the "outputs" -- might indicate that they somehow still receive the opportunity for a sound basic education. The showing, however, is otherwise." CFE II, 100 N.Y.2d at 913-14.

violation requires immediate judicial relief in the form of a declaratory judgment and order for prompt remedial relief.

A. Declaratory Judgment is Appropriate

Plaintiffs have proven a violation of Maisto Districts students' constitutional right and thus this Court can and must enter a declaratory judgment that the State is not affording Maisto Districts students the opportunity to receive a sound basic education, in violation of their rights under Article XI, Section 1 of the New York Constitution. N.Y. CONST., art. XI, §1.

B. Remedial Relief is Appropriate

The State's violation of Plaintiffs' constitutional rights requires further immediate judicial relief. Unlike in CFE, Plaintiffs are not alleging that the current funding system (Foundation Aid) is itself inadequate to provide the opportunity for a sound basic education. Rather, it is the State's failure to fully fund the system that is causing the deprivation of a sound basic education in the Maisto Districts. Implementation of the Foundation Aid Formula will remedy the proven constitutional violation in the Maisto Districts.

The State characterizes Plaintiffs' requested relief from this Court as "extraordinary," and contends that directing implementation of the Foundation Aid Formula in the Maisto Districts would intrude into "the prerogative of the elected branches" over "budgetary issues," in contravention of "separation of powers principles." Def. Br. at 101.

Contrary to the State's assertions, Plaintiffs are not asking this Court to intrude upon legislative and executive branch authority to "enact or adopt" the annual State budget or any other "budgetary measure." Def. Br. at 101. Rather, full funding of Foundation Aid is necessary to remedy the violation of the right to a sound basic education in the Maisto Districts, as overwhelmingly demonstrated at trial.[38] Where, as here, there is a proven violation of Plaintiffs

constitutional rights, "it is *the province of the Judicial branch* to define, and safeguard rights provided by the New York State Constitution, *and order redress for a violation of them.*" CFE II, 100 N.Y.2d at 925 (emphasis added). Thus, far from intruding upon separation of powers principles, Plaintiffs' requested relief is wholly consistent with them.

Further, the State ignores the precedent in the CFE litigation to guide the determination of a judicial remedy for inadequate school funding. The Court of Appeals made clear that courts must approach the "final question" of remedy grounded in "actual cases and controversies, and not abstract global issues, *and fashion [remedial] directives based on the proofs before them.*" CFE II, 100 N.Y.2d at 925, 928 (emphasis added). The Court of Appeals also made clear that the "ascertainable starting point" to remedy the proven deprivation of resources was the "actual cost" and "the funding level" to provide the plaintiff school children the opportunity for a sound basic education. Id. at 930. Finally, the Court of Appeals underscored the necessity of judicial deference to the Legislature's "education financing" plans when fashioning a remedy to "safeguard" the right of to a sound basic education. CFE II, 100 N.Y.2d at 925.

A directive to fully fund the Foundation Aid formula over the next four years in the Maisto Districts is entirely consistent with these principles. The State, through the Foundation Aid Formula, "ascertain[ed] the actual cost" and "funding level" of providing a sound basic education in the Maisto Districts. CFE II, 100 N.Y.2d at 930. As the State itself represented to

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[38] In their Proposed Conclusions of Law, Plaintiffs' requested an order directing the State to fully fund state aid under the Foundation Aid Formula in the Maisto Districts, over the next four years, calculated without any of the adjustments, cuts, or modifications to the Formula made by the State beginning in the 2009-10 school year such as the Gap Elimination Adjustment. P. Br. at 46. To clarify, Plaintiffs request full funding of the 2007 Foundation Aid Formula without the reductions, freezes or extensions of implementation imposed starting in 2009. Any adjustments required by the Formula related to education cost, particularly updating the successful schools analysis, are appropriate for proper implementation of the formula.

the Court of Appeals in this case, the Foundation Aid Formula was "enacted to reflect the estimated cost of providing a constitutionally adequate education" in the Maisto Districts. Addendum at 8.

Plaintiffs also demonstrated that the State has failed to implement the Foundation Aid Formula in the Maisto Districts, resulting in a cumulative aid shortfall of $1.1 billion, causing spending gaps in the Districts' budgets and forcing massive, harmful cuts in staff and programs. These proofs further establish the causal connection between the State's failure fund the Formula and the glaring input deficits and low student outcomes in the districts. Thus, Plaintiffs' requested relief is firmly rooted in the overwhelming evidentiary record before this court.

Finally, restoration of full Foundation funding in the Maisto Districts in no way usurps the Legislature's discretion.[39] Indeed, Plaintiffs' request that this Court, by directing implementation of the Foundation Aid Formula, defer to the State's own education financing plan, thereby obviating the need for the court to fashion a remedy out of whole cloth. Simply put, Plaintiffs' requested relief elevates and preserves—and does not encroach upon or undermine—judicial deference to the Legislature's role in determining matters of education cost and funding.[40]

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[39] The State also erroneously characterizes Plaintiffs requested relief as an injunction requiring a showing of irreparable harm to individual students. Def. Br. at 104-05. As in the CFE litigation, Plaintiffs are asking this Court to "order redress for violation" of the constitutional rights of student in Maisto Districts "based on the proof" of "systemic failure" of both inputs and outcomes in those districts contained in the evidentiary record adduced at trial. CFE II, 100 N.Y.2d at 903, 914, 925, 928.

[40] Of course, the Court has the authority to order other relief it deems appropriate to remedy the constitutional violation. However, any remedy must be based upon the actual cost and funding levels necessary to provide the opportunity for a sound basic education in the Maisto Districts. CFE II, 100 N.Y.2d at 928.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court enter an order:

(1) Declaring that the current level of funding in each of the Maisto Districts is inadequate and violates the rights of Plaintiffs and all other students in each of those Districts, including children living in poverty, racial minorities, children with disabilities and children learning English as a second language, to an opportunity of a sound basic education under Article XI, Section 1 of the New York State Constitution;

(2) Directing the State to correct those violations and to fully fund state aid under the Foundation Aid Formula in the Maisto Districts;

(3) Directing the State to begin providing state aid under the Foundation Aid Formula to the Maisto Districts in equal annual installments commencing in the 2016-17 school year and achieving full state Foundation Aid by the 2019-20 school year; and

(4) Such other relief as may be appropriate and necessary to ensure Plaintiffs an opportunity of a constitutional sound basic education.

Plaintiffs further request this Court retain jurisdiction of this matter to ensure compliance with this Court's remedial directives and orders.

DATED: February 9, 2016
ALBANY, NEW YORK

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ADDENDUM

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Hon. Andrew W. Klein
Clerk of the Court
Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: Hussein v State of New York

Dear Mr. Klein:

By letter dated May 25, 2011, the Court has advised that this appeal has been selected for treatment under the alternative procedures set forth in Rule 500.11. We urge the Court to terminate the Rule 500.11 review and set this appeal down for full briefing and oral argument. Pursuant to this Court's direction, we also address the merits of the State's appeal.

This case presents a novel and important question that warrants full briefing and oral argument before this Court. In 2007, in response to *Campaign for Fiscal Equity v. State of New York* ("*CFE III*"), 8 N.Y.3d 14 (2006), the Legislature enacted major reforms to funding public education, which will provide substantial increases in funding not only for New York City, but state-wide. These reforms include the phase-in of increased school aid, called Foundation Aid, to all the school districts in the State based on a funding formula that takes into account the needs of the students and districts. The funding formula is more generous than the one this Court approved as reasonable in the *CFE* litigation. In the first two years of implementation, these reforms increased funding for public schools state-wide by about $3 billion (R. 89-94), commensurate with the amount that would have been provided under

the formula approved as reasonable in *CFE III*. When fully implemented, these reforms will more than double that amount, although recent years' budget constraints have resulted in temporary reductions in school funding and delays in phasing them in.

The question presented in this case is whether, notwithstanding these major state-wide reforms, plaintiffs should now be permitted to pursue a claim that the State is not meeting its obligations under the Education Article in eleven small city school districts. The answer is no, and plaintiffs' claim should be dismissed. Their complaint is moot to the extent that it alleges inadequacies of resources and deficiencies of student performance based on data that pre-date the 2007 State aid reforms, and it is premature to the extent that it alleges that the 2007 reforms, even when fully implemented, will not meet the State's funding obligations under the Education Article. And to the extent the complaint alleges that the resources provided now are inadequate, prudential considerations counsel against permitting this litigation to proceed before these reforms are fully phased in.

The State's Education Funding Reforms

In response to this Court's decisions in *CFE*, the State enacted state-wide reforms in its education funding scheme, substantially increasing the resources available to school districts to provide an opportunity for all students in New York to receive a sound basic education.[1] Chapter 57 of the Laws of 2007, now codified in Education Law § 3602, overhauled the State's methodology for calculating and providing state aid to public school districts, consolidating 30 pre-existing programs into new Foundation Aid. Foundation Aid for each district is now determined according to a formula developed by the Board of Regents which, with minor variations, tracks the formula that this Court found rational in *CFE III*. When fully implemented, New York's state-wide formula will vastly increase State education funding, with more than two-thirds of the increase going to high-needs school districts such as those at issue in this litigation.

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[1] While *CFE* involved a challenge to funding for New York City schools, this Court recognized that the State, in formulating a remedy, "may of course address statewide issues if it chooses." *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 928 (2003) ("*CFE II*").

Under the 2007 reforms, Foundation Aid for each district is determined by adjusting "foundation cost," which is the average cost of providing a successful education, to reflect the pupil needs and regional costs of the district. *See* L. 2007, ch. 57, part B, §§ 11, 13; Educ. L. § 3602(4). "Foundation cost" is measured by the instructional costs of the nearly 200 school districts in the lower-spending half of school districts state-wide that have successful track records. *See* Educ. L. § 3602(4)(a)(1). That foundation cost is adjusted by a pupil needs index to reflect the increased amount of funding required to educate low-income students and English language learners in each district. *See* Educ. L. § 3602(1)(o), (p), (q) and (r), and § 3602(4)(a). In addition, a special needs co-efficient is entered into the formula to account for the district's increased costs of providing disabled children an opportunity for a sound basic education, *see* Educ. L. § 3602(1)(i)(4), and a regional cost factor is applied, *see* Educ. L. § 3602(4)(a)(2). The resulting per-pupil figure is then multiplied by the district's enrollment to arrive at the total district's adjusted foundation cost. The amount of State Foundation Aid provided to each district is then calculated by subtracting an expected local contribution from the district's adjusted foundation cost. *See* Educ. Law § 3602(4)(a).

Chapter 57 of the Laws of 2007 also contained rigorous accountability measures to ensure that the increased resources will be used effectively. The centerpiece of the legislation is the Contracts for Excellence program. Each school district that has one or more low-performing schools and receives an annual increase in Foundation Aid of at least 10% of the prior year's aid or $15 million, is required to enter into a Contract for Excellence with the State Education Department that governs how the new funds will be used to provide new or expanded programs that have been demonstrated to improve student achievement. Under this program, school districts will be required to identify new programs and opportunities, to affirm that they will predominantly benefit students with the greatest educational needs, to certify that the funds are used to supplement, not supplant, local funding, and to report publicly that 25% of the increased funds will be used to reduce class size, increase time on task, provide initiatives to improve quality of teachers and principals, and other specified activities. *See* L. 2007, ch. 57, part A; Educ. L. § 2011-d.

The State began phasing in Foundation Aid in the 2007-2008 school year, anticipating full implementation after four years. L. 2007, ch. 57, § 13. In the second year of implementation, 2008-2009, school districts received 37.5% of the projected, inflation-adjusted Foundation Aid increase to be provided them at full phase-in. *See* Educ. L. § 3602(4)(b)(2). This resulted in total increases in State

aid of nearly $3 billion statewide in the first two years of implementation (R. 89-94).

In the face of the wide-spread financial crisis and revenue shortfalls, the Legislature amended the phase-in of Foundation Aid in 2009 so that it would not be fully funded until the 2013-2014 school year. L. 2009, ch. 57, § 13; Educ. L. § 3602(4)(b). While there were reductions in total State education aid in 2009-2010 and 2010-2011, they were almost completely offset by federal funding.[2] And while revenue constraints resulted in further State aid reductions in 2011 and annual growth limits that will extend full implementation of the reforms beyond the 2013-2014 school year, *see* L. 2011, ch. 58, §§ 26 and 37, New York continues to be among the highest spending states on public education in the country.[3]

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[2] In 2009, the State froze the amounts of certain categories of state aid (Foundation Aid and certain other grants, but not expense-based aids such as transportation and building aid) to school districts, including plaintiffs' districts, at the 2007-2008 levels. L. 2009, ch. 57, pt. A, § 13, codified at Education Law 3602(4)(a), (b), (b-1). That legislation also imposed a deficit reduction assessment on each district for that year. L. 2009, ch. 57, pt. A, § 23, codified at Education Law § 3609-a. But federal funding wholly mitigated the deficit reduction assessments in 2009-2010. *See* American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (Feb. 17, 2009), as amended Pub. L. 111-8, 123 Stat. 524 (Mar. 11, 2009), §§ 14001 et seq.

The 2009 legislation further froze Foundation Aid for the 2010-2011 academic year. L. 2009, ch. 57, pt. A, § 13. Legislation in 2010 also provided for a net Gap Elimination Adjustment to State education aid of approximately $800 million. State aid reductions of $ 2.1 billion (of the total of about $22 billion in State education funds that would have been appropriated that year) were largely offset by federal funding provided to mitigate education funding reductions at the state level. L. 2010, ch. 53, § 1, pp. 59-64. Specifically, the federal government gave New York $725 million under the American Recovery and Reinvestment Act, which the legislature allocated to the school districts for that fiscal year. L. 2010, ch. 53, § 1, pp. 88-90. In addition, the federal government gave New York $ 608 million to help retain teachers and other education personnel whose jobs were in jeopardy due to the State's fiscal constraints. *See* Education Jobs Fund Act, Pub. L. No. 111-226 (Aug. 10, 2010).

[3] According to the most recent United States Census Bureau report, in 2009 New York spent an average of $18,126 per pupil, significantly more than was spent in any other state in the country. "Census Bureau Reports Public School Systems Spend $10,499 Per Pupil in 2009" (May 25, 2011), available at

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Plaintiffs are parents of minor students in eleven small city school districts across the State. In 2008, shortly after the State enacted the Foundation Aid reforms, they commenced this action seeking a declaration that the State is not fulfilling its responsibility under the Education Article of the New York Constitution to provide adequate funding so that children in these small city school districts have the opportunity of a sound basic education, and an injunction compelling the State to provide a system of funding that ensures that children receive such an opportunity. In their pleadings, plaintiff cited data from the 2004-2005 school year to support allegations that district resources and student outcomes were too low. Plaintiffs acknowledged that the State in 2007 enacted a new Foundation Aid formula that increases funding and takes into account student and district needs, but alleged that this formula will not provide adequate funding to plaintiffs' school districts even when fully implemented.

The State moved to dismiss on the ground that the State's education funding reforms significantly changed the landscape, and therefore any challenge to the State's education funding scheme is not justiciable at this time. On one hand, to the extent plaintiffs premise their claims of constitutional inadequacy on pre-2007 resources and performance data, such claims are moot, because the State in the first two years of implementation had already vastly increased funding for these districts. On the other hand, to the extent plaintiffs challenge the adequacy of funding under the new Foundation Aid formula, the action is premature, because the education financing reforms enacted in 2007 have not been fully phased in, the reforms have not had time to take effect, and their effectiveness cannot yet be measured. Consequently, plaintiffs cannot now allege or marshal facts to support their claim that educational resources provided by the 2007 reforms will be so grossly inadequate that students in any or all of these eleven small city school districts will be deprived of an opportunity for a sound basic education.

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http://www.census.gov/newsroom/releases/archives/governments/cb11-94.html. The amount reported for New York appropriately includes state, federal and local funds, all of which count toward the State's constitutional obligation to provide a system of free public education. *See Paynter v. State of New York*, 100 N.Y.2d at 442 (Education Article "enshrines" State-local partnership); *Anderson v Regan*, 53 N.Y.2d 356 (1981) (State legislature is required to authorize disbursement of federal funds).

By decision and order entered in Albany County on August 9, 2009, Supreme Court (Devine, J.) denied the State's motion to dismiss the complaint. The Appellate Division affirmed, concluding that it was constrained by this Court's decisions in *CFE* to rule that the complaint states a cause of action sufficient to survive a motion to dismiss. But it recognized the serious problems in allowing this case to go forward and granted the State's motion for leave to appeal so that this Court can decide whether plaintiffs' claims are justiciable in light of the 2007 State aid reforms that have not yet been fully phased in.

Argument

Given the continued phase-in of the State's 2007 education funding reforms plaintiffs do not and can not allege facts to assert a justiciable *CFE*-style claim at this time. Accordingly, the complaint should be dismissed without prejudice.

This Court has imposed stringent pleading requirements on education funding claims. In *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307 (1995) (*"CFE I"*), this Court articulated a "template" for alleging a claim under the Article XI, § 1 of the New York Constitution, the Education Article. While recognizing that the standard for dismissal under C.P.L.R. § 3211(a)(7) requires the courts to take as true the allegations in the complaint, this Court required more than generalized assertions that the State is violating its constitutional obligation to fund a system of free public education. To state such a claim, this Court held, plaintiffs must "allege and specify gross educational inadequacies that, if proven, could support a conclusion that the State's public school financing system effectively fails to provide for a minimally adequate educational opportunity." 86 N.Y.2d at 319.

In *Paynter v. State of New York*, 100 N.Y.2d 434 (2003), this Court reiterated plaintiffs' obligation to allege that through "some gross and glaring inadequacy in their schools," students are being deprived of their right to a sound basic education. *Id.* at 439. They must allege factually "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." 100 N.Y.2d at 440. The Court observed: "[I]f the State truly puts adequate resources into the classroom, it satisfies its constitutional promise under the Education Article, even though student performance remains substandard." *Id.* at 441; *see also New York State Ass'n of Small City School Dists.*, 42 A.D.3d 648 (3d Dep't 2007) (dismissing

complaint for failure to meet rigorous prerequisites for alleging Education Article claim).

Conclusory assertions that there are and will continue to be deficient inputs and substandard performance as a result of inadequate funding are particularly suspect given this Court's observation that the situation in New York City was unique and the doubt it expressed that other school districts in New York could bring similar claims. *CFE II*, 100 N.Y.2d at 932. Responding to the dissents' concerns that the New York City plaintiffs' success would "inspire a host of imitators throughout the state," the Court observed that the *CFE* plaintiffs prevailed there "owing to 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." *Id.* (emphasis in original). The Court continued, "[p]laintiffs in other school districts who cannot demonstrate a similar combination may find it tougher going in the courts." *Id.*

As explained below, plaintiffs have not satisfied the stringent pleading requirements this Court has imposed. Their claims should not proceed while the 2007 reforms are being phased in.

1. Plaintiffs' Allegations of Inadequacies Based on Pre-2007 Data Are Moot.

Plaintiffs' second amended complaint contains page after page of allegations of resource deficiencies and student performance in plaintiffs' school districts during the years predating the 2007 reforms (R. 41-66). It lists the per pupil expenditures for each district from the 2005-2006 school year and claims that these spending levels are significantly below the amounts needed as reflected in the *CFE* plaintiffs' *Adequacy Study* (R. 25-26). It then presents data for each of the eleven small city school districts regarding class sizes, ranging from 20 to 26 pupils (R. 41); teachers' qualifications and experience (R. 43-45); facilities and instrumentalities of learning (R. 46-51); rates of graduation and percentages of students who receive Regents diplomas and plan to attend college (R. 52-53, 55-56); dropout and suspension rates (R. 53-54); and test scores[4]

[4] Plaintiffs rely on performance indices established by the Board of Regents, which this Court of Appeals has held are aspirational and "exceed notions of a minimally adequate or sound basic education" that the State is obligated to provide under the Education Article. *CFE II*, 100 N.Y.2d at 907-08 .

(R. 56-64). But these data are from the Board of Regents' *Annual Report to the Governor and the Legislature on the Educational Status of the States Schools* in 2006, which reflects conditions in the 2004-2005 school year.

Claims premised on the 2004-2005 data are moot. The 2007 legislation enacted in response to the Court's decisions in the *CFE* litigation reflects a new costing-out analysis and applies a new Foundation Aid formula state-wide.[5] The reforms, which continue to be phased in, will substantially increase funding to school districts according to their demographic needs. They so change the education financing landscape in New York that any challenge based on pre-2007 funding is rendered moot.

Because the 2007 Foundation Aid legislation overhauls the state aid formula and substantially increases the amounts of state aid provided to plaintiffs' school districts, any judicial decision regarding the adequacy of pre-2007 funding and resources would be ineffectual and the rights of the parties with respect to pre-2007 funding would not be directly affected by the determination of these claims. Moreover, given the long-term formulaic changes embodied in the 2007 legislation that were enacted to reflect the estimated cost of providing a constitutionally adequate education in this State, and the consequential increases in State's education funding that will flow from these reforms, this case does not fall within the exception to the mootness doctrine. *See Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-15 (exception applies where the issues are substantial or novel, likely to recur and capable of evading review).

Similarly, allegations that the State is not providing adequate funding now should also be dismissed as nonjusticiable. In their third amended complaint (which added allegations about the Poughkeepsie and Utica Central School Districts), filed after the Appellate Division rendered its decision below, plaintiffs included allegations regarding reductions in State funding in 2010 and 2011 and impacts on resources that may be available in certain districts in those years. In one footnote, they also make limited allegations about student

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[5] As it becomes more apparent that increased funding does not necessarily improve student performance, the State has also enacted programmatic reforms, including Race to the Top funding to encourage innovative ways to improve student performance and management efficiencies, *see* L. 2011, ch. 58, part B, §§ 1, 2, codified at Educ. L. § 3641(5), (6); and mechanisms to foster the accountability and effectiveness of classroom teachers and principals, *see* L. 2010, ch. 103, codified at Educ. L. § 3012-c; *see also* 8 N.Y.C.R.R. subpart 30-2.

performance in the 2009-2010 school year as an example to support their broad allegation that since 2004-2005, student performance continues to be sub-par. Even if plaintiffs were to allege a full-throated claim based on data from recent years, the Court, for prudential reasons, should nevertheless dismiss such a claim without prejudice while the 2007 reforms are being phased in. Under the current statute, the State continues to work toward providing aid pursuant to the Foundation Aid formula reflecting district needs and resources, as well as other types of funding to try to encourage the implementation of effective and efficient pedagogical programs. It would serve no purpose to allow continued litigation of claims alleging current year inadequacies while the reforms are being phased in.

New Hampshire's Supreme Court recently dismissed similar education funding claims where that state's legislature had overhauled its education aid program in response to an earlier judicial declaration of constitutional inadequacy. In *Londonderry School Dist. v. New Hampshire*, the court had held unconstitutional the state statute governing education funding and allocation after finding, among other things, that it failed to determine the cost of a constitutionally adequate education, failed to provide proper funding, and failed to provide for accountability. 154 N.H. 153, 907 A.2d 988 (2006). In response, the New Hampshire legislature passed legislation determining the cost of a constitutionally adequate education, enacted a multi-year funding plan to meet its obligations based on those determinations, and established accountability mechanisms to help ensure that its constitutional obligations were met. 157 N.H. 734, 736, 958 A.2d 930, 931 (2008). Based on the intervening changes in state law, the New Hampshire Supreme Court dismissed the petitioners' claims regarding continued constitutional violations as moot. *Id.* at 736-738, 958 A.2d at 932. In so holding, the Court "presumed that in enacting [such legislation], the legislature acted in good faith" to address the constitutional infirmities of the prior legislation. *Id.* at 737, 958 A.2d at 932.

Like the legislative reforms in New Hampshire, New York's 2007 education funding reforms, enacted state-wide in response to *CFE*, render this case moot.

2. Plaintiffs' Claim that Funding under the 2007 Reforms Will Be Inadequate Is Not Ripe for Review.

The complaint also alleges that funding under the State's new Foundation Aid formula will continue to be constitutionally inadequate. Claims regarding the adequacy of future funding are not ripe for review because there is no factual predicate at this time to support any such claims. Until the Foundation Aid scheme is fully implemented and its effects measured, plaintiffs cannot state a justiciable claim. No factual record can yet be made because the education financing reforms enacted in 2007 have not been fully phased in, the reforms have not had time to take effect, and their effectiveness cannot yet be measured. Until then, plaintiffs cannot prove that the resources provided under the 2007 reforms are constitutionally deficient. More than that, plaintiffs cannot even allege with any factual specificity that funding under the new Foundation Aid formula will be "grossly and glaringly" inadequate.

Plaintiffs' allegations regarding pre-2007 funding inputs and performance outcomes are irrelevant to the adequacy of resources that will be provided and the outcomes that will result under these reforms, which have already increased State education aid by nearly $3 billion annually, and will more than double that amount when fully implemented (R. 89-94). *See* Educ. L. § 3602(4)(b). Any claim that funding under the Foundation Aid formula will result in deficient inputs and performance is purely speculative. For example, plaintiffs cannot allege factually that, under the increased funding reforms, the districts will be unable to hire qualified teachers, or that class sizes will be too large. And any assertions that student achievement under the reforms will be constitutionally substandard are even more speculative.

Plaintiffs try to avoid their inability to specify resource and performance deficiencies in future years, and a causal nexus between the two, by claiming that the formula underlying the State's Foundation Aid underestimates the cost of providing a sound basic education. They base their claim on a costing-out study entitled *New York Adequacy Study: Determining the Cost of Providing All Children in New York an Adequate Education* (March 2004) (R. 25-26). But plaintiffs' allegations that their *Adequacy Study* is right and the State's Foundation Aid formula is wrong cannot support their claim.

For one thing, the complaint compares the amounts indicated in their *Adequacy Study* to per pupil spending amounts in the districts in years that pre-

date the 2007 funding reforms (R. 25-26). Because the relevant comparisons are the amounts that are being and will be provided pursuant to the new Foundation Aid formula, the allegations in the complaint do not support a claim for current or future violation of the Education Article.

For another thing, the *Adequacy Study* upon which plaintiffs rely to assert that the per pupil spending is inadequate is the very same study that this Court rejected in *CFE III* in favor of the reasonable cost study underlying the remedial plan that the State proposed in that case. 8 N.Y.3d at 22-24, 27, 30-31. Specifically, plaintiffs contend that the 50% cost-effectiveness filter that the State uses to identify the relevant successful school districts to estimate costs "arbitrarily lowers" the amount determined to be necessary to fund a constitutionally adequate education (R. 36). But this Court held that this same methodology, which the Board of Regents employs to reflect the fact the higher spending half of the successful school districts is spending more that the constitutional minimum, is rational and therefore entitled to deference by the courts. *CFE III*, 8 N.Y.3d at 30-31. Plaintiffs also claim that the regional cost factor and weightings for special needs that are used in the 2007 formula do not reflect the true cost of providing a sound basic education. But those factors and weightings also track the formula the State proposed in *CFE III*.[6] *See* 8 N.Y.3d at 30-32.

Thus, contrary to the Appellate Division's view, this Court's *CFE* decisions do not require that this case go forward. In fact these decisions require the opposite result. To state a claim under *CFE*, the complaint must allege "gross and glaring" inadequacies in State funding, deficiencies in student performance,

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[6] The 2007 Foundation Aid formula employs an extraordinary needs coefficient of 1.5 to account for students with limited English language proficiency that exceeds the 1.2 weighting approved in *CFE*. *Compare* Educ. L. § 3602(1)(o), (s) *and CFE III*, 8 N.Y.3d at 31. The 2007 formula also uses a two factors to account for poverty -- 1.65 for pupils receiving free and reduced price lunches plus an additional 0.65 for pupils below the poverty level in the last census count -- again well exceeding the 1.35 poverty coefficient approved in *CFE*. *Compare* Educ. L. § 3602(1)(p), (q) *and CFE III*, 8 N.Y.3d at 31. Next the 2007 formula employs a coefficient for disabled students of 1.41, which is less than that used in *CFE*, but provides additional "excess cost aid" for disabled students who have the more cost-intensive needs. *See* Educ. L. § 3602(5)(a), (5-a). And finally, the 2007 formula uses a regional cost index reflective of the labor market developed by the Board of Regents, instead of the geographic cost of education indices used in the *CFE* formula. *See* Educ. L. § 3602(4)(a)(2).

and a causal connection between the two. Given the substantial infusion of funding that has already resulted from the Foundation Aid reforms, plaintiffs' allegations of resource inadequacies and performance deficiencies based on pre-2007 data are moot. And plaintiffs cannot now allege a *CFE*-style claim that funding under the Foundation Aid formula is constitutionally inadequate because they cannot allege with any specificity that the new formula will result in gross resource inadequacies and performance deficiencies inasmuch as the formula has not been fully implemented and its effects cannot be measured. Nor can plaintiffs proceed on the basis of allegations that their experts' studies show that funding provided under the Foundation Aid formula will be inadequate, given this Court's holding in *CFE III* that the judiciary should not substitute the findings of the plaintiffs' Adequacy Study for the reasonable findings of a State-commissioned study. Indeed the Foundation Aid formula enacted in 2007, when fully implemented, will provide much more generous funding than the formula this Court found reasonable in *CFE III*.

Finally, the Appellate Division erroneously concluded that the State's control "over the implementation of the Foundation Aid formula and the increases in funding encompassed therein" precludes dismissal on grounds of ripeness and mootness. *See* slip opn. at 5. The need-based Foundation Aid formula remains the law of the State and is ensconced in the Education Law at § 3602(1) and (4). The State is entitled to a presumption that it will be implemented in good faith. The fact that the legislature has enacted short-term funding reductions and extended the phase-in schedule to accommodate serious revenue shortfalls during this global economic downturn does not mean that the statutory increases in State aid will not be implemented.

Indeed, the recent legislation further delaying full implementation in the face of severe budget constraints only underscores the constitutional and prudential concerns that militate against judicial involvement in these education finance matters. This Court has recognized that even in ordinary times "[t]he determination of the amounts, sources, and objectives of expenditures of public monies for educational purposes, especially at the State level, presents issues of enormous practical and political complexity, and resolution appropriately largely left to the interplay of interests and forces directly involved . . . in the arenas of legislative and executive activity." *Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27, 38-39 (1982). Particularly now, the judiciary is obliged to maintain "a disciplined perception of the proper role of the courts in the resolution of our State's educational problems." *Id.* at 50.

In sum, the enactment of state-wide education funding reforms in 2007 so changes the landscape that plaintiffs' Education Article claims must be dismissed outright, albeit without prejudice. In this time of competing demands and severely constrained resources, it would be "unwise and unsound" for the Court to allow these claims to go forward under these circumstances. *See Matter of N.Y. Ass'n of Convenience Stores v. Urbach*, 92 N.Y.2d 204, 214 (1988). At the very least this case presents a novel and important question about whether parents of students in the small city school districts should be permitted to proceed with their Education Article claims at this time that warrants full briefing and oral argument in this Court.

Respectfully submitted,

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