To Be Argued By:
Robert E. Biggerstaff
Time Requested: 15 Minutes

Appellate Division — Third Department Docket No. _____

New York Supreme Court

APPELLATE DIVISION — THIRD DEPARTMENT

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

Plaintiffs-Appellants,

against

STATE OF NEW YORK,

Defendant-Respondent.

BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

This lawsuit was filed in October 2008. The children who were in first grade when the lawsuit was filed are now freshmen in high school. It is grossly unfair to delay any longer Plaintiffs' children's right to have the courts determine whether they have been given or denied a sound basic education. Plaintiffs-Appellants ("Plaintiffs") are parents acting on behalf of their public school children in eight upstate New York small city school districts: Jamestown, Kingston, Mt. Vernon, Newburgh, Niagara Falls, Port Jervis, Poughkeepsie, and Utica ("Maisto Districts" or "Plaintiffs' Districts"). All these districts contain blighted inner cities which are very poor and have been left behind with all the societal problems of the urban poor. None offer the economic benefits available in suburban and major metropolitan areas. Plaintiffs submit this Brief in support of their appeal of the September 19, 2016 Decision by Hon. Kimberly A. O'Connor, Acting Supreme Court Justice, dismissing Plaintiffs' Third Amended Complaint ("Complaint"). Plaintiffs ask for a reversal of the Decision and a de novo review of the facts. The facts are overwhelming and if this Court does not review them now, they will only be faced again with doing so in a year and one half in the next appeal. Meanwhile, 55,000 students will have been denied a sound basic education for two more school years.

PRELIMINARY STATEMENT

In *Campaign for Fiscal Equity, Inc. v. State* ("*CFE*"), 100 N.Y.2d 893, 902 (2003), the Court of Appeals established (1) that the "State has obligated itself

constitutionally to ensure the availability of a 'sound basic education' to all its children"; (2) that the courts are "responsible for adjudicating the nature of that duty"; and (3) that there is a legal "template, or outline, of what is encompassed within a sound basic education."

The instant case returns to this Court after an eight-week trial before the Supreme Court in which Plaintiffs overwhelmingly proved that the Defendant-Respondent State of New York has breached its constitutional obligation to provide the opportunity to obtain a sound basic education to Maisto District students. Plaintiffs proved, with clear and convincing evidence largely conceded by the State, each of the elements of the *CFE* template: deficient inputs, inadequate outputs, and causation, a link between those deficits, and the lack of sufficient funding.

Without reference to a single fact from the nearly 50,000 pages of record evidence, the Supreme Court in its decision simply announced that **"the analysis outlined in *CFE* of inputs, outputs, and causal linkage is not required** (emphasis added)." Decision (R.17)[1]. The court constructed out of whole cloth what it called a "post-CFE world" in which the State's obligation to provide adequate funding for a sound basic education is insulated from judicial review.

The "post-CFE" approach devised by the Court below would bar **any** challenge to the constitutionality of educational funding, regardless of the proof a

[1] Cites to the Record will appear as R. . to the Court's Exhibits as C.X., to the Plaintiffs' Exhibits as P.X. and Defendant's Exhibits as D.X..

plaintiff presents and regardless of the level of funding actually provided to individual districts under that system.

This ruling is patently erroneous and must be reversed.

STATEMENT OF THE CASE

Since at least 1982, New York has recognized a qualitative standard for the education required under Article XI of the New York State Constitution (*Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 57 NY2d 27). That concept was further defined by the Court of Appeals in a series of decisions, *Campaign for Fiscal Equity et al. v. New York State et al.* (*CFE I* (86 NY2d 307 (1995)), *CFE II* (100 NY2d 893 (2003)) and *CFE III* (8 NY3d 14 (2006)) respectively), which recognized that Article XI of the New York State Constitution safeguarded an important right by mandating that the State provide its students the opportunity of a sound basic education. The Court of Appeals further established the pleading and proof requirements for students asserting that their rights under the Education Article were being violated (*CFE II* at 905-925) and the standard of review for remedial measures, if a violation is found to exist (*CFE III* at 27-30). Although the particular factual findings were limited to the New York City schools at issue (*CFE III* at 19), the *CFE* cases delineated a framework for the courts to assess such Education Article claims.

In 2007, in response to the Court of Appeals' decision in *CFE III*, the Legislature adopted what were heralded as major reforms to funding public

education (resulting in the formula known as Foundation Aid) (L. 2007, ch. 57, now codified in Education Law Section 3602(1) and (4)). While *CFE III* only involved the New York City School District, Foundation Aid addressed funding for all public school districts in the State.

Subsequently, thirty-two parents, on behalf of their minor children, commenced this action in October 2008. The complaint followed the framework laid down by the Court of Appeals and alleged that serious educational deficiencies exist in Plaintiffs' districts, as shown upon examination of educational resources or "inputs" and student performance or "outputs;" that these deficiencies were caused in part by insufficient funding, both past, present and continuing under currently enacted law; and that the Defendant State had thereby violated the Education Article of the New York State Constitution (see Causes of Action respecting each of Plaintiffs' districts in paras. 72 through 125 of the Third Amended Complaint, R.97-108.) Additionally, Plaintiffs alleged the State had separately violated the Education Article in respect to at-risk students in the districts. Plaintiffs requested both declaratory and injunctive relief.[2] While the Third Amended Complaint (hereinafter "the Complaint") recognized that the State had enacted education finance reforms in response to the *CFE* decisions to address inadequacies in statewide funding, the Complaint alleged past, present and continuing constitutional violations not corrected by that 2007 legislation with respect to the districts attended by Plaintiffs'

[2] Before the Court is the Third Amended Complaint (Complaint). During the litigation Plaintiffs from several districts were joined and several withdrew.

children. The Complaint also alleged that the deep cuts to education aid to Plaintiffs' districts, the real property tax cap, and other post-2007 enacted legislation only increased the deficiencies for these districts and the students they serve. (R.33)

A. State's Unsuccessful Motion to Dismiss

The State moved to dismiss the Complaint. The motion alleged that the Complaint was not ripe for adjudication. Supreme Court Justice Eugene Devine denied the State's motion and specifically found that Plaintiffs' claims were ripe in that they were based on past and current actual conditions. (R.231) ("Devine decision") Judge Devine wrote that:

> "...defendant has failed to provide any evidence with respect to the actual costs of a sound basic education in Plaintiffs' districts and thus has clearly failed to show that the increased aid provided by Chapter 57 of the Laws of 2007 is sufficient or likely to result in acceptable student performance (*Hussein et al. v State of New York*, Sup Ct, Albany County, July 21, 2009, Devine, J. at 4, Index No. 8997-08)." (R.232).

Judge Devine also noted that Plaintiffs alleged that Foundation Aid had been improperly frozen, leaving the Plaintiff's districts with increasingly insufficient funds. As later events would show, education aid to Plaintiffs' districts further deteriorated from the time of the Supreme Court's ruling. The seemingly temporary freeze in Foundation Aid then developed into deep multi-year cuts to existing funding levels beginning in 2009-10 and restrictions on future increases beginning in 2011-12 (the school tax cap and the Personal Income Growth Index or PIGI cap, L. of 2011,Chs. 97 and 58, respectively), leaving Plaintiffs' districts at the time of

trial[3] in 2015 in approximately the same or worse position than seven years before on an annual basis and in a significantly worse position considering the cumulative effect of multi-year cuts. (See the following chart which sets forth the shortfall in Foundation Aid for each of Plaintiffs' districts.)

	TOTAL 2008-09 FOUNDATION AID	ACTUAL 2014-15 FOUNDATION AID NET OF THE GAP ELIMINATION ADJUSTMENT	FOUNDATION AID IF FULLY FUNDED	YEARLY SHORTFALL IN FOUNDATION AID
JAMESTOWN	$ 40,687,030	$ 41,958,877	$ 61,407,372	$ (19,448,495)
KINGSTON	$ 39,083,812	$ 35,276,427	$ 47,279,474	$ (12,003,047)
MOUNT VERNON	$ 62,482,667	$ 56,730,268	$ 81,415,299	$ (24,685,031)
NEWBURGH	$ 93,804,523	$ 92,153,101	$ 132,249,135	$ (40,096,034)
NIAGARA FALLS	$ 69,854,050	$ 69,955,506	$ 90,402,360	$ (20,446,854)
PORT JERVIS	$ 24,512,354	$ 24,679,998	$ 37,053,597	$ (12,373,599)
POUGHKEEPSIE	$ 47,498,008	$ 47,062,158	$ 58,452,062	$ (11,389,904)
UTICA	$ 71,034,634	$ 75,415,738	$ 127,497,036	$ (52,081,298)
MAISTO DISTRICTS TOTAL	**$ 448,957,078**	**$ 443,232,073**	**$ 635,756,335**	**$ (192,524,262)**

Data from: State Aid Runs DBSAA1 and SA141-5, P.X. 19, 20..

Even before these aid cuts and freezes, which have had serious, deleterious effects, Plaintiffs' districts were classified by the State as high need and failing/unsuccessful. Nevertheless, the State continued to assert that these crippling cuts and freezes in aid were part of a "good faith effort" and that the State's effort should be shielded from judicial review and scrutiny.

The State then appealed to this Court, again asserting the case should be dismissed on the basis of lack of ripeness and mootness. By a unanimous decision, this Court affirmed the finding below. (R.234-38). While citing the principles of restraint to be exercised by the courts in reviewing legislative activities, this Court nevertheless affirmed on grounds that Plaintiffs' claims were justiciable under the precedent of prior education funding cases. This Court stated "...we are

[3] Inasmuch as the trial took place in the middle of school fiscal year 2014-15 , the parties stipulated that the trial record would include school data available up to February 23, 2015 (R. 3375)..

constrained to hold that the present action must be permitted to proceed *according to the course chartered by the Court of Appeals* (emphasis supplied) (R.235)." This Court stated:

> According to [the State], because Foundation Aid has not yet been fully implemented, the factual record is incomplete and the effects of the legislation cannot be measured. . . . [But] the Court of Appeals has already determined in the CFE cases that the constitutionality of particular levels of education funding are a proper matter for consideration by the courts . . . .
>
> Here, plaintiffs' complaint is replete with detailed data allegedly demonstrating . . . glaring deficiencies in the current quality of the schools in plaintiffs' districts and a substantial need for increased aid. . . .
>
> "Only after discovery and the development of a factual record can this issue be fully evaluated and resolved" ([*CFE I*], 86 N.Y.2d at 317) (R.235-37).

The State appealed this decision to the Court of Appeals. The Court of Appeals affirmed, holding that "Plaintiffs' claims are neither moot nor unripe for review." (R.239-51). Judge Ciparick, concurring, stated that "[i]f we declare that a sound basic education consists only of what the Legislature and Executive dictate," that would "cast them in the role of being their own constitutional watchdogs." (R.242). Moreover, Justice Smith, also concurring, dismissed the State's ripeness arguments, stating that:

> "...if plaintiffs, the parents of children in those schools, are constitutionally entitled to have this money spent on their children's educations, then they are entitled to it now. They would be rightly dismayed to learn that their claims

would not ripen for several years, until after their children have graduated (R.246)."

B. Trial

The Court of Appeals remanded to Supreme Court, Albany County, for trial. The trial took place before Acting Supreme Court Justice Kimberly O'Connor over 29 court days from January 21, 2015 to March 12, 2015. Throughout the trial, the parties and the Court explicitly agreed that the sole issue for decision was whether Plaintiffs had proved the elements of the CFE template. As Plaintiffs said in their opening statement:

> [In] proving a violation of the right to a sound, basic education [t]he first [element] is, **output** . . . which is how are the students doing? And this is measured by State test scores, graduation rates, dropout rates, and we have **inputs** and inputs are what do the districts have, to educate the students, teachers, buildings, text books, technology, programs, non-teacher personnel. And then finally the third part is **causation** . . . to show a violation there has to be a link between inadequate funding from the State, and the inadequate inputs and outputs. (R.273-74) (emphasis added).

In its own opening statement, the State concurred:

> The first element is the plaintiffs must establish inadequate **input**. . . . [I]nput is teaching, school facilities, and instrumentalities of learning, books, computers, libraries, pencils, paper. . . . If the plaintiffs establish inadequacies of input they must [then] establish inadequate **outputs**. Is the issue in this case the outputs in these districts are fantastic? Of course not. The outputs are disappointing. . . .
>
> And the third element . . . they must show **a causal link** between the present funding system and any proven failure

> to provide an opportunity for a sound, basic education. (R.315-16) (emphasis added).

At no time during the trial did the State argue or suggest that Plaintiffs' claims were moot or unripe.

At the close of Plaintiffs' case, the State moved for a directed verdict. In making that motion, the State again set forth the three *CFE* elements of the case, arguing that:

> ...plaintiffs have failed to satisfy their burden of showing, one, inadequate **inputs**; two, inadequate **outputs**; and three, **causation**. (R.3609) (emphasis added).

The lower court denied the motion, specifically finding that Plaintiffs had made out a prima facie case under the *CFE* framework:

> ...based on the three elements that we've heard ad nauseam in this case, **inputs, outputs and the causal link that's required**, looking at the evidence that's been presented by plaintiffs . . . I believe that there is enough to sustain a prima facie case, enough evidence before the Court, so I'm going to deny the motion. (R.3614) (emphasis added).

Following a lengthy ten month post-trial briefing period through February 9, 2016, a Decision and Order, dated September 19, 2016 (R.7) was handed down, dismissing the Complaint. The decision found that student performance in Plaintiffs' districts was inadequate (R.12). Nevertheless, it found that once the State had enacted the Foundation Aid Formula the courts could not tell the Legislature to restore aid cuts or otherwise increase funding to Plaintiffs' districts at this time. (R.17).

C. Lower Court Decision

In the trial before the Hon. Kimberly A. O'Connor, testimony was taken from thirty-seven (37) witnesses and included sixty-eight (68) court exhibits, one hundred forty-seven (147) plaintiffs' exhibits and one hundred one (101) defendant's exhibits which were admitted into evidence comprising over fifty thousand (50,000) pages of exhibits.[4] Judge O'Connor observed in the opening paragraph of her decision that the Plaintiffs in the instant case were making claims that the schoolchildren from these eight small city school districts were seeking a judicial determination that the education funding provided by the State of New York was so inadequate that the schoolchildren in these eight school districts were being deprived of their constitutionally mandated opportunity for a sound basic education. Judge O'Connor stated the Plaintiffs' claim was similar to the determination with respect to the school children of the New York City school district in the *CFE* cases. (R.8). At the trial, the overwhelming thrust of the testimony and exhibits was to present evidence supporting and opposing whether the schoolchildren in the eight plaintiff small city school districts met the evidential criteria to support a finding that the education funding provided by the State of New York was so inadequate that it deprived these schoolchildren the constitutionally mandated opportunity for a sound basic education.

[4] The exhibits are to be filed with the Appellate Division, Third Department by the Albany County Supreme Court Clerk's Office.

After a short discussion of the development of the Foundation Aid Formula which was enacted in 2007, prior to the commencement of the instant case in 2008, the lower court noted "It is against this backdrop that plaintiffs, representatives of children in eight small city school districts in the State of New York, have brought this action against the State for declaratory and injunctive relief alleging that the schoolchildren in these school districts are being deprived of the opportunity for a sound basic education, required by Article XI, § 1 of the New York State Constitution ..." (R.10-11).

In a paragraph discussing the evidence, the lower court stated:

> "The common thread running through the eight school districts is one of high-need, based upon the demographics of most of the children in the districts. It is undisputed that many, and often a majority, of children in these districts are economically disadvantaged, have disabilities, and/or have limited English proficiency. The parties generally agreed that children with higher needs often require programs to address the problems that their situations and circumstances create. The performance of the children in these school districts is **undeniably inadequate** (emphasis supplied). It is the import of this performance deficiency analyzed through the lens of the adequacy of funding that this Court must address, and is the area where the parties' agreement ends." (R.12).

The lower court then proceeded to discuss what *CFE I, CFE II* and *CFE III* required in order to find that schoolchildren in a school district were being denied the constitutionally required sound basic education. The lower court stated:

> "Analysis of the constitutional adequacy of school aid, as well as the Court's role in making such determination, must necessarily begin with CFE. In *CFE I*, the Court of

> Appeals held that the Education Article of the New York State Constitution 'requires the State to offer all children the opportunity of a sound basic education' (86 N.Y.2d 307, 316 [1995]). A sound basic education was understood by the Court to mean 'the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury' (*CFE I*, 86 N.Y.2d at 316). Eight years later, in *CFE II*, the Court of Appeals defined 'sound basic education' more exactly as 'the opportunity for a meaningful high school education, one which prepares [children] to function productively as civic participants' (100 N.Y.2d 893, 908 [2003]).
>
> In determining whether New York City schoolchildren were being provided the opportunity for a sound basic education required by the State Constitution, the Court of Appeals, in *CFE II*, reviewed the 'inputs' children receive, i.e., teaching, facilities, and instrumentalities of learning and the resulting 'outputs,' such as test results, graduation rates, and drop out rates, and concluded that the plaintiffs had 'establish[ed]. . .a casual link between the present funding system and [a] failure to provide a sound basic education to New York City schoolchildren' (100 N.Y.2d at 908, 919). The Court agreed with the trial court's reasoning 'that the necessary 'casual 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,' and found 'that this showing together with evidence that such improved inputs yield better student performance, constituted plaintiffs' prima facie case, which **plaintiffs established'** (emphasis supplied) (*id.* at 919)." (R.12-13).

The lower court then proceeded to discuss the remedy phase of the *CFE* cases. It noted the Court of Appeals directed the State "to ascertain the actual cost of providing a sound basic education in New York City." (*CFE II* at 930). The lower court went on to observe in *CFE III* the Court of Appeals accepted that the State's

increased funding for the schools of New York City "was reasonable" (*CFE III* at 19-20) to meet the State's obligation to increase funding to meet the earlier finding that the schoolchildren of New York City were being denied this constitutionally guaranteed right. (R.19).

In its Decision and Order, the lower court failed to discuss the earlier Court decisions in the instant case. In the instant case, as noted above the State of New York had made a motion to dismiss stating the Plaintiffs' claim was not ripe and was moot because Foundation Aid which had been enacted in 2007 provided the funding to meet the State's constitutional duty to provide each school child a sound basic education. Judge Devine, in his Decision dated July 21, 2009, denied Defendant's motion to dismiss. (R.229-233).

This Court affirmed the decision by Judge Devine and concluded the case was ripe to decide on the merits of their claim on behalf of these eight school districts if their schoolchildren were being denied the opportunity to obtain a sound basic education. (R.234-38). The Court of Appeals affirmed this Court's decision and order. The Court of Appeals held "Plaintiffs' claims are neither moot nor unripe for review." (R.239-51).

Although Plaintiffs have clearly sought a declaratory judgment that their schoolchildren were being denied a sound basic education, Judge O'Connor interpreted the instant case as one solely challenging the reductions to the Foundation Aid after its enactment. (R.15; 17-18). While the lower court interpreted

the Plaintiffs' claim in this manner, it also stated "each witness discussed inputs, outputs and the causal link between funding and performance" (R.16). The lower court held Plaintiffs framed the issue in the context of a *CFE* analysis while having observed the testimony clearly went to their declaratory judgment claim on whether the said schoolchildren were being denied their constitutional right to a sound basic education. (R.15). The lower court relied on a statement in Plaintiffs' reply to Defendant's post-trial memorandum to justify its analysis. The said comment in the reply brief discussed whether the Court **as a remedy** could order full funding of Foundation Aid by the State of New York. (R.17-18). This discussion of a possible remedy was mistakenly used by the lower court as a basis to neglect its obligation to address Plaintiffs' claim for a declaratory judgment on whether these schoolchildren were being deprived their right to the constitutionally guaranteed right to a sound basic education. In analyzing this issue, the lower court held it could not award the Plaintiffs' suggested remedy of fully funding Foundation Aid because the Plaintiffs had not demonstrated that the State's action in reducing Foundation Aid was unconstitutional. The lower court did not cite any case law or statutory basis for its analysis or explanation of how it reframed the relief sought by Plaintiffs or its holding that Plaintiffs had not met the burden of showing a reduction in Foundation Aid was unconstitutional.[5]

[5] Plaintiffs asserted at trial that the Foundation Aid Formula acted as an admission by the State of the cost of a sound basic education and therefore failure to fund the formula was evidence of insufficient funding in Plaintiffs' Districts. (See Point IV below)

In dicta, the lower court's decision implies that NYC is far worse than the Maisto districts as a way of disparaging the strength and validity of the Plaintiffs' constitutional claims, quoting[6] dicta from CFE III (R.13). It does so without actually reviewing the Maisto districts' inputs and outputs.

While this reasoning is off point, i.e. either there is a constitutional violation (failure to provide an opportunity for a sound basic education) at present in the Maisto districts or there is not, regardless of how reasonable in theory the formula may be, this reasoning ignores the fact that the Maisto districts' student performance, student need, spending per pupil and district wealth among many critical factors are lower or similar to that in NYC. This is a critical fact. Justice Kaye in *CFE II* said that while the Court could not determine exactly where the benchmark for a sound basic education is[7], it was clear that NYC school system was below it. If the district capacity and student performance of the Maisto districts are below or similar to that in NYC, there is no question but that Plaintiffs have, through the overwhelming weight of the evidence, demonstrated a violation of Article XI. (*See* charts below showing comparisons of NYC and Maisto districts student need, district spending per pupil, district wealth and student performance below (P.X. 7-9, 19-20)).

[6] The Decision leaves out the following which is a significant portion of the paragraph quoted, "Plaintiffs in other districts who cannot demonstrate a similar combination may find tougher going in the courts." *CFE II* at 892

[7] "...a constitutional standard of sound basic education need not pinpoint a date with statutory precision, so long as it defines the contours of the requirement, against which the facts of a case may then be measured." *CFE II* at 892.

	2013 14 FRPL*	2013 14 CWR**	2014 % 4th Grade ELA scoring at Level 3 or 4	2014 % 4th Grade Math scoring at Level 3 or 4
NEW YORK CITY	0.7758	1.023	30%	37%
JAMESTOWN	0.7061	0.309	19%	24%
POUGHKEEPSIE	0.8777	0.586	9%	9%
NIAGARA FALLS	0.7402	0.37	26%	25%
UTICA	0.8114	0.286	17%	27%
NEWBURGH	0.6935	0.587	22%	24%
PORT JERVIS	0.5901	0.505	24%	25%
KINGSTON	0.4822	0.89	22%	23%
MOUNT VERNON	0.6968	0.798	13%	20%

*0083H M(PC0260) 04 LUNCH %, K-6, 3-YEAR AVG.
** (WM0197) 05 COMBINED WEALTH RATIO FOR 13-14 FND SSR

	2013 14 Per Pupil Spending for General Education Instructional Expenditures	2014 15 Per Pupil Spending for General Education Instructional Expenditures
NEW YORK CITY	$17,615	$18,365
JAMESTOWN	$8,582	$9,103
KINGSTON	$12,125	$12,277
MOUNT VERNON	$12,843	$12,977
NEWBURGH	$13,019	$13,018
NIAGARA FALLS	$9,492	$9,919
PORT JERVIS	$10,337	$10,615
POUGHKEEPSIE	$13,736	$14,155
UTICA	$8,801	$8,832

https://data.nysed.gov/ The numbers used to compute the statistics on this page were collected on the State Aid Form A, the State Aid Form F, the School District Annual Financial Report (ST-3), and from the Student Information Repository System (SIRS).
https://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y2014_2015/function.asp
https://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y2013_2014/function.asp

D. Plaintiffs' Appeal

The Plaintiffs appeal from the Decision and Order, request it be reversed and assert that:

1. it fails to explicitly answer the basic question raised by Plaintiffs' Complaint, are the children in Plaintiffs' districts **currently** receiving an opportunity of a sound basic education,

2. it fails to follow the prior and controlling decision in this case of State Supreme Court Judge Eugene Devine, upheld on appeal to this Court and the Court of Appeals,

3. it fails to follow controlling precedent in *CFE I* and *CFEII* with regard to Education Article claims,

4. it fails to make distinction between the violation and remedy phases of the case, confuses educational inputs with educational dollars, and thereby fails to understand the basic causes of action and relief requested in the Complaint,

5. it fails to recognize that Plaintiffs have a right to determination of a violation based on current inadequacy of educational resources and funding, not prospective funding, promised at some indefinite time in the future,

6. it fails to recognize that despite the enactment of the Foundation Aid Formula, that formula itself is subject to state law (PIGI cap) which caps and prohibits that funding from ever being provided without further Legislative action,

7. it confuses educational funding which includes funding from federal, state and local sources with state aid, using the terms interchangeably and thereby failing to understand the basic causes of action and relief requested in the Complaint,

8. it fails to recognize that the State, despite enacting the Foundation Aid Formula in 2007, has, more than 9 years later, after approximately 40,000 students in Plaintiffs' districts have left school without an opportunity for a sound basic education, failed to fund that formula for Plaintiffs' districts and that this failure resulted in the loss of more than $1.1 billion in aid in the five years leading up to trial as shown above and as stipulated by the State at trial (P.X. 113-120),

9. it fails to make the distinction between the binding *CFE* framework/precedent of the specific factual findings that were limited to NYC and the general concerns for educational financing raised in *CFE* that were addressed by the legislature after *CFE* , and

10. it fails to recognize as Judge Devine did in his July 21, 2009 decision, that the *CFE III* finding that the Pataki methodology was not unreasonable applied only to New York City and that the State has repeatedly misstated this (supra. at 3) (R.229-233).

Plaintiffs also request de novo review of the record by this Court. (*See infra* Point V). The Court below agrees that student performance in Plaintiffs' districts is unacceptable, showing inadequacy of outputs. The State's own witnesses admit that additional educational funding for the districts would improve student performance thereby satisfying the third element of the *CFE* template for an Article XI claim, i.e. causation. Therefore, only analysis of the adequacy of educational resources is

needed to follow the template laid out in *CFE II* (inputs/outputs/causation) for determining a violation claim under the Educational Article. The record is replete with evidence and testimony showing the inadequacy of inputs in each district. In fact, most of the trial was devoted to testimony on the issue of inadequate educational resources and what additional resources are needed to provide a sound basic education in each district. A de novo review would avoid further delay in providing relief to these Plaintiffs, who have already waited over eight years for vindication of their constitutional rights.

STATEMENT OF FACTS

The relevant facts are detailed in the Joint Statement of Undisputed Facts (R.23) and are incorporated herein by reference. As the Supreme Court acknowledged, "each witness" Plaintiffs presented "discussed inputs, outputs, and the causal link between funding and performance." Decision (R.16). A summary of that evidence follows below.

A. Inadequate Inputs

Inputs refer to the teachers, support staff, facilities, technology, programs, and other instrumentalities of learning provided by a school district to students. As the State stipulated, the eight Maisto Districts received $1.1 *billion* less in state aid over five years than they would have had the State not frozen and cut school funding beginning in 2010-11. 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.

It is also undisputed that because of this massively reduced funding, each of the Maisto Districts had to make large cuts to necessary staff such as teachers, social workers, counselors, Academic Intervention Service Teachers, special education teachers, reading teachers, literacy and math coaches, English Language Learner instructors, administrative positions, and security personnel. The State's own expert reports and report cards showed the following devastating cuts during the period at issue:

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
TOTAL:	**1,513**

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 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.

The Maisto Districts have had to cut numerous programs that are particularly necessary for high need and at-risk students. For example:

Jamestown does not have adequate academic intervention services (AIS)[8], services for English language learners, or early literacy intervention (C.X. 6, Statement, p. 6; R.943, 3188, R.1126-27);

Kingston is deficient in academic intervention services, Response to Intervention programs, and programs for students with disabilities (C.X. 10, Report, p.14; R.1400, 1315-16, 1329-1331);

Mt. Vernon has had to cut library, art, music, band, and orchestra; reading teachers, and in particular AIS teachers, have been reduced to an inadequate level (R.2510, 2514; C.X. 7, p. 11-12);

Newburgh does not have enough social workers, counselors, or academic intervention services teachers to provide adequate services (R.2325-2327);

Niagara Falls has cut literacy and math coaches, AIS teachers in math and reading, parent advocates, parent support personnel, home school partners, discipline teachers, attendance monitors, truancy officers, and police officers (P.X. 68; R.1809-1812);

[8] Academic intervention services are required by regulation for all students who fail to achieve passing grades on state assessments. 8 NYCRR § 100.1 (g).

Port Jervis has insufficient academic intervention services, does not have full services for students with disabilities, and lacks qualified teachers and support staff (C.X. 12; R.3096);

Poughkeepsie is out of compliance with standards for students with disabilities, out of compliance with special education, and out of compliance with academic intervention services (R.408, 637, 595-96, 598);

Utica is not in compliance with the State's regulations regarding academic intervention services (R.717).

Every fact and expert witness for the Plaintiffs testified to the negative effects of the resource cuts and agreed resources would improve the test scores and graduation rates in their districts, particularly for the districts' high need students.

The State's own experts and fact witnesses also conceded the negative effects of the resource cuts. For example, State expert Roger Gorham testified that the staff cuts in Poughkeepsie have had an effect that no one would want and that if Poughkeepsie had more money, it could save programs from elimination and could have smaller class sizes. (R.3842, 3869-70). Gorham acknowledged that cuts to the teaching staff in Utica were dramatic and detrimental and that there was no educational reason for the cuts, which were made solely for budget reasons. (R.351, 737).

B. Inadequate Outputs

Under benchmarks[9] established by the State Education Department, a school district is providing the opportunity for an adequate education if the vast preponderance of its students are scoring at level 3 or higher on state tests. (P. X. 112, p. 3). The Education Department admits that districts in which less than 80 percent of students score at levels 3 or 4 likely need to increase instructional expenditures in order to improve academic performance. (P.X. 112, p. 6).

According to State standards, the following percentages of students in the eight districts (in grades 3-8) scored at level 1 – well below level 3 and not on track to graduate in the 2013-14 school year (the last year in the record at the time of trial):

Percentage of Grades 3-8 Students Well Below Proficient and Not on Track to Graduate (Level 1), 2013-14
All Students

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%

P.X. 1-3, 45, 50, 56, 74, 79.

[9] Student performance on state assessments are rated in 4 categories, or levels 1, 2, 3 and 4. Levels 3 and 4 indicate the student has achieved a passing grade. 8NYCRR § 100.18 (b)(14).

For the 2013-14 school year, the graduation rates were:

72% in Jamestown
76% in Kingston
48% in Mt. Vernon
67% in Newburgh
60% in Niagara Falls
75% in Port Jervis
57% in Poughkeepsie
58% in Utica

P.X. 1-3, 45, 50, 56, 74, 79.

Unsurprisingly, the State conceded that the outputs in all eight districts are inadequate:

i. State expert Gregory Scott Hunter acknowledged Jamestown is not achieving adequate outputs. (R.3983).

ii. State expert Gregory Aidala agreed that too many Kingston students are not graduating and too many did poorly on state assessments. (R.3761, 3763).

iii. State expert John McGuire stated that the graduation rates in Mt. Vernon are unacceptable and that the level of school performance in Mt. Vernon is below the acceptable minimum. (R.3761, 3763)

iv. Aidala stated student outcomes in Newburgh are "very weak" and outputs across the board for the district are unacceptable (R.3636-37, 3722).

v. State expert Thomas Coseo acknowledged that Niagara Falls's graduation rate is not adequate (R.4125) and that "the outputs for a

sound, basic education continue to be less than acceptable in Niagara Falls." (R.4123).

vi. State expert Jeffrey McLellan acknowledged that test scores for Port Jervis are "not acceptable," "disappointing" and need to improve. (R.4844-46).

vii. Gorham stated that the graduation rate in Poughkeepsie is not adequate (R.3831-33), that outputs in Poughkeepsie are unsatisfactory, and that Poughkeepsie does not have acceptable academic achievement. (R.3829, 3836).

viii. Gorham testified that Utica has unacceptable outputs. (R.3884).

Ira Schwartz, Assistant Commissioner for Accountability at the State Education Department ("SED"), testified that the outputs "in all eight" of the Districts "are not adequate." (R.5025-26, 5066). Julia Rafal-Baer, another Assistant Commissioner of SED, summarized that all eight districts "are under the State average," which "is not acceptable and [SED] believe[s] needs to be improved." (R.5130, 5275). Rafal-Baer testified that Mt. Vernon's 48% graduation rate is "[t]ragic" (R.5267) and that the outputs in a Mt. Vernon elementary school were "more than tragic for sure" and not what those "kids are entitled to, in terms of an education." (R.5291).

C. Causation

Causation refers to the determination that inadequate inputs or outputs are caused in part by insufficient funding in a school district. Causation can be shown according to the Court of Appeals in *CFE II* by demonstrating that additional funding would improve student performance (*CFE II* at 919).

Both the Plaintiffs' and the State's witnesses testified that the lack of essential educational resources, caused by the massive cuts to state funding, had a negative impact on outputs, or student outcomes. Witnesses testified that the lack of staff and services to provide academic intervention, support, and additional learning time seriously harmed students in each district. Witnesses repeatedly testified that greater access to these services and interventions would improve outcomes. (R.391, 596-97, 610-12, 635, 716-18, 743-45, 747-753, 947, 1120-21, 1126-27, 1151-52, 1331, 1778-79, 1784, 1800, 1822-23, 1934-35, 1939-40, 2184, 2324-25, 2162, 2407-08, 2411, 2514, 2591-92, 2935, 3990, 4007; C.X. 10, Report, p. 13). The lack of support staff such as guidance counselors and social workers harmed students in all districts. (R.599, 637-38, 690-91, 736, 733, 1128, 1584, 1804-1812, 1828, 1830-31, 1826-1829, 1926, 1929-30, 1945, 1947-1950, 1809-12, 1824-25, 1830-31, 1946-47, 1965, 2592, 3090, 3093-94, 2594-96; C.X. 10, Report, p. 29). The absence of sufficient teachers and other staff to work with English Language Learners lowered those students' performance. (R.594-95, 689, 949-50, 1329-30, 1945-46, 2158, 2328). Large class sizes reduced learning by at-risk students. (R.401, 536-37, 714-15, 711,

1715-16, 3926-28, 1813, 2332, 2947, 3934-35, 3885, 4181; P.X.11; C.X. 7, p. 22). The lack of educational staff harmed student learning. (R.721, 735-36, 2176). The lack of teachers and other staff reduced the effectiveness of teachers and administrators. (R.880, 1136-37, 1749, 1827-29, 1953-54, 1968-71, 1977-79, 2179, 2510, 2597-98, 3131-32).

The State experts who visited the Maisto districts conceded that additional funding would improve student outcomes.

Dr. Gregory Aidala:

- "only a fool would suggest that additional [monetary] resources aren't helpful, aren't beneficial [to students]. Of course they are." (R.3727-28).
- "[C]ertainly [Newburgh] would benefit from additional funding." (R.3643).
- 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." (R.3635).
- "More funding would help Newburgh students." (R.3643).
- "[I]t's not controversial" that "Newburgh students would be better served with additional funding." (R.3643).
- "[M]ore resources in Newburgh . . . if used properly, would help improve student

  outcomes." (R.3649).

Dr. Roger Gorham:

- He "would advocate for more resources for Poughkeepsie." (R.3859-60).
- "If applied well," more monetary resources "certainly would" "help to generate better outcomes for students in Poughkeepsie." (R.3860).
- "Poughkeepsie school district would be better off if it received more money than it is receiving now." (R.3872).
- "[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. (R.3873).
- 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." (R.3950-51).
- "[A]dditional [financial] resources will be beneficial in" solving the problems in Utica. (R.3964).
- "[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." (R.3916).
- "only a fool would suggest that additional [financial] resources aren't helpful and beneficial" for students. (R.3865).
- "more [financial] resources are certainly good if they're applied well." (R.3859).

Gregory Scott Hunter:

- More Academic Intervention Services "would help" in Jamestown. (R.4024).
- As to $109 million in state 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." (R.3996).

John McGuire:

- As to $116.5 million in state aid Mt. Vernon did not get: "That's a huge amount"; the district "would have benefited" if it had received that amount. (R.4099).
- "More money is always beneficial" (R.4029); "those who need more should get more in the way of resources to help them meet a minimum standard" (R.4040).

Dr. Thomas Coseo:

- As to $128,976,854 in state aid Niagara Falls did not receive: "If the expenditures are made in the right ways, absolutely, that kind of money can make a significant difference" in outputs. (R.4164).
- "Targeted, strategic placement of [additional monetary] resources in . . . well-developed reading programs at the elementary level absolutely would help" students. (R.4198).

Dr. Eric Hanushek:

- It is a "tautolog[y]" that "if the Maisto districts had additional funds and they spent those funds wisely . . . it would ultimately lead to improved performance." (R.4621).
- "I believe it is useful to try to provide extra funds. Extra counselors, et cetera, that you want and extra reading specialists." (R.4692).

Jeffery McLellan:

- As to the $67 million Port Jervis did not receive in state aid, if that money "was used wisely," it "would have generated better outcomes for the students." (R.4858).
- "Port Jervis would benefit from additional AIS funding" if "well spent." (R.4889).
- The fact that in Port Jervis 99% of students with disabilities 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. (R.4889-90).

Ira Schwartz:

- "additional resources used effectively and efficiently would likely help to improve student outcomes." (R.5083).

- "The 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." (R.5084).

QUESTIONS PRESENTED

1. Did the Trial Court err in failing to declare that the school children of the Plaintiffs' eight school districts are being denied the constitutionally guaranteed right to the opportunity of a sound basic education?
2. Did the trial court err by failing to direct the State to correct the constitutional violation in Plaintiffs' districts?
3. In the interests of judicial economy and the protection of a fleeting constitutional right, shall this Court make the necessary Education Article determinations upon a de novo review?

ARGUMENT

POINT I

THE COURT BELOW FAILED TO FOLLOW THE LAW OF THIS CASE

It is the law of this case that Plaintiffs' claims are ripe and not moot and as such is binding on the trial court. An appellate resolution of an issue on a prior appeal constitutes the law of the case and is binding upon the trial court as well as the appellate court. *J-Mar Serv. Ctr., Inc. v Mahoney, Conner & Hussey*, 45 A.D. 3rd

809 (2nd Dept. 2007).[10] The J-Mar case is directly on point. There the Appellate Division denied the defendants' motion to dismiss which claimed the plaintiff was unable to prove every element of its claim for legal malpractice. Later in the case the defendants moved again on the same grounds and the motion was granted. The trial court was reversed by the Appellate Division. The prior appellate decision constituted the law of the case, foreclosing the trial court from re-examining the issue. (Id at 809). Thus in this case, the trial court had neither the authority nor the discretion to reconsider the issues already settled on the State's motion to dismiss and the appeals to this Court and to the Court of Appeals.

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[10] The law of the case doctrine is not found in any statute, it has been long recognized in New York case law. The prohibition against a second motion to dismiss set forth in CPLR 3211(e) appears, however, to incorporate into statutory law the doctrine of law of the case. It is a "judicially crafted doctrine that "expresses the practice of courts generally to refuse to reopen what has been decided." *Messenger v. Anderson,* 225 US 436 (44). While it is directed in part to the discretion of the court, its authority is recognized (*Arizona v. California,* 460 US 605, 618). In its decision in *People of the State of New York v. Eric Evans,* 94 N.Y.2d 499, the Court of Appeals stated:

> "The law of the case doctrine is part of a larger family of kindred concepts, which includes res judicata (claim preclusion) and collateral estoppel (issue preclusion). These doctrines, broadly speaking, are designed to limit relitigation of issues. Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a "full and fair" opportunity to litigate the initial determination (*see, Arizona v California*, 460 US 605, 619; *People v Guerra*, 65 NY2d 60, 63; *Sales v State Farm Fire & Cas. Co.*, 902 F2f 933, 936 [11th Cir 1990]).
>
> As distinguished from issue preclusion and claim preclusion, however, law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment (*Matter of McGrath v. Gold*, 36 NY2d 406, 413; *Walker v. Gerli*, 257 App div 249, 251; *see generally, Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Trasferred Cases and in multidistrict Litigation*, 135 U Pa L Rev 595 [1987]; 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4478). Res judicata and collateral estoppel generally deal with preclusion after judgment: res judicata precludes a party from asserting a claim that was litigation in a prior action (*see, Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347), while collateral estoppel precludes relitigating and issue decided in a prior action (*see, Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 649). Accordingly, law of the case has been aptly characterized as "a kind of intra-action res judicata" (Siegel, New York Practice § 448, at 723 [3d ed]). 94 N.Y.2d 499, 502.

Nevertheless and without employing the terms "mootness" or "ripeness," the lower court held the matter lacks justiciability, despite the fact that this issue has been well-litigated in the instant case with three courts dismissing such a conclusion. (R.21).

The lower court decision's focus on the Foundation Aid Formula, which was first enacted in 2007 **before** the filing of Plaintiffs' case in 2008, led the lower court to state that Plaintiffs' claims were not ripe[11] for review:

> In the infancy of the post-CFE world, **where Foundation Aid has barely gotten off of the ground**, it cannot be said that the State has failed to meet its constitutional obligation. This fact, in conjunction with other significant reforms to the standards in the State...creates an environment that **cannot truly be assessed yet**. The Judiciary spoke, and the political branches responded; however, the effectiveness of that response **cannot yet be measured**. (R.21) (ellipsis and emphasis added).

One of the problems[12] with this conclusion, however, is that this is exactly the argument that was advanced by the State in its motion to dismiss this case over six years ago, and this argument was rejected by all courts that considered the argument: the Supreme Court, this very Court, and Court of Appeals.

As the Supreme Court opined in its July 21, 2009 decision:

[11] The lower court notably did not review the standard for ripeness. The doctrine of ripeness bars judicial review of cases where the following conditions are true: the harm alleged by plaintiffs is contingent upon future events that may not come to pass; there is a high degree of uncertainty as to whether the future events may occur; and the happening of the events are not within the parties' control. *New York Public Interest Research Group, Inc. v. Carey*, 42 NY2d 527, 531 (1977); *Capital Dist. Enterprises, LLC v. Windsor Development of Albany, Inc.*, 53 AD3d 767, 769 (3rd Dept. 2008); *Lewis v. City of Gloversville*, 246 AD2d 804, 805 (3d Dept. 1998). Here the plaintiffs have introduced much evidence of current harm and any future increases in education funding in entirely within the State's control.

[12] Other errors inherent in this analysis are addressed below in Points II - IV

> Defendant contends that a possible future event—namely that the current and planned future increased funding levels provided by Chapter 57 of the Laws of 2007 may successfully improve the subject school districts to the point where they attain acceptable student performance—renders the instant litigation premature. This Court concludes, however, that defendant's argument stands the doctrine of ripeness on its head. Plaintiffs' complaint is based upon past and current actual conditions. (R. 230-231).

Additionally, the Court of Appeals found Plaintiffs' claims neither moot nor unripe, and Judge Smith, even while expressing caution about the *CFE I* precedent, reiterated in a concurring opinion that:

> And the case is obviously neither moot nor unripe.... if plaintiffs, the parents of children in those public schools, are constitutionally entitled to have this money spent on their children's educations, they are entitled to it now. They would be rightly dismayed to learn that their claims will not ripen for several years, until after their children have graduated. (*CFE I*, 86 N.Y.2d 307 p.4 of concurrence) (ellipsis added).

While the procedural posture of this case is not the same as it was when these decisions were rendered (a lengthy trial has ensued and considerable evidence has been introduced into the record), the language used by this Court in affirming the lower court's denial of the State's motion to dismiss and thereby rejecting the State's arguments is controlling:

> As to whether plaintiffs' claims are ripe, the future event to which such claims relate- the implementation of the Foundation Aid and the increases in funding encompassed therein- is controlled by defendant and is likely to occur. Furthermore if plaintiffs are successful in proving the allegations in their complaint that such funding will not

> remedy an existing unconstitutional deprivation of the opportunity to obtain a sound basic education, a judicial determination of their claims will have an immediate and practical effect on the rights and actions of the parties. Additionally, the hardship that may be suffered if we do not permit consideration of these claims to go forward cannot be said to be insignificant, remote or contingent. (R.237) (internal citations omitted).

Since that July 21, 2009 decision of the Supreme Court Judge Devine denying the State's motion to dismiss, the State made significant cuts to education aid to Plaintiffs' districts through the Gap Elimination Adjustment, froze Foundation Aid levels and repeatedly delayed the phasing in of Full Foundation Aid (Law of 2011, Chapter 58). Therefore, the emphasis at trial was on the deficits in educational resources, student performance, how additional funds could improve both resources and performance (i.e. inputs, outputs, and causation under the CFE framework), and the impact of the State's failure to fully fund Foundation Aid. The deficiencies inherent in the Foundation Aid Formula became less important to Plaintiffs' case because the State even failed to fully fund its own formula. Less than half of promised Foundation Aid increases had been phased in at the time of trial (*see infra* chart under Point IV) and based on the State's past and current actions, it may never be fully funded. Ten years have passed since its enactment, hardly an insignificant amount of time considering that a child of eight at the time would now have aged out of the public school system. Certainly the State cannot keep using a formula it has failed to fund for ten years to shield itself from current constitutional violations. The July 21, 2009 decision of Judge Devine as upheld on appeal to this Court and

the Court of Appeals has already considered and rejected the same specious argument made by the State in 2009.[13]

POINT II

THE DECISION SHOULD BE REVERSED BECAUSE THE TRIAL COURT EXPLICITLY REFUSED TO APPLY THE THREE PART FRAMEWORK ESTABLISHED IN THE COURT OF APPEALS' DECISIONS IN *CFE I* AND *CFE II* AND THUS VIOLATED THE PRINCIPLE OF STARE DECISIS.

As the Court of Appeals has eloquently counseled:

> *Stare decisis* is deeply rooted in the precept that we are bound by a rule of law – not the personalities that interpret the law.

People v. Taylor, 9 N.Y.3d 129, 148 (2007). Thus, "'. . . common law decisions should stand as precedents for guidance in cases arising in the future' and . . . a rule of law 'once decided by a court, will generally be followed in subsequent cases presenting the same legal problem.'" (*People v. Peque*, 22 N.Y.3d 168, 194 [2013], quoting *People v. Damiano,* 87 N.Y.2d 477, 488 [1996], Simon, J. concurring). This legal principle must be respected absent a "compelling justification" counselling to the contrary (*People v. Peque,* 22 N.Y.3d at 194; *see also People v. Lopez*, 16 N.Y.3d 375 [2011]; *People v. Taylor*, 9 N.Y.3d at 148; *Eastern Consol. Props v. Adelaide Realty Corp.*, 95 N.Y.2d 785, 787 [2000]). Nothing was presented by the trial court, or the defendant in its proof, which approaches this stringent standard.

[13] Budget Bills in the NYS Legislature introduced by the Governor, S2003/A3003 and S2006/A3006, in support of the 2017-18 State Budget repeal the existing law with respect to the Foundation Aid Formula.

In *Campaign for Fiscal Equity, Inc. v. State of New York* the Court of Appeals articulated "a template reflecting [its] judgment of what the trier of fact must consider" (*CFE I* at 317) in adjudicating a claim under the Education Article of the New York State Constitution. "[T]he 'inputs' children receive – teaching, facilities, and instrumentalities of learning – and their resulting 'outputs,' such as test results and graduation and dropout rates," (*CFE II* at 908) must be evaluated, and a causal link to funding found. The *CFE* analytical framework has been re-affirmed in subsequent rulings both by the Court of Appeals and Appellate Divisions. *See e.g.*, *New York Civ. Liberties Union v State of New York*, 4 N.Y.3d 175, 179-81 (2005) (Education Article claim requires proof of district-wide deprivation of inputs and outputs and causes attributable to the State); *Paynter v State of New York*, 100 N.Y.2d 434, 440 (2003) (elements of a viable claim are deficient inputs which lead to deficient outputs and that the failure in part is causally connected to the funding system); *Brown v. State*, 144 A.D.3d 88, 94-95 (4th Dept. 2016) (CFE framework requires proof of district-wide deficient inputs, deficient outputs and a causal connection between the deficient inputs and outputs). Thus, the trial court ignored and directly repudiated this well-established precedent by concluding that "an examination" of the evidentiary record below "similar" to the *CFE* analysis "is not required." (R.17).

Moreover, there is no precedent to support a distinction between a "pre" and "post" *CFE* "world" in a court's obligation to apply the *CFE* framework when

evaluating Education Article claims. When the Court of Appeals "define[d] the contours" of the requirement for a sound basic education "against which the facts of a case may then be measured," it anticipated other cases may follow.

This Court also found that Plaintiffs properly pled their claims under the *CFE* framework, holding that the Complaint "is replete with detailed data allegedly demonstrating . . . glaring deficiencies in the current quality of the schools in plaintiffs' districts and a substantial need for increased aid." (R.236). Accordingly, the Court found that "it would be premature" to determine whether "the present and contemplated funding levels of education" in the Maisto Districts "are inadequate to meet the constitutional standards established" in the *CFE* rulings, and that "[o]nly after discovery and the development of a factual record can this issue be fully evaluated and resolved." (R.237) (internal quotation marks omitted). The Court of Appeals affirmed this ruling. (R.239-251). Thus, the trial court was explicitly instructed to analyze the evidence of inputs, outputs, and causation in the Maisto Districts. By refusing to conduct this mandated analysis, the trial court simply ignored the clear commands of this Court and the Court of Appeals. *CFE II*, 100 N.Y.2d at 931, 942. Even more telling, the Court in *CFE II* specifically recognized that plaintiffs from districts other than New York City could challenge the constitutionality of State funding in their districts. *CFE II*, 100 N.Y.2d at 932. As other plaintiffs have elected to bring such challenges in the wake of *CFE*, the Court of Appeals and this Court have repeatedly affirmed the requirement for proofs of

inputs, outputs and causation in Education Article claims. *See, e.g., New York Civ. Liberties Union v. State of New York*, 4 N.Y.3d 175, 179-81 (2005); *Paynter v. State of New York*, 100 N.Y.2d 434, 440 (2003); *Brown v. State*, 144 A.D.3d 88 (4th Dept. 2016). Thus, there is simply no basis for the trial court's contention that, because this case occurred in a "post-CFE environment," an analysis of the evidentiary record under the *CFE* framework "is not required." (R.17).

In its decision, the trial court acknowledged that "[a]s in CFE, plaintiffs' fundamental claim in this case is that the children in the eight small city school districts have been deprived of the opportunity for a sound, basic education based upon the inadequate level of funding provided by the State." (R.15).

Additionally, the trial court and both the parties evinced a clear understanding throughout the trial that this prescribed *CFE* framework would govern the submission of proof and the ultimate adjudication of the Plaintiffs' Education Article claims. The record below leaves no doubt that the trial court fully understood its obligation as the trier-of-fact to evaluate the evidentiary record under the requisite *CFE* framework. From their opening statement to post-trial briefs, Plaintiffs made it crystal clear they would proffer evidence on each of the three *CFE* elements to prove the deprivation of a sound basic education to Maisto students. *See e.g.*, (R.273-74) (Plaintiffs' opening statement outlining CFE elements they would prove at trial). Throughout the course of the trial, the State concurred that the *CFE* framework governed the adjudication of Plaintiffs' claims. *See e.g.*, (R.315-316)

(State's opening statement delineating the three *CFE* elements Plaintiffs must prove at trial); (R.3619) (State's motion for directed verdict). Indeed, when the State moved for a directed verdict asserting that Plaintiffs "failed to satisfy their burden of showing, one, inadequate inputs; two, inadequate outputs; and three, causation," (R.3619), the trial court rejected the motion because Plaintiffs had proffered evidence "ad nauseam" of "inputs, outputs and the causal link." (R.3614). *See also* (R.12-13; 15) (detailing the elements and Plaintiffs CFE-based claims). The entire trial, start to finish, centered on proving the *CFE* elements of an Education Article claim in all eight Maisto Districts.

Nonetheless, without explanation or citation to the record or precedent, the court below proceeded to contend, ". . . this case requires this Court to look outside of the *CFE* framework and at the actions undertaken by the State post-CFE." (R.17) The merits of Plaintiffs' claims and whether there was a constitutional violation was never explicitly addressed.

Given its disregard of principle of *stare decisis*, the trial court decision must be reversed.

POINT III

THE TRIAL COURT ERRED IN CONFUSING THE STANDARDS OF REVIEW FOR THE VIOLATION STAGE (*CFE I* AND *II*) WITH THE REMEDY STAGE (*CFE III*) OF AN EDUCATION ARTICLE CLAIM.

The *CFE* line of decisions outlines existing law, and controlling precedent, for claims arising under the Education Article of the New York State Constitution, and

its framework should be applied to the instant case, as we have argued in Point II above. The lower court seemingly placed this case outside of the *CFE* orbit; the court below stated it did not need to engage "in a detailed analysis based upon the *CFE* framework (R. 17)." However, the court below did in fact use *CFE*'s precedent to the extent that it applied *CFE III's* standard of review in approving the State's education funding scheme. Plaintiffs submit that this was a further error; the trial court applied the wrong standard of review given the procedural posture of this case.

The lower court stated:

> It is not the Judiciary's role to make a determination of exactly what number is appropriate to fund a particular school district, but instead the Court must determine whether the State's funding mechanism is **reasonable and rational**, or if the State has failed to meet its constitutional obligation (*see CFE III*, *supra* at 14, 26, 29). (R.17, emphasis added).

This sentence shows the fundamental confusion of the two phases of an Education Article claim: the determination of the existence of a constitutional violation and the evaluation of proposed remedies to a found violation. The Court of Appeals in its *CFE I* and *CFE II* decisions acknowledged that students and other proper plaintiffs could state a valid claim against the State for a district wide failure to provide the opportunity of a sound basic education under the state constitution and laid down the framework for how a court would determine whether such a violation exists. Under this framework the court weighs evidence of deficiencies in a district's educational resources, such as insufficient numbers of teachers and staff,

in student outcomes, such as low graduation rates, and the causal link between these deficits and levels of funding, such as evidence that increased funds could increase resources and student performance. (*CFE I* at 317 and *CFE II* at 908) Contrary to the decision of the court below, this violation phase does not involve specific dollar amounts[14], but only evidence that more money could be part of the answer to poor outputs, or student performance.

> As we noted in *CFE,* in order 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" (86 NY2d at 318). 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 (187 Misc 2d at 68). 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,* 8 N.Y.2d 893, 919).

Notably, the State tried to argue that pending reforms, analogous to possible future full funding of Foundation Aid at issue here, should influence the court's determination of whether an Education Article violation exists but the Court in *CFE II* rejected this, stating:

> All of these [educational] initiatives promise, but await, demonstrable outcomes. We are, of course, bound to decide this case on the record before us and cannot conjecture about the possible effect of pending reforms, at

[14] Discussions of the Foundation Aid Formula at trial and in the record were either attempts to show the State had admitted that it had costed out a SBE in plaintiffs' districts or provided as evidence of a causal link between additional funding and increased educational resources and student performance.

> least when determining whether, on the evidence gathered over four years and presented during the seven-month trial, a constitutional violation exists. (id at 927).

Further, if the trier of fact determines under this framework that the Education Article has indeed been violated in plaintiffs' districts, then the State would be given the opportunity and ample time, as it was in *CFE* [*CFE II*, 100 N.Y.2d 893, 930 (one year specified)], to solve the violation through legislative or executive action. Plaintiffs here have in fact requested a declaratory judgment that involves such a legislative remedy (R.109-110). Only if there is no legislative response or if the adequacy of such a response is in dispute, does the remedy phase of *CFE III* require the court to then determine whether the proposed remedy is reasonable or rational. As the Court stated:

> In this third appeal by plaintiffs Campaign for Fiscal Equity, Inc. (CFE), et al., we address the cost of providing children in New York City's public schools with a sound basic education. The State estimated this cost to include a minimum of $1.93 billion, in 2004 dollars, in additional annual operating funds. We conclude that this estimate was a reasonable one and that the courts should defer to this estimate, appropriately updated. (CFE III p. 19-20) The role of the courts is not, as Supreme Court assumed, to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State's proposed calculation of that cost is rational. (*CFE III*, 8 N.Y.3d 14, 27).

It is important to note that the trial court used a quote from a section of Plaintiffs' reply brief with the heading "B. Remedial Relief is Appropriate" and which was followed immediately by the sentence "Implementation of the Foundation Aid Formula will remedy the proven constitutional violation in the

Maisto Districts." The fuller context makes clear that the court below fundamentally confused the separate tasks of determining whether an Education Article violation exists in Plaintiffs' districts and determining the appropriateness of a proposed remedy to that violation.

Thus the court below has erred in eliding over the analysis of deficits in educational inputs and outputs to determine whether a violation exists in these districts and instead used *CFE III*'s standard for proposed remedies to dismiss plaintiffs' case.

POINT IV

THE DECISION OF THE TRIAL COURT SHOULD BE REVERSED BECAUSE THE EXISTANCE OF THE FOUNDATION AID FORMULA DOES NOT INVALIDATE PLAINTIFFS' CLAIMS

A. The Court's Role in Education Article Claims is Firmly Established by Controlling Precedent.

The decision below erroneously deferred to the Legislature in its annual appropriation of education funds without analyzing whether sufficient resources were being provided in Plaintiffs' eight districts. This abdicates the judiciary's well-settled role in determining the violation of constitutional rights. (*CFE II* at 902) The Court of Appeals' *CFE* decisions stand specifically for the principle of judicial review of claims arising under the Education Article of the New York State Constitution. In fact in the instant case the Court of Appeals reiterated this important role:

> If we declare that a sound basic education consists only of what the Legislature and Executive dictate, the scope of the State's constitutional duty under the Education Article and conversely, the scope of the constitutional rights of our school children, is limited to what those branches say it is. Abandoning CFE I would not only entrust the Legislature and Executive with the decidedly judicial task of interpreting the meaning of the Education Article but cast them in the role of being their own constitutional watchdogs. (R.242).

The Plaintiffs have asked for a declaratory judgment that a constitutional violation exists in their eight districts (Complaint, R.109-110). Controlling case law adheres to the principle of checks and balances among our branches of government: once a violation was found, the courts in *CFE* gave the State the opportunity to fashion their own reasonable remedy to ensure students were provided the constitutionally required educational opportunities. (*CFE II* at 925-930).

However, if the trial court decision is not reversed it will effectively remove the essential role of the judiciary in the safeguarding of the constitutional right to an adequate education.

B. The Possible Future Funding of the Foundation Aid Formula is not Entitled to Judicial Deference and is not Dispositive.

Plaintiffs assert that the lower court erred in failing to find that violations of Plaintiffs' children's rights under the Education Article under current conditions exist and then to determine what the remedy for those violations should be. The court below hangs its refusal to consider the existence of violations on the narrow finding that Foundation Aid has been enacted and the State should be given deference by the

courts[15]. It makes a determination that the State has addressed the non-district specific "concerns raised in the *CFE* case" by enacting the Foundation Aid Formula in 2007 and concludes that "... an examination similar to the analysis outlined in CFE regarding inputs, outputs and causal linkage is not required (R.17)."

Such reasoning fundamentally confuses the timeline of this litigation. This case was filed on October 31, 2008, *after* the Foundation Aid Formula was enacted in 2007. This is not a situation where suit is filed, the legislature addresses the subject of the claim, and the court must defer to the legislative solution. The Foundation Aid Formula reforms were not a *response* to a claim asserted by Plaintiffs. In fact, the complaint alleges that the Foundation Aid Formula was seriously flawed, as did the report of Bruce Baker (CX 20-21) and was not providing adequate aid in Plaintiffs' districts. Only after huge cuts to the anticipated aid levels under the formula were made in subsequent years, cumulatively $1.1 billion for Plaintiffs' districts in 2010-15 (see PX 113-120, and stipulated to by counsel R.3594, 3598, 4401) and the formula itself was frozen at 2008-09 levels did the idea surface that Plaintiffs could argue, as a proposed **remedy**, that the Foundation Formula Aid as determined by the State equaled the constitutionally required

[15] It justifies this conclusion on the basis of deference to the Legislature and Executive by quoting from *CFE III* (id. at 29) which quotes from *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 N.Y.2d 233 (1984). (R.9). However, *Matter of New York State Inspection* is wholly inapposite and involves competing statutory and policy issues, not as in the instant case, constitutional rights. Citing this case ignores the well settled holding that budgetary and other public policy concerns are not valid bases for failing to uphold constitutional rights (*Klosterman et al. v Cuomo*, 61 NY2d 525 (1984)). The State's own witness admitted that the cuts to foundation aid were made on the basis of State budgetary concerns (R.4386). That witness made no mention that the State was concerned with the effect those cuts would have its constitutional responsibilities under Article XI to Plaintiffs' districts.

minimum and could provide a way to expedited relief. This proposed remedy did not alter the bases of Plaintiffs' claims asserted in the Complaint that their children were being denied an opportunity for a sound basic education or relieve the trial court of its responsibility to so find using the *CFE* template.

The trial court ignored the causes of action and prayer for relief pleaded in the Complaint. For example, for the Jamestown Plaintiffs the Complaint stated that the State educational system is unconstitutional having failed and continuing to fail, by reason of insufficient funding, to provide all children including children with socio-economic and other disadvantages the opportunity for a sound basic education. The Complaint requested a judgement declaring that Defendant's failure to appropriate sufficient funds to permit each of the Plaintiffs' districts to provide sufficient educational services to all their children to insure opportunities to meet or exceed the statewide standards of educational quality and quantity and to obtain a sound basic education, has violated and continues to violate Defendant's obligations under the Educational Article of New York State Constitution, Article XI, Section. The Complaint then asked the court to enjoin the Defendant to correct those violations. (R.95-110)

Moreover, in contradiction to the decision of the lower court, the future funding of Foundation Aid in the absence of action by the courts is highly speculative and thus not entitled to judicial deference. The State's own recent actions show education funding cannot be presumed. In the next year this case was

commenced (2008), the State had already reduced the second of four installments of foundation aid by 5% or about $250 million. In the following year (2009) the State made its motion to dismiss, the State froze Foundation Aid. In the same year the State argued its motion to dismiss on the basis of deference and unripeness before the Court of Appeals (2012), the State had already taken all Foundation Aid back that had been phased in during 2007-08 and 2008-09 in installments one and two. The use of judicial deference excused the court below from looking at the devastating effects the freeze and cuts to foundation aid have had on Plaintiffs' districts and the children they serve; from looking at the effect that the layoff over 2010-2014 of nearly 1500 teachers and staff or 25% of district employees have had; from admitting the abject failure of the State to fulfill its constitutional duty to Plaintiffs.

Therefore the court below erred in dismissing Plaintiffs' Complaint based on the speculation that the Foundation Aid Formula will be fully funded in the future (R.21) and without finding that this funding will be adequate to provide students in the eight Maisto Districts with a constitutionally mandated opportunity for a sound basic education.

C. Foundation Aid Was Determined to be the Amount of State Aid Necessary to be Successful. The Gross Underfunding of that Aid is Evidence that the Maisto Districts Lack Revenues to Provide Sufficient Inputs.

The Decision finds that the reduction of amounts of state aid required by the Foundation Aid Formula does not constitute a constitutional violation because the

methodology presented by Governor Pataki in *CFE III* was reasonable and more than the $2.5 billion statewide which was also held as reasonable has been funded (Decision, R.19). There are a number of serious problems with this logic.

First, the Court of Appeals in *CFE III* specifically limited its finding of reasonability to the amount ($1.9 billion indexed for inflation) specified for New York City. Any application of that finding to Plaintiffs' districts is based on dicta. Plaintiffs were not parties to the *CFE* case and had no opportunity to respond to that factually based finding.

Second, the Decision itself makes no finding specific to Plaintiffs' districts. It finds that the methodology was constitutionally reasonable and that the amount specified for districts outside of New York City ($600 million in 2004 dollars or $2.5 billion minus $1.9 billion) must therefore be reasonable, but it does not specify how much of that $600 million is constitutionally necessary in the eight Plaintiffs' districts. The instant case is not about all districts statewide but only about the Plaintiffs' eight districts. The Decision is therefore deficient in this respect.

Third, the Decision relies on figures from the 2006 *CFE III* decision, i.e. $2.5 billion statewide. That figure was based on 2004 data which needs to be updated as recognized by the Court of Appeals (*CFE III* at 19). No evidence was produced at trial regarding the update of the *CFE III* numbers. The Decision is therefore wholly unsupportable with respect to this finding. The State informed the trial court it

intended to bring an expert witness to report and testify on this point but withdrew him at the last moment.

Fourth, at trial, Plaintiffs presented evidence that the State designed Foundation Aid to calculate the minimum funding necessary to provide a sound basic education in the Maisto Districts and districts statewide.[16] The Decision finding against Plaintiffs on this point is contrary to the overwhelming weight of the evidence in part because the State failed to offer any proof **specific to Plaintiffs' districts** rebutting Plaintiffs' evidence which showed that the Foundation Aid for each of Plaintiffs' districts was **at most** the minimum required to provide an opportunity for a sound basic education (See Baker Report, C.X. 21 . Mauro Report , C.X.25 , Clarkson testimony R. 3355 , Mauro testimony, R.3385-3388 , and Baker testimony, R.3567-3571).

In fact, the State stipulated to the Foundation Aid shortfalls and the State's own expert witnesses admitted that more money would improve student performance (P.X. 113-120, and see admissions *infra* Point VI(3)).

Fifth, essential to understanding the Foundation Aid Formula it must be recognized that the phrases 'successful school districts' and 'sound basic education' are inextricably linked in the Court of Appeals decisions where the state aid

[16] The lower court ignored the record demonstrating that the State expressly designed the Foundation Aid Formula to calculate the amount of funding necessary to provide the opportunity for a "sound basic education." For example, see P.X. 130 at 10 (Board of Regents 2012 statement that "[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."); D.X. X-1 at 22 (State Education Department 2014 statement 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").

methodology proffered by Governor Pataki to determine the cost of a sound basic education in New York City was based on the costs at successful school districts. The phrase 'successful school districts' is now embodied in the law enacting the Foundation Aid Formula which bases the Foundation Aid on the cost of education in 'successful school districts.'

> The foundation amount shall reflect the average per pupil cost of general education instruction in successful school districts, as determined by a statistical analysis of the costs of special education and general education in successful school districts, provided that the foundation amount shall be adjusted annually to reflect the percentage increase in the consumer price index as computed pursuant to section two thousand twenty-two of this chapter,.... (Education Law section 3602 (4)(a)(1)).

'Successful school districts' is not defined in statute or regulation but is a term used in the *CFE III* decision by Justice Pigott (*CFE III* at 22) and acknowledged by Justice Kaye (*CFE III* at 38). The State Education Department used the definition of successful school districts i.e. 80% passage on seven state assessments, contained in the Pataki methodology to measure the minimum cost of a sound basic education and as shown in a State Department of Education memorandum[17] to identify successful/unsuccessful districts. All eight Maisto districts are in the unsuccessful category. The State admitted/stipulated Foundation Aid was not fully funded, i.e. was frozen at 37 ½% and then that was taken away in full by the GEA. By clear

[17] *See infra* Appendix I

implication, the State has acknowledged districts do not have money needed to be successful and that inputs in the form of necessary funding are insufficient.

The Foundation Aid Formula, following the methodology approved in the *CFE* rulings, determines the funding level required, based on need, for students to meet State academic benchmarks. (*CFE III,* 8 N.Y.3d at 30; P.X. 107, pp. 8, 47-52.)[18] The evidence also showed that the State acknowledged Foundation Aid was designed to calculate the amount of funding needed to deliver a sound basic education to Maisto District students. (*See, e.g.*, P.X. 130 at 10; D.X. X-1 at 22). Therefore, at trial, Plaintiffs were able to demonstrate that the amount calculated for each district under the Foundation Aid Formula fully funded represents the State's own determination of the funding level required to provide a sound basic education.

Therefore, even if Plaintiffs may agree arguendo that the Foundation Aid Formula may not compute the **exact** cost of a sound basic education, it is not reasonable to argue that funding only between 26% and 46% of it (*see* the chart below) is therefore constitutional. It cannot be plausibly denied that this gross underfunding of that formula, i.e. $192 million/year, is incontrovertible evidence that the Maisto Districts do not have sufficient inputs in the form of educational funding to provide their students with an opportunity for a sound basic education.

[18] The lower court indicated that it "agrees" with the State that Foundation Aid does not represent the "constitutionally-permissible minimum," relying upon the Court of Appeals finding in the *CFE* litigation that lower amounts calculated under a proposal by Governor Pataki were reasonable. (R.19). As previously explained by the Supreme Court in this litigation, that determination of reasonableness by the Court of Appeals is "dicta" that "did not specifically refer to the [Maisto] districts" which were not parties to the *CFE* litigation. (R.9). In any event, as Plaintiffs demonstrated at trial, Foundation Aid was enacted in the wake of *CFE* to provide adequate funding for all districts and remains in effect as the State's funding mechanism statewide.

	FOUNDATION AID INCREASE TO FULLY FUNDED	FOUNDATION AID ACTUALLY FUNDED 2014-15	% FOUNDATION AID ACTUALLY FUNDED IN 2014-15
JAMESTOWN	$ 28,001,584	$ 9,125,392	32.59%
POUGHKEEPSIE	$ 18,644,053	$ 8,599,107	46.12%
NIAGARA FALLS	$ 30,214,687	$ 11,145,921	36.89%
UTICA	$ 72,997,251	$ 21,769,102	29.82%
NEWBURGH	$ 55,543,745	$ 19,785,159	35.62%
PORT JERVIS	$ 17,356,212	$ 5,635,176	32.47%
KINGSTON	$ 13,490,358	$ 6,064,667	44.96%
MOUNT VERNON	$ 23,840,488	$ 6,350,922	26.64%

*Database MODEL EDITION SA141-5 0190C Plaintiffs' Exhibit No. 19

POINT V

PLAINTIFFS ASK THIS COURT TO CONDUCT A DE NOVO REVIEW BASED ON THE EXTENSIVE DOCUMENTARY EVIDENCE, TESTIMONIAL EVIDENCE AND THE STIPULATED FACTS IN THE RECORD.

"The appellate division shall review question of law and question of fact on appeal from a judgment or order ... on an appeal ... from the supreme court" (CPLR 5501[a]) "and on such review is empowered to and should render such judgment as should have been granted by the trial court ..." *Humble Oil & Refining Co. v. Jaybert Esso Service Station, Inc.*, 30 A.D.2d 952 (1st Dept. 1968). While in a jury case, the Appellate Division review of facts is limited to when no reasonable person could agree with the findings below (*Rapant v. Ogsbury*, 279 A.D. 298, 299 [3rd Dept. 1952]) in a non-jury case, such as the instant case, the Appellate Division, if it appears that upon all the credible evidence, a finding different from that of the trial court is not unreasonable, then it must "weigh the relative probative force of

conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony." *People ex. rel. MacCracken v. Miller*, 291 N.Y. 55, 62 (1943). In a non-jury case, the Appellate Division has "the power to review the record, make its own findings of fact or can remand for findings of fact to be made." *Weckstein v. Breitbart*, 111 A.D.2d 6 (1st Dept. 1985). See *Brooks v. State*, 68 A.D.2d 943 (3rd Dept. 1979). For the Appellate Division to make its findings of fact, it is necessary for the record to be complete and the essential facts can be established by a review of the record. *Weckstein v. Breitbart, supra*). In non-jury cases, the Appellate Division is empowered to "make new findings of fact and a final adjudication thereon." *Impastato v. Village of Catskill*, 55 A.D.2d 714 (3rd Dept. 1976), quoting *York Mtge. Corp. v. Clotar Constr. Corp.*, 254 N.Y. 128, 134 (1930).

"In a nonjury case this court's inquiry is not limited to whether the findings were supported by some credible evidence, but rather if it appears on all the credible evidence that a finding different from that of the trial court is not unreasonable, this court must weigh the probative force of the conflicting evidence and inferences (*Shipman v. Words of Power Missionary Enterprises*, 54 A.D.2d 1052). Then it is within the power of this court to grant the judgment which upon the evidence should have been granted by the trial court (*Spano v. Perini Corp.*, 25 N.Y.2d 11; McCarthy v. Port of N. Y. Auth., AD2d 111)." *Grow Construction Co., Inc. v. State of New York*, 56 A.D.2d 95, 99 (3d Dept. 1977). "Initially, we note that 'we are 'vested with broad authority to independently review the probative weight of the evidence,

together with the reasonable inferences that may be drawn therefrom, and grant the judgment warranted by the record in this nonjury case' (*Medina v. State of New York*, 133 A.D.3d 943, 944 [2015], quoting *Shon v. State of New York*, 75 AD3d 1035, 1036 [2010]; *see Weinberger v. State of New York Olympic Regional Dev. Auth.*, 133 A.D.3d 1006, 1007 [2015])." *Davis v. CEC Inc., et al.*, 135 A.D.3d 1049, 1050 (3rd Dept. 2016).

The Court of Appeals has confirmed the *de novo* review power of the Appellate Division in the case of *Northern Westchester Professional Park Associates v. Town of Bedford*, 60 N.Y.2d 492, in which it stated:

> "Concerning standard of review, plaintiff argues first that on evidence which conflicts or from which conflicting inferences may be drawn, the Appellate Division cannot reverse unless the trial court's decision is so clearly erroneous that it can be said that it is not supported by the evidence. For more than 50 years, however, since the 1925 amendment to the Constitution (art VI, § 5), the rule has been that the power of the Appellate Division is not so limited, that its authority is as broad as that of the trial court (*Jacques v Sears, Roebuck & Co.*, 30 N.Y.2d 466, 471p; *O'Connor v. Papertsian*, 309 N.Y. 465, 471-472) and that as to a bench trial it may render the judgment it finds warranted by the facts, taking into account in a close case "the fact that the trial judge had the advantage of seeing the witnesses" (*York Mtge. Corp. v. Clotar Constr. Corp.*, 254 N.Y. 128, 133-134; accord *Cohen v Hallmark Cards*, 45 N.Y.2d 493, 498; *Bernardine v City of New York*, 294 N.Y. 361, 366-367; *People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 62; *see Miller v Merrell*, 53 NY2d 881, 883; Siegel, NY Prac, § 529, pp 731-732; Cohen and Karger, Powers of the New York Court of Appeals, § 112)." (60 N.Y.2d 492, 499).

It is submitted that in the instant case, the record requires this Court to make the factual finding that the children in these eight school districts have had their constitutionally guaranteed right to a sound basic education denied by the failure of the State of New York to adequately fund their education. This is supported by:

(i) The overwhelming weight of the evidence in support of this finding (See Fact discussion and Point VIX);

(ii) The lower court's finding that the education outputs in these eight school districts were unacceptable (R.12;21);

(iii) The multiple admissions by the State's own experts that increased funding would improve the education achievement of the students at these schools (*See supra* Statement of Facts at 32-36);

(iv) The extensive credible evidence that these eight school districts had inadequate inputs (*See supra*, pp 23-25); and

(v) The right of these eight school districts to have this determination made now because the record is complete and to further delay this case by remanding it to the lower Court to make findings

of fact would be to condemn more students to these inadequate educational conditions.

This case was commenced in 2008. This is its second visit to this Court for a ruling. Since this commencement of this case, nearly 40,000 students have aged out from the eight school districts having been denied their constitutional right to a sound basic education. The present students and future students of these eight districts deserve a decision now. The overwhelming evidence supporting their claim as set forth in the Record, the inordinate delays that have already taken place in this litigation, the failure of the lower court to do its duty to clearly rule on the factual issues in this case and the continuing harm being suffered by the students attending these school districts left behind by the politicians of this state, the Plaintiffs on behalf of the students in these schools beg this Court to rule now on their claim that their constitutionally guaranteed right to a sound basic education has been denied.

POINT VI

UPON A DE NOVO REVIEW OF THE FACTUAL ISSUES, THIS COURT MUST FIND DEFENDANT STATE HAS VIOLATED THE CONSTITUTION BY FAILURE TO PROVIDE PLAINITFFS' CHILDREN AN OPPORTUNITY FOR A SOUND BASIC EDUCATION.

As discussed supra, it is clear that when Plaintiffs establish district-wide inputs deficits and low outcomes attributable to a lack of funding, then a court must conclude the State has violated the right to a sound basic education under the Education Article. *CFE II*, 100 N.Y. 2d at 919; *Paynter v State of New York*, 100

N.Y.2d 434, 440 (2003). In its Decision, the lower court found that student outcomes in Maisto Districts were "undeniably inadequate". (R.12). Further, the evidentiary record below overwhelmingly demonstrates glaring and severe deficiencies in essential inputs and a significant and ongoing lack of funding as a cause of those deficiencies and the unacceptably low outcomes. Accordingly, not only must the lower court's erroneous legal conclusions be reversed, but also this Court should review the evidentiary record de novo and make the requisite findings of fact under the *CFE* framework and conclude that the State has violated the right of students in Maisto Districts to a sound basic education. When the record is complete, the Appellate Division is empowered to make its own findings of fact de novo. *Bernardine v. City of New York*, 294 N.Y. at 366 (all propositions of fact in issue were fully litigated, therefore it was proper for Appellate Division to find facts).

The record is complete in this case. *Chao v Chang*, 192 A.D.2d 649 (2nd Dept. 1993), The two-month trial generated five thousand pages of testimony and fifty thousand pages of exhibits that gave a clear picture of the state of inputs and outputs in each district, and the necessary causal link. Had the trial court conducted the requisite CFE analysis, Plaintiffs would have prevailed. This Court, upon a de novo review of the evidence, should affirm the trial court's finding that outcomes were inadequate and should further find that the Plaintiffs established the other CFE elements of input deficits and funding causation for all eight Maisto Districts.

A. The Record Established at Trial Overwhelmingly Demonstrates Deficient Inputs in the Maisto Districts

The proofs at trial demonstrated that each Maisto District is severely lacking in the resources identified in CFE as essential to afford the opportunity for a sound basic education. 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. It is undisputed that these cuts resulted in the loss of hundreds of teachers and support staff and a deficit in programs and services for the most vulnerable student populations.[19] The State's experts admitted that these staggering cuts "have had an effect that no one would want," and were "dramatic" and "detrimental."[20] The State acknowledges that districts like the Maisto Districts, 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 from ten to thirty percent of their staff in just a few

[19] State's expert reports and report cards indicate the following cuts to staff:

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

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 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.

[20] *See, e.g.*, (R.3842) (Roger Gorham agreeing that staff cuts in the Districts have had an effect that no one would want); (R.4158) (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); (R.3871) (Roger Gorham admitting that the gap elimination adjustment had detrimental effect on Poughkeepsie).

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 devastated the expanded platform of services for at-risk and high-need students identified in *CFE* as necessary for a sound basic education.[21]

State witnesses admitted that the massive cuts in State funding have devastated the ability of the Maisto Districts to provide all students with a sound basic education. Gregory Hunter, the State's expert for Jamestown, admitted that the district's loss of 24.1% of its total professional staff "very well could have contributed to a lack of ability to affect student improvement." (R.3997-4002). Similarly, Gregory Aidala agreed that reduced aid had a negative impact on both Newburgh and Kingston. (R.3713-14; 3784-85).

Jeffrey McLellan testified that Port Jervis lost over 10% of its staff in one year, and that Port Jervis is able to spend approximately $1,000 (or 5%) less per student than the state average (R.4866; 4854) while facing increasing special education needs. (R.4832-33). Thomas Coseo admitted that Niagara Falls is the highest-need district in Niagara County and that 110 additional teachers would need to be hired to bring its student-teacher ratio in line with the region. (R.4171-73). John McGuire recognized that a district with greater need, like Mt. Vernon, should

[21] 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." *CFE Trial Ct.*, 187 Misc.2d at 76. Accordingly, when developing the categories of essential resources it recognized (i) an expanded platform of programs 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). It is precisely these types of programs that are most necessary for the student population in the Maisto Districts.

be given additional resources, and that the amount of state aid Mt. Vernon failed to receive, $116.5 million, was a "huge amount" that would have benefited the district. (R.4040; 4099).

Roger Gorham agreed that Poughkeepsie had the highest needs population of any district in Dutchess county, that the district lost 11% of its teachers from 2007-08 to 2011-12 (R.3844-45; 3842) as a result of budget cuts, and that the student-teacher ratio went up over time, even as student needs were increasing. (R.3848; 3850). He admitted that staff cuts "have had an effect that no one would want. . . . [D]o [the cuts] hurt? *Certainly they do. No question about it.*" (R.3842) (emphasis added).

Gorham called the cut of 11% of Utica's staff in one year "dramatic" and "detrimental," and said that the cut of 70 elementary school teachers over five years was a "dramatic number." (R.3926-28). 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 . . . due to the budgetary constraints." (R.3931; 3855).

B. There is no Dispute that Outputs in the Maisto Districts are Unacceptable

Supreme Court acknowledged in its Decision that "[t]he performance of the children in these school districts" – i.e., outputs – "is undeniably inadequate." This conclusion was clearly correct.

The State's own experts agreed that student outcomes in Maisto Districts are "inadequate," "absolutely unacceptable," and, as an assistant commissioner in the State Education Department (SED) put it, "more than tragic for sure."[22] The State's district-specific experts stated as follows:

Jamestown: Gregory Scott Hunter testified that "Jamestown's outputs as a district are inadequate." (R.3974).

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." (R.3761; 3763).

Mount Vernon: John McGuire testified that in Mt. Vernon, the graduation rates and test scores "are unacceptable" and "[t]here's a large gap between where [Mt. Vernon is] right now and the minimum level" of performance. (R.4021; 4061).

Newburgh: Gregory Aidala stated that "across the board generally for the district outputs are unacceptable." (R.3722).

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." (R.4123).

[22] 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." (R.5265-66). Jamestown's 72% graduation rate is "not adequate." (R.5266). Kingston's 22% proficient on grades 3-8 ELA and 24% on grades 3-8 math are "not adequate." (R.5266). Kingston's 76% graduation rate is "not adequate." (R.5266-67). Mount Vernon's 12% proficient in grades 3-8 ELA and 15% proficient in grades 3-8 math are "definitely not adequate." (R.5267). Mt. Vernon's 48% graduation rate is "[t]ragic." (R.5267). "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." (R.5268). 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." (R.5291).

Port Jervis: According to Jeffery McLellan, Port Jervis's overall dropout rate is "not acceptable" and its dropout rates for disabled and economically disadvantaged students are "unacceptably high." (R.4836-37). The percentages of students scoring proficient in Port Jervis "are not acceptable." (R.4844).

Poughkpeesie: Roger Gorham stated that outputs for students in Poughkeepsie are "unsatisfactory," "not what they should be," and "not acceptable." (R.3829). "Poughkeepsie does not have acceptable academic achievement." (R.3836).

Utica: Gorham also testified that Utica "has unacceptable outputs." (R.3884).

C. The Record Evidence Overwhelmingly Demonstrates that Inadequate State Funding Is a Cause of Deficient Inputs and Outputs in the Maisto Districts

In *CFE II*, the Court of Appeals held that causation is established by showing that increased funding would improve inputs and, in turn, yield better student outputs. 100 N.Y.2d at 919. The Plaintiffs are not required to show that inadequate state funding is the only cause of district-wide failure; they need only show that it is one cause. *CFE II*, 100 N.Y.2d at 923 (requirement is 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.").

Witnesses from every district provided undisputed testimony that as a result of the massive cuts in state funding, the districts were forced to cut staff, services and programs. These cuts occurred in the face of the State's acknowledgement that districts like the Maisto Districts, 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. There was no educational reason for the cuts in staff and services.[23] Plaintiffs further demonstrated that the cuts to these educational resources directly affected student outcomes such as test scores, graduation rates, and drop-out rates. Moreover, Plaintiffs showed that these cuts hindered the ability of the remaining staff to adequately serve the districts' children.

In response to this overwhelming evidence, the State conceded the plain fact that increased funding would improve the currently "tragic" results for these children. As noted above, every state expert who visited the districts agreed that more funding would improve inputs and outputs in each district. Gregory Aidala acknowledged that "*only a fool* would suggest that additional resources aren't helpful, aren't beneficial. Of course they are." (R.3727-28) (emphasis added). Eric Hanushek, a Stanford University expert, 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." (R.4621). Hanushek added: "I believe it is useful to try to provide extra funds." (R.4692). Because the State's own witnesses conceded increased funding would improve inputs and student performance, Plaintiffs established the causation element of their claim.[24]

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[23] State expert Roger Gorham acknowledged that cuts to the teaching staff in Utica were dramatic and detrimental and that there was no educational reason for the cuts; the cuts were made solely for budget reasons. (R.351; 737).

[24] 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.

D. Because The Record Below Established Each of the CFE Elements, this Court Should Make the Requisite Findings De Novo.

When the lower court fails to make essential findings of fact, the appellate court can and should do so. *Matter of Zisman*, 128 A.D.2d at 789. The record is complete and there are no issues of credibility that must adjudicated. Thus, de novo review by this Court would advance the interests of justice and of judicial economy.

Because the record provides an overwhelming basis for this Court to make findings of fact and conclusions of law, Plaintiffs should not be subjected to further delays in the adjudication of their constitutional rights simply because the trial court refused to conduct the proper factual analysis in the first instance. The clear and undisputed proof of the CFE elements compels this Court to conclude that Plaintiffs have prevailed on their Education Article claim with respect to all eight Maisto Districts.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court reverse the Decision of the Trial Court and make findings of fact and conclusions of law under the *CFE* framework based on the record below finding a violation of the Education Article with respect to Plaintiffs in each of the Maisto Districts and directing the legislature to correct such violations and then remanding to the Trial Court with instructions to retain jurisdiction to ensure compliance with the order of this Court.

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APPENDIX I
(Produced through discovery by the State of New York on July 11, 2011, judicial notice of which may be taken pursuant to CPLR 4511.)

DRAFT

KEY POINTS ON THE 2009 ESTIMATES

PERFORMANCE CRITERIA: 80% PASSING

2005-2006, 2006-07 & 2007-08 TESTS FOR 4TH GRADE ELA AND MATH, AND REGENTS ENGLISH, MATH A, GLOBAL HISTORY, AMERICAN HISTORY, LIVING ENVIRONMENT AND EARTH SCIENCE

PASSING – LEVEL 3 OR 4 (4TH GRADE) OR 65+ (REGENTS)

CALCULATION = SUM OF ALL PASSING / SUM OF ALL TEST TAKERS

MISSING DATA: WAS IGNORED
(ONLY ONE DISTRICT [illegible] WAS EXCLUDED DUE TO LACK OF ANY TEST DATA)
(SOME DISTRICTS LACKED CERTAIN TESTS DUE TO GRADE CONFIGURATION)

518 DISTRICTS MET THE CRITERIA

1,254,[illegible] DCAADM ([illegible] OF STATE WIDE TOTAL)

	DISTRICTS	
	MET STANDARD	DID NOT MEET STANDARD
NYC	0	1
BIG 4	0	4
HI NEED URBAN/SUBURBAN	6	39
HI NEED RURAL	90	68
AVERAGE NEED	290	47
LOW NEED	132	1
TOTAL	518	159

EXPENDITURES AND STUDENTS

STUDENT COUNTS = 3YR AVERAGE OF GENERAL ED COUNT + 3YR AVERAGE OF FRPL
FRPL WEIGHTING OF 1.0
(FRPL FROM DATABASE - CHS FIGURES BASED ON AVERAGE OF COMPONENTS)

EXPENDITURES = 3YR AVERAGE GENERAL EDUCATION INSTRUCTIONAL EXPENDITURES
2009 ROUTED

CALCULATING THE COST

DESIRED SPENDING LEVEL ESTABLISHED AS THE DISTRICT MEAN EXPENDITURE PER PUPIL CALCULATED FOR THE LOWER SPENDING 50% OF THE 518 DISTRICTS

PER PUPIL EXPENDITURE OF EACH NON-PERFORMING DISTRICT SUBTRACTED FROM DESIRED LEVEL (NO RESULTS ALLOWED TO GO BELOW $0)

REMAINDER THEN MULTIPLIED BY REGIONAL COST INDEX AND PUPIL COUNT TO DETERMINE ADDITIONAL DISTRICT INSTRUCTIONAL SPENDING DESIRED