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To be argued by: Robert M. Goldfarb
Time Requested: 10 minutes

Supreme Court of the State of New York
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,

v.

STATE OF NEW YORK,

Defendant-Respondent.

BRIEF FOR RESPONDENT

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Dated: May 30, 2017

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PRELIMINARY STATEMENT

Over 10 years ago, the Court of Appeals, in *CFE v. State*, 8 N.Y.3d 14 (2006) (*CFE III*), cautioned litigants that "[j]udicial intervention in the state budget may be invoked only in the narrowest of instances." *Id.* at 29. The Court stressed the "formidable burden of proof" that is "imposed on one who attacks the budget plan": Judicial deference will give way only if it is proven that the state financing plan is "patently *irrational*." *Id.* (emphasis in the original).

Applying this precedent to the present case, Supreme Court, Albany County (O'Connor, J.), held that plaintiffs failed to sustain their formidable burden to establish that the Executive and Legislature's 2007 statewide education funding reforms after *CFE*—including the new Foundation Aid formula designed to assist high-need and high-cost districts—were patently irrational and present the narrow instance where judicial intervention is warranted. The court further held that the political branches acted rationally and constitutionally in cautiously implementing the new Foundation Aid funding to maintain the State's fiscal solvency and to resolve extraordinary budget gaps caused by 2007-08 financial crisis and Great Recession.

Plaintiffs, parents and students in several small city school districts, allege that the funding in those districts violated the Education Article by

failing to provide the opportunity for a sound basic education. Plaintiffs do not claim that the new Foundation Aid formula is inadequate to provide the opportunity for a sound basic education, but instead allege that the State's failure to fully fund the system immediately following the financial crisis and Great Recession was unconstitutional. For the reasons set forth below, this Court should affirm.

After trial, Supreme Court held that plaintiffs had not sustained their Education Article claim (7-22).[1] Applying the separation of powers principles articulated in *CFE III*, the court deferred to the Executive and Legislature's statewide education funding reforms and those branches' determination that Foundation Aid, coupled with districts' other local, state and federal funding and other non-fiscal educational reforms, would provide more than sufficient resources to provide the opportunity for a sound basic education in plaintiffs' districts and throughout the State. The court held that the Executive and Legislature's statewide reform, using a formula similar to that to which the Court of Appeals deferred in *CFE III*, was rational and within the political branches' domain.

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[1] References are to the record on appeal. References preceded by "PX" or "DX" are to plaintiffs' and defendant's trial exhibits, respectively, the originals of which have been filed with the Court.

The court rejected plaintiffs' contention that the 2007 enactment of Foundation Aid established a constitutional minimum that could not be modified during a fiscal and budgetary crisis, and held that that the political branches had acted rationally and constitutionally in slowing the implementation of that aid in response to the financial crisis and Great Recession.

Accordingly, Supreme Court correctly dismissed the complaint upon finding that the State, in response to *CFE*, enacted a rational, statewide restructuring of state education funding and programs that, in the political branches' reasonable estimation, would provide more than sufficient resources to districts to satisfy the Education Article.

In *CFE III*, the Court of Appeals deferred to the Legislature and Executive's determination that $1.93 billion in additional funding in New York City from state, federal and local sources, amounting to $2.5 billion statewide, was sufficient to remedy a constitutional deficiency in the New York City schools, and suggested additional statewide reforms. In response, the political branches acted. In 2007, the new Foundation Aid funding formula was enacted, designed to exceed constitutional requirements, that fundamentally changed the State's formula for apportioning general operating aid among school districts. Rigorous accountability measures were

also established. Using a methodology similar to the Governor's proposal for the New York City schools to which the Court of Appeals deferred in *CFE III*, the Foundation Aid formula calculates a per-pupil amount that adjusts for a district's local costs, capacity to raise local taxes, and number of high-need students such as low-income students, English language learners and students with special needs. Thus, as Supreme Court found, the Foundation Aid formula, as enacted, *significantly exceeded* the amounts that the Court of Appeals found reasonable in *CFE III*.

Just as the *CFE III* Court deferred to the Governor's rational plan and estimate of additional funds needed in the New York City schools, Supreme Court properly deferred to the Executive and Legislature's statewide restructuring of education aid and other programs after *CFE*. Plaintiffs failed to sustain their formidable burden to show that the political branches' determination that the new aid formula would provide funds to districts well over the constitutional minimum was patently irrational.

Finally, Supreme Court correctly held that the Executive and Legislature acted constitutionally by initially slowing the implementation of the Foundation Aid to cope with the State's historic budget deficit caused by the financial crisis and ensuing recession. Supreme Court again properly deferred to the Executive and Legislature's judgment to establish appropriate

funding levels by upholding their decision to cautiously implement the new aid, and to subsequently *increase* education funding in the ensuing years and simultaneously adopt a host of programmatic (non-fiscal) reforms designed to assist educational outcomes. Notably, in the ensuing years since the economic downturn, the Executive and Legislature significantly increased New York State Foundation Aid and overall education funding every year to a record amount—32% in the last 6 years, while overall state spending has been held to 2% or less annual growth—with the largest increases going to high-need districts like plaintiffs', bringing New York State's total per-pupil education funding to the highest of any state in the nation. Accordingly, the order appealed from should be affirmed.

ISSUES PRESENTED

1. Whether, as in *CFE III*, Supreme Court properly deferred to the Executive and Legislature's statewide education funding reforms in response to *CFE*—designed to exceed the constitutional minimum through the Foundation Aid formula providing greater funding for high-need and high-cost districts—as a rational estimate of the funds and programs even greater than necessary to ensure the opportunity for a sound basic education in all school districts in the State.

2. Whether the Executive and Legislature acted rationally, constitutionally and within the political branches' policymaking, budgetary authority in slowing the implementation of the new Foundation Aid to address the State's precarious fiscal condition and unprecedented budget deficit caused by the 2007-08 financial crisis and the Great Recession.

3. Whether the recent dramatic increases in Foundation Aid and overall state education funding—32% in the last 6 years, while overall state spending has been held to 2% or less annual growth—confirm that Supreme Court's deference was appropriate.

STATEMENT OF THE CASE

The Education Article of the State Constitution provides in full: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. Const. art. XI, § 1.

A. The *CFE* Decisions

The Court of Appeals' trio of decisions in the *CFE* litigation provide the historical background and legal principles governing this action.

CFE I – The Court of Appeals Recognizes a Cause of Action Under the Education Article for a Minimally Adequate Educational Opportunity

In *CFE*, the plaintiffs alleged that the State's educational financing scheme violated the Education Article with respect to public school students in the City of New York. The Court of Appeals held that the Education Article requires the State to provide "minimally acceptable educational services and facilities" that afford the opportunity for a sound basic education, consisting of "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." *CFE v. State*, 86 N.Y.2d 307, 316 (1995) (*CFE I*). The Court held that the complaint sufficiently stated a cause of action under the Education Article because it "allege[d] and specif[ied] gross educational inadequacies that, if proven, could support a conclusion that the State's public school financing system effectively fails to provide for a minimally adequate educational opportunity." *Id.* at 319. The Court stressed that the plaintiffs would "have to establish a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children." *Id.* at 318.

CFE II – The Court Holds that the State's Education Funding Formula Failed to Provide Students in New York City with the Opportunity for a Sound Basic Education and Directs the State to Ascertain the Appropriate Amount

After trial, in *CFE v. State*, 100 N.Y.2d 893 (2003) (*CFE II*), the Court of Appeals held that the State's education funding formula failed to provide New York City students with the opportunity for a sound basic education, in violation of the Education Article. Reviewing the educational inputs that students received—*i.e.*, teaching, facilities and instrumentalities of learning—the Court held that plaintiffs had established "gross and glaring" inadequacies of resources in the City schools. *Id.* at 909-14, 921. After considering the resulting outputs such as test results and graduation and dropout rates, the Court concluded that plaintiffs had established a causal link between the existing funding system and the lack of an opportunity for a sound basic education in those schools. *Id.* at 914-25.

Responding to the dissent's concern that the plaintiffs' success would "necessarily inspire a host of imitators throughout the state," the *CFE II* majority stressed the unique circumstances in the New York City schools and the limited nature of its holding:

> Plaintiffs have prevailed here owing to a unique combination of circumstances: New York City schools have the *most* student need in the state and the *highest* local costs yet receive some of the *lowest* per-student funding and have some of the *worst*

> results. Plaintiffs in other districts who cannot demonstrate a similar combination may find tougher going in the courts.

Id. at 932 (emphasis in the original).

In determining the appropriate remedy, the Court endeavored to "fashion an outcome that will address the constitutional violation instead of inviting decades of litigation." *Id.* at 931. The Court emphasized that it "had neither the authority, nor the ability, nor the will, to micromanage education financing," and its responsibility "to defer to the Legislature in matters of policymaking, particularly in a matter so vital as education financing." *Id.* at 925.

Accordingly, the Court imposed a remedy "less entangling for the courts." *Id.* Fixing "signposts" as opposed to specific funding, the Court directed the State to "ascertain the actual cost of providing a sound basic education in New York City." *Id.* at 930, 932. The Court observed that the existing formula was "not designed to align funding with need," did "not take into account the high cost of running schools in the City," and thus "the political process allocate[d] to City schools a share of state aid that does not bear a perceptible relation to the needs of City students." *Id.* at 929-30. The Court added that "the new scheme should ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound

basic education." *Id.* at 930. The Court concluded that the State "should have until July 30, 2004 to implement the necessary measures." *Id.*

The Court noted that its remedy was "limited to the adequacy of education financing for the New York City public schools, though the State may of course address statewide issues if it chooses." *Id.* at 928. The Court recognized that in a budgetary matter such as education funding, "the Legislature must consider that any action it takes will directly or indirectly affect its other commitments" apart from education aid. *Id.* at 930 n.10.

CFE III – The Court Defers to the Governor's Rational Estimate of the Additional Funds Necessary to Provide the Opportunity for a Sound Basic Education in the New York City Schools and Suggests a Statewide Approach

In *CFE v. State*, 8 N.Y.3d 14 (2006) (*CFE III*), the Court of Appeals upheld the State's estimate that a $1.93 billion in additional funds over five years was the cost of providing New York City's public school students with the opportunity for a sound basic education. *Id.* at 19. The Court held that "this estimate was a reasonable one and that the courts should defer to this estimate, appropriately updated." *Id.*

Within weeks of the *CFE II* decision, the Governor created the Zarb Commission to recommend to the Executive and Legislature education financing and other reforms to ensure that all children in the State have an opportunity for a sound basic education. The Commission retained Standard

and Poor's, which used a "successful schools" model, developed by the New York State Board of Regents, that studied the spending of school districts with high student performance. *Id.* at 22. Reasoning that not all high-performing schools operate in an economical manner, S & P applied a "cost-effectiveness filter" so that the successful districts were "ranked according to expenditures and those in the lower-spending half were to be used to create an average." *Id.* S & P then applied three coefficients to take into account the greater spending required for students with disabilities, economically disadvantaged students and students with limited English proficiency. *Id.* at 23. Adjustments were also made with cost indices "to account for the local purchasing power of the dollar" in a district. *Id.*

The Governor thereafter proposed a program bill to the Legislature incorporating the Zarb Commission's methodology. The Governor concluded that "'the S&P analysis as adopted by the Zarb Commission and by State defendants determined that $2.5 billion in additional revenues [*i.e.*, state, federal and local] statewide (equating to $1.9 billion in New York City) was a valid determination of the cost of providing a sound basic education in New York City.'" *Id.* at 24 (quoting State Educ. Reform Plan, at 14 (Aug. 12, 2004)) (DX T-1). In his program bill memorandum, the Governor also "made it clear that he intended New York City schools to receive additional funding that

exceeded the minimum cost of a sound basic education," proposing "approximately $4.7 billion in additional support over the next five years." *Id.* The Senate passed a version of the bill, but it was ultimately not enacted. *Id.* The Legislature, however, passed a bill providing $300 million in additional education aid to New York City. *Id.* at 24-25.

Meanwhile, after *CFE II*'s June 30, 2004 deadline passed, Supreme Court appointed a panel of referees to report on whether the steps taken by the State were in compliance with *CFE II*. The referees accepted the "successful schools" methodology used by the Zarb Commission, but rejected its cost-effectiveness filter and applied a different weighting for economically disadvantaged students. *Id.* at 25. The referees rejected the State's conclusion that additional funding of $1.93 billion would ensure the opportunity for a sound basic education in New York City, and recommended $5.63 billion instead. *Id.* Supreme Court confirmed the referees' funding recommendation. *Id.* at 26.

On appeal, the Court of Appeals held that "Supreme Court erred by, in effect, commissioning a de novo review of the compliance question." *Id.* at 27. It explained that "[t]he 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." *Id.*

The Court stressed, as it had in *CFE II*, "the necessity for courts to tread carefully when asked to evaluate state financing plans," and that deference to the political branches is "especially necessary where it is the State's budget plan that is being questioned." *Id.* at 28. The Court observed that "[t]he legislative and executive branches of government are in a far better position than the Judiciary to determine funding needs throughout the state and priorities for the allocation of the State's resources." *Id.* at 29. For these reasons, the Court explained, "[j]udicial intervention in the state budget may be invoked only in the narrowest of instances," and a party challenging a state financing plan has a "formidable burden of proof" to show that the plan is "patently *irrational*" before judicial deference will give way. *Id.* (emphasis in the original; internal quotation marks deleted).

The Court held that the plaintiffs had failed to meet this formidable burden. The Court found that, in response to *CFE II*, "the state plan found that the cost of providing a sound basic education in New York City was $1.93 billion in additional annual operating funds, and that Governor Pataki's proposal to provide $4.7 billion in additional funding amounted to a policy choice to exceed the constitutional minimum." *Id.* at 27. The Court did

"not find unreasonable the assertion that $2.5 billion in additional revenues statewide (equating to $1.9 billion in New York City) was a valid determination of the cost of providing a sound basic education in New York City." *Id.* at 30 (internal quotation marks omitted). The Court found that, in formulating this plan, the Governor had rationally accepted "the Board of Regents approach to identifying successful schools, the S & P weightings for students with special needs and the cost-effectiveness filter." *Id.* Addressing these components, the Court explained that even if debatable, "we cannot say they are irrational, and they are therefore entitled to deference from the courts." *Id.* at 31. Accordingly, the Court "declare[d] that the constitutionally required funding for the New York City School District includes additional operating funds in the amount of $ 1.93 billion," appropriately updated. *Id.*

In a concurrence, Judge Rosenblatt emphasized that the additional $1.93 billion for the New York City schools, and $2.45 billion statewide, were "designated by the State as reflecting the constitutional *minimum* for a sound basic education." *Id.* at 33 (Rosenblatt, J., concurring) (emphasis in the original). Judge Rosenblatt expected that "[w]hen it comes to educating its children, New York State will not likely content itself with the minimum." *Id.* He stated that "[h]ow much more it can and should spend, however, is a matter for the political branches." *Id.*

Judge Rosenblatt also emphasized that "this lawsuit has consequences beyond New York City and that there are, no doubt, other school districts that should benefit from increased budgets. This requires a statewide approach that is also best left to the Executive and Legislature." *Id.*

B. The State Responds to *CFE* By Fundamentally Altering Education Funding Statewide Through a New Formula Designed to Assist High-Need and High-Cost Districts, Which Significantly Exceeds the Threshold Endorsed by the Court in *CFE*

Judge Rosenblatt was correct that the State would not "content itself with the minimum" funding necessary for the opportunity for a sound basic education and that a statewide approach was indicated. In 2007, the Executive and Legislature overhauled the State's methodology for determining state education aid in a manner that went well beyond the proposed funding increases which the Court of Appeals had endorsed in *CFE*.

1. Foundation Aid

In 2007, the Governor proposed a new statewide funding formula known as Foundation Aid, as well as various measures to strengthen educational accountability by establishing measureable performance targets, promoting strong educational leadership, and raising standards (PX 111 pp. 5-6, DX V-1 p. 66). The Governor's proposed Foundation Aid formula called

for a $4.8 billion increase in operating aid to be phased in over four years (3317-3318, DX V-1 p. 66).

In a January 2007 press release entitled "Unprecedented Expansion of School Aid Tied to Accountability," the Governor observed that his budget proposal "provides more than sufficient funds to address the school funding needs highlighted by the [*CFE*] lawsuit" (DX U-1 p. 2). In its February 2007 Staff Analysis of the 2007-08 Executive Budget, the Senate noted that "the Executive far surpasses the funding requirements of [*CFE*]" and that "[t]he Executive's approach goes far beyond the November 2006 Court of Appeals ruling" in *CFE* that an additional $1.93 billion in New York City and $2.5 billion statewide was reasonable (DX V-1 pp. 7, 66).

In 2007, the Legislature enacted, and the Governor signed into law, the State Education Budget and Reform Act. L. 2007, c. 57. The enacted Foundation Aid formula called for an increase of $5.5 billion, higher than the Governor's proposal, also to be phased in over four years (3318, 4277-4282).

Codified at Education Law § 3602(4), Foundation Aid is determined by a formula that uses the same "successful schools" methodology that the Court of Appeals found reasonable in *CFE III*. A district's Foundation Aid is determined by adjusting the "foundation amount"—the average cost of providing general education in successful school districts—to reflect district-

specific pupil needs and regional costs. The foundation amount is measured based on the instructional costs of the school districts in the lower-spending half of school districts statewide that have successful track records. That cost is then adjusted by a district-specific pupil need index to reflect the increased amount of funding required to educate high-need students such as low-income students and English language learners. A special needs coefficient is entered to account for the district's increased costs of educating children with disabilities. In addition, a regional cost factor adjusts for the costs of providing services in that particular locality. The per-pupil figure is multiplied by the district's enrollment to arrive at the district's total adjusted foundation cost. The amount of Foundation Aid provided to each district is then calculated by subtracting an expected local contribution from the district's adjusted foundation cost (4293-4394).

Foundation Aid is only one element of the total state funding provided to school districts. As delineated on districts' "state aid runs," districts receive other distinct state aid such as universal pre-kindergarten aid, BOCES aid, high cost excess cost aid, hardware and technology aid, software, library and textbook aid, transportation aid and building aid (PX 19). For example, the costs of general capital maintenance and new construction incurred by school districts are eligible for reimbursement at the district's

building aid ratio, up to 98%, computed by analyzing the wealth of the district in relation to the other districts in the State (4570-4574). Local funding sources must also be acknowledged as a significant factor contributing toward overall school budgets. Statewide, local funding sources account on average for more than half of all dollars to school districts.

2. Additional State Fiscal and Accountability Reforms

Additional fiscal and accountability education reforms enacted after *CFE* include the following:

- **Contracts for Excellence Program:** In 2007, along with the Foundation Aid legislation, the Contracts for Excellence Program was enacted to provide rigorous accountability for the increased state aid to underperforming districts. *See* Education Law § 211-d. Under this program, each school district that has one or more low-performing schools and receives an annual increase in foundation aid of at least 10% of the prior year's aid or $15 million is required to enter into a Contract for Excellence with SED that governs how the new funds will be used to provide new or expanded programs that have been demonstrated to improve student achievement.

- **Diagnostic Tool for School and District Effectiveness:** In 2012-13, pursuant to the No Child Left Behind Act, SED implemented this new tool. *See* 8 N.Y.C.R.R. § 100.18. Underperforming schools are designated as "priority" or "focus" schools and a district that has at least one priority or focus school is designated a focus district. The program involves annual on-site diagnostic reviews that compare a school or district's practices to the optimal conditions of learning as defined by the DTSDE rubric. The diagnostic results are used to develop improvement plans (5029-5054).

- **Smart Schools Bond Act:** This act was passed in the 2014-15 state budget and approved by the voters in a 2014 statewide referendum. *See* Education Law § 3641(16). The Act authorized the issuance of $2 billion of bonds to finance improved educational technology and infrastructure to improve learning and opportunity for students throughout the State. The $2 billion is distributed among school districts based on the percentage of the total amount of state aid that each district receives (4356-4361).

- **Extended Learning Time Grant:** Commencing in 2014, this program provides funds for extended school day or year programs to improve academic achievement. *See* Education Law § 3641(6-b). The program was funded with $20 million in the 2013-14 school year and each school year thereafter, subject to grantee performance and annual appropriation, and additional planning funding of up to $10,000 is available (4347-4356).

- **Community Schools Initiative Grant:** This program provides up to $500,000 for a district to create a school building as a community hub in which to provide programs such as health, dental, and mental health services, additional after-school time, and meal plans (4348-4350). *See* Education Law § 3641(6-a).

- **Statewide Universal Pre-Kindergarten Grant:** The Statewide Universal Pre-Kindergarten Grant program provides funding for pre-kindergarten programs, in addition to the universal pre-kindergarten state aid that each district receives (4339-4346).

- **Race to the Top Funds:** In 2010, the State secured nearly $700 million in federal RTT funds to reform assessments and standards to align them with college and career readiness standards, prepare, retain, and develop superior teachers and principals, enhance data systems, and turn around the lowest performing schools. Half of the $700 million was allocated to districts and 91 percent of them, including plaintiffs' districts, signed memoranda of understanding to participate (4496, 4531-4537, 5134-5146).

- **Strengthening Teacher and Leader Effectiveness Grant:** This grant program, running from 2012 through 2015, provided funds to districts for training, recruiting, developing and retaining teachers and administrators (5193-5194, 5209-5223).

- **District Demonstration Project Grant:** A joint fund from the New York State United Teachers and the Regents Research Foundation which provided funding for districts for technical assistance, training, and professional development (5216-5217).

- **Teaching is the Core Grant:** This program provided funds to districts for technical support in developing quality student assessments (5219-5220).

- **Annual Professional Performance Review:** Commencing in 2011-12, Education Law § 3012-c directed a four-level evaluation system rating teachers and principals as highly effective, effective, developing, or ineffective using rubrics tied to standards developed by teachers. APPR is a multiple measuring system requiring that student growth be used as a significant factor in the evaluations and that the evaluation system be used for employment decisions. When there is a misalignment between student outcomes and overall ratings, SED is required to take corrective action, such as providing additional professional development or retraining evaluators (5157-5188). In 2015, this system was updated to create a scoring "matrix" combining evaluation reviews based upon student performance and classroom observations. Negative scoring results require actions to be taken by a school to improve underperforming educators and ultimately remove chronically ineffective teachers. *See* Education Law § 3012-d.

- **Expanding Our Children's Education and Learning Funds:** In 2006, all school districts started receiving an allocation of Expanding Our Children's Education and Learning funds, a $2.6 billion program, which could be used to make up the district's local share of the costs of capital projects relating to physical capacity expansion, health and safety, technology, and handicapped accessibility (4336-4338, 4575-4581). *See* Education Law § 3641(14).

C. The Executive and Legislature Slow the Implementation of Foundation Aid as a Result of the Financial Crisis and Great Recession

During 2007-08 and 2008-09, Foundation Aid was implemented as originally planned.

In 2007-08, the worldwide financial crisis hit, and the Great Recession ensued. Enacting the 2009-10 state budget. the State was tasked with closing "the largest budget gap ever faced by the State"—totaling $20.1 billion. DOB, *NYS 2009-10 Enacted Budget Financial Plan*, at 4.[2] As a result, the Governor and Legislature were constrained to enact across-the-board gap-closing measures including reductions in spending for health care, mental hygiene, public safety, human services, transportation and local government aid, along with increases in taxes and assessments. *Id.* at 4-15. Because school aid was, and historically is, "the single largest State-financed program," the Governor and Legislature exercised their discretion to hold Foundation Aid at 2008 levels for 2009-10 and 2010-11 and extended its phase-in period from four to seven years. *Id.* at 78-79. On the other hand, the 2009-10 budget eliminated a one-time "deficit reduction assessment" that had reduced general fund payments in the school aid formulas, by backfilling

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[2] *Available at* https://www.budget.ny.gov/pubs/archive/fy0910archive/enacted0910/2009-10EnactedBudget-FINAL.pdf

those reductions with federal economic recovery aid under the federal American Recovery and Reinvestment Act (4363-4364). *Id.* at 81.

In 2010, with the State still facing a budget gap of $9.2 billion, the budget's gap-closing plan included "reductions in spending affect[ing] nearly every activity financed by State government." DOB, *NYS 2010-11 Enacted Budget Financial Plan*, at 9-11.[3] The "Gap Elimination Adjustment" was enacted which assigned a portion of the State's funding shortfall to all school districts as individual reductions in state aid, "limited to a lesser percentage of total General Fund expenditures for school districts designated as 'high-need' by SED, and districts deemed to be administratively efficient." *Id.* at 80. Thus, "[t]he progressive structure of the Gap Elimination Adjustment maintain[ed] a core principle of New York State school financing by ensuring that school districts with the greatest needs and limited ability to pay receive[d] the smallest reductions in aid." *Id.*

The GEA was reduced in the 2012-13 through 2015-16 budgets by including a separate formula for unrestricted GEA Restoration Aid in the budget every year. The restoration formula had different calculations in each year, but the net impact was to reduce the GEA's effect on high-need districts more quickly than on average or low-need districts. *See* Board of Regents,

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[3] *Available at* https://www.budget.ny.gov/pubs/archive/fy1011archive/enacted1011/2010-11FinancialPlanReport.pdf

2016-17 State Aid Outlook, at 11-12 (Sept. 16, 2015).[4] For example, in 2015-16, as with most high-need urban/suburban and rural districts, the districts at issue in this case had very low net GEA per-pupil, averaging -$36 per pupil. In 2016-17, the GEA was eliminated altogether for all school districts. DOB, *FY 2017 Enacted Budget Financial Plan*, at 90.[5]

Despite the GEA and the modifications to the Foundation Aid phase-in required by the financial crisis and Great Recession, plaintiffs' school districts still received substantially more state aid and had significantly higher revenues in 2013-14, the last full school year before trial, than they did in 2006-07, the year before Foundation Aid was enacted (4367-4371, 4375-4378, DX J-2, DX N-2). As a result, by the time of trial in 2015, the districts' enacted budgets had increased as follows, while six of plaintiffs' districts had significantly declining student enrollments over this period:

	2006-07 Enacted Budget	2014-15 Enacted Budget
Poughkeepsie	$71,092,632	$87,341,000
Utica	$107,018,838	$146,709,543
Jamestown	$62,929,245	$75,768,676
Kingston	$123,368,170	$150,168,875
Niagara Falls	$111,414,400	$126,363,144
Newburgh	$183,118,102	$244,792,719
Port Jervis	$50,049,514	$63,856,785

[4] *Available* at http://www.regents.nysed.gov/common/regents/files/meetings/Sep%202015/StateAid_1.pdf

[5] *Available at* https://www.budget.ny.gov/pubs/archive/fy17archive/enactedfy17/FY2017FP.pdf

Mount Vernon	$164,800,785	$227,475,244

(23-27.4, PX 10).[6]

D. Federal Education Aid to School Districts

In addition to state aid and funds raised through local taxation, the school districts also received federal funding, including: Title I funds (for supplemental education for at-risk students) (4500-4503); IDEA funds (for supplemental education services for students with disabilities) (4508-4509); Title IIA funds (for recruitment, training, and retention of highly qualified teachers) (4512-4514); Title IIIA funds (for language instruction for limited English proficient and immigrant students) (4516, 4524); ARRA RTT Strengthening Teacher and Leader Effectiveness funds (to enhance the system of supports for teachers and principals in districts that exceed the 25% poverty threshold) (4527-4528, 5131).

For example, in 2014-15, the plaintiffs' districts received the following amounts in federal education aid: Mount Vernon: $6,825,094; Kingston: $4,289,814; Niagara Falls: $6,236,873; Poughkeepsie: $7,264,217;

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[6] Declining enrollments from 2006-07 to 2014-15 were: Poughkeepsie (4,660 to 4,240); Kingston (7,363 to 6,222); Niagara Falls (7,518 to 6,704); Newburgh (12,164 to 10,991); Port Jervis (3,224 to 2,725); Mount Vernon (9,735 to 8,182). Only two districts' enrollments increased over this period: Utica (8,981 to 9,715); Jamestown (4,800 to 4,840) (27.1-27.4).

Jamestown: $5,207,097; Port Jervis: $1,579,994; Newburgh: $9,648,750; and Utica: $11,484,476 (4529, PX 26).

E. The Complaint

In 2008, plaintiffs commenced this action for declaratory and injunctive relief under the Education Article.[7] The amended complaint acknowledged that "[i]n 2007 the State enacted major reform in education aid by creation of foundation aid," and that "[f]oundation aid was the Legislature's and Governor's response to the Court of Appeals decision in the CFE case, and was intended not only to remedy the education funding shortfall for NYC but also for the entire state" (32-33). The complaint alleged, however, that the delay in the Foundation Aid phase-in, the deficit reduction assessments in 2009-10 and the gap elimination adjustments in 2010-11 and 2011-12 had resulted in plaintiffs' districts not receiving sufficient aid to provide students with the opportunity for a sound basic education as required by the Education Article (33).

F. The State's Motion to Dismiss and the Prior Appeal

In 2009, the State moved to dismiss the complaint under CPLR 3211 on the basis that plaintiffs' claims were not ripe for review and/or were moot

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[7] The action was initially brought by representatives of children in ten small city school districts. Claims relating to five of those districts were withdrawn, and three districts were added, leaving claims related to eight districts at the time of trial.

(235). The State argued that plaintiffs' claims were based on pre-2007 data before the enactment of the Foundation Aid reforms, and that until reforms were implemented and their effects measured, plaintiffs could not state a justiciable claim. Supreme Court denied the motion (229-233).

On the State's appeal, this Court affirmed (234-238). *Hussein v. State*, 81 A.D.3d 132 (3d Dep't 2011) (Stein, J.), *aff'd*, 19 N.Y.3d 899 (2012).[8] This Court was "loathe to enmesh the courts in a subject that primarily involves state fiscal policy and social policy concerns, rather than strictly legal issues." *Id.* at 134. This Court invoked Judge Rosenblatt's concurrence in *CFE III*, which "noted that those cases dealt only with school funding in the City of New York, and that a statewide approach to this problem is best left to the Executive and Legislature." *Id.* at 134. This Court "wholeheartedly agree[d], and believe[d] that those branches of government should be dealing with this issue without undue interference—potentially rising to the level of civil actions commenced on behalf of students in every school district across the state." *Id.*

Nevertheless, this Court was "constrained" by the *CFE* decisions to hold that the face of the complaint stated a justiciable claim and was not

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[8] Subsequent to the decision on the motion to dismiss, plaintiff Hussein withdrew his claims on behalf of students in the Albany City School District, leaving Maisto as the first named plaintiff.

barred at the outset by the mootness or ripeness doctrines. *Id.* The Court held that "[i]n the procedural context of this case, it would be premature for us to determine the merits of plaintiffs' allegations that the present and contemplated funding levels of education in their school districts are inadequate to meet the constitutional standards established by the Court of Appeals in the *CFE* cases." *Id.* at 136. This Court observed that after further proceedings, the State "may be able to demonstrate that the 2007 legislation will ameliorate the defects and discrepancies that plaintiffs allege exist." *Id.* at 137.

The Court of Appeals affirmed the denial of the motion to dismiss in a brief decision:

> Plaintiffs' claims are neither moot nor unripe for review. The merits of the controversy are not before us.

19 N.Y.3d at 900.

In a concurring opinion, Judge Ciparick, the author of *CFE I*, wrote to emphasize that *CFE* "is, and should remain, good law." *Id.* at 901 (Ciparick, J., concurring). She stated that "there *is* 'a point at which the education available is so palpably inadequate that the courts must intervene.'" *Id.* at 906 (emphasis in the original) (quoting *CFE I*, 86 N.Y.2d at 342 (Simons, J. dissenting)). Judge Ciparick observed, however, that "plaintiffs face the 'formidable burden of proof imposed on one who attacks the budget plan'" and

"the trial court may very well determine that the State has met its constitutional obligations through the enactment of the 2007 Foundation Aid reforms." *Id.* (quoting *CFE III*, 8 N.Y.3d at 29).

G. The Trial and Supreme Court's Decision

The case proceeded to a bench trial in 2015, where Supreme Court heard proof pertaining to the 2006-07 through 2013-14 school years (11 n.4). The parties presented extensive testimony and evidence regarding the Foundation Aid and other reforms in 2007 and thereafter, the state, federal and local funding provided to plaintiffs' school districts, the educational services provided to students and their academic performance. By decision dated September 19, 2016, Supreme Court found that "plaintiffs have failed to establish their claim that the State has not met its constitutional obligation to provide the students in the eight small city school districts with the opportunity for a sound basic education" (18).

The court observed that assessing "the State's response to the determination in the CFE case is paramount to understanding and analyzing what is constitutionally required" (17). The court explained that in 2007, in response to CFE, "the executive and legislative branches of New York State government reformed the method of determining school aid for all school districts in the State," which "wholly changed the way school funding was

calculated, creating a new funding formula known as 'Foundation Aid'" (9). This "fundamental change in the way school aid is calculated in New York State was the subject of years of analysis and negotiation by and between the Legislature and the Executive" (9). The court found that the new Foundation Aid methodology had "very similar elements" to the methodology in the Governor's proposal found in *CFE III* to be a reasonable approach to restructuring school funding and warranting judicial deference (19). Under these circumstances, where the Executive and Legislature had already responded to CFE with a new statewide methodology for school funding, the court concluded that a snapshot analysis of the inputs and outputs in the subject school districts was not the proper one. Rather, the proper analysis was that set forth in *CFE III—i.e.*, whether the Executive and Legislature's assessment that the new Foundation Aid formula and accountability reforms, along with the other state, federal and local funding provided to districts, would ensure the opportunity for a sound basic education statewide was reasonable and subject to judicial deference (17).

The court held that the Executive and Legislature's statewide response to *CFE* was reasonable, within the policy-making functions of the political branches, and warranted deference from the Judiciary (14-15, 18-21). The court explained that plaintiffs were "'not alleging that the current funding

system (Foundation Aid) is itself inadequate to provide the opportunity for a sound basic education,'" but rather that the State's "'failure to fully fund the system'" immediately as a result of the financial crisis and Great Recession was unconstitutional (17-18) (quoting Pls' Reply to Def's Post-Trial Mem at 46). The court rejected plaintiffs' contention that the 2007 enactment of the Foundation Aid established a constitutional minimum that could not be reduced during a financial and budgetary crisis (18-19). The court stressed that in 2006, in *CFE III*, the Court of Appeals found that the Governor's proposal for an additional $2.5 billion in education revenues statewide over five years, equating to $1.9 billion in New York City, was a rational determination of the cost of providing the opportunity for a sound basic education, warranting judicial deference (19). Thus, the court explained, "this determination by the Court of Appeals, finding that a substantially lower level of funding is constitutionally adequate, necessarily negates plaintiffs' argument that the level of enacted Foundation Aid, commencing in 2007-2008 and phased in over four years, is the constitutionally-permissible minimum" (19). The court added that the "State Constitution requires that all State moneys be spent pursuant to an appropriation, and that such spending must be made within two years of the appropriation," constitutional

requirements that "make it impossible for the actions of a Legislature to bind future Legislatures with regard to its funding decisions" (18).

The court held that plaintiffs had failed in their burden to demonstrate that there was anything irrational or unconstitutional in the Executive and Legislature's adjustment of the Foundation Aid phase-in to cope with the State's precarious fiscal condition and unprecedented budget deficit caused by the financial crisis and Great Recession (19). The court explained that altering funding levels "based upon the fluctuation of the State's fiscal condition," as well as "the needs of the school districts, the level of local contribution and federal funding for the school districts, and other competing issues that are considered in the development of the New York State budget," involved discretionary economic and social policy determinations within the purview of Executive and Legislative branches (18).

In sum, the court concluded, "[t]he Judiciary spoke [in *CFE*]," "the political branches responded," and "[t]he State has continued to address the issues raised by school districts across the State in the development of the State budget every year, as well as through the implementation of nonfiscal reforms that provide assistance to school districts" (21). The enactment of Foundation Aid, "in conjunction with the other significant reforms to the standards in the State, the teacher performance tools and measures, and

other nonfiscal reforms designed to assist those struggling school districts to achieve improved student performance, creates an environment that cannot truly be assessed yet" (21). The court held that "[i]n the infancy of the post-CFE world, where Foundation Aid has barely gotten off the ground, it cannot be said that the State has failed to meet its constitutional obligations" (21). Accordingly, the court dismissed the amended complaint (22).

STATE EDUCATION AID INCREASES SINCE 2013-14

Since the 2013-14 year encompassed by the trial, state budgets have dramatically accelerated Foundation Aid and other state education funding to record levels.

2014-15

The 2014-15 budget provided for $22.2 billion in school aid, the highest ever at that time, an increase of $1.1 billion—or 5.3%—over 2013-14. L. 2014, ch. 56; DOB, *FY 2015 Enacted Budget Financial Plan*, at 84.[9] In contrast, overall state spending was held to less than 2% growth, and funding for agency operations generally remained at the prior year levels. *Id* at 9-10, 12. The $1.1 billion increase included, among other things:

- $251 million increase in Foundation Aid, for total of $15.4 billion;
- $602 million in restoration of the Gap Elimination Adjustment; and

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[9] *Available at* https://www.budget.ny.gov/pubs/archive/fy1415archive/enacted1415/FY2015EnactedBudget.pdf

- $275 million for increased reimbursement in expense-based aid programs, such as transportation and school construction, and other miscellaneous aid categories.

In addition, the budget funded the following initiatives, among other things:

- $340 million for the Statewide Universal Full-Day Pre-Kindergarten Initiative;
- $2 billion Smart Schools Bond Act authorized for voter referendum;
- $5 million for the Pathways in Technology and Early College High School (P-TECH) program.

Id. at 84; *see* DOB, *Description of 2014-15 New York State School Aid Programs*, at 6-23.[10]

2015-16

The 2015-16 budget provided for $23.5 billion in school aid, again the highest ever, an increase of $1.4 billion—or 6.1%—over 2014-15. L. 2015, ch. 56; DOB, *FY 2016 Enacted Budget Financial Plan*, at 88.[11] Overall state spending was held to 2% growth, and funding for agency operations generally remained at the prior year levels. *Id* at 8-9. The $1.4 billion increase included, among other things:

- $428 million increase in Foundation Aid, for total of $15.9 billion;
- $603 million in restoration of the Gap Elimination Adjustment;
- $274 million for increased reimbursement in expense-based aid

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[10] *Available at* https://www.budget.ny.gov/pubs/archive/fy1415archive/enacted1415/1415NYSSchoolAidPrograms.pdf

[11] *Available at* https://www.budget.ny.gov/pubs/archive/fy1516archive/enacted1516/FY16FinPlan.pdf

programs, such as transportation and school construction, other miscellaneous aid categories;
- $30 million to expand pre-kindergarten programs for three- and four-year-old children; and
- $5 million for an expanded Master Teachers program.

In addition, the budget funded the following initiatives, among other things:

- $340 million for the Statewide Universal Full-Day Pre-Kindergarten Initiative; and
- $75 million for turn-around strategies for "persistently failing" schools.

Id. at 88; *see* Comptroller, *Report on the State Fiscal Year 2015-16 Enacted Budget*, at 31-34.[12]

2016-17

The 2016-17 enacted budget provided for $24.8 billion in school aid, again the highest ever, an increase of $1.5 billion—or 6.5%—over 2015-16. L. 2016, ch. 54; DOB, *FY 2017 Enacted Budget Financial Plan*, at 8, 90.[13] Again, overall state spending was held to 2% growth, and most executive agencies were expected to hold spending to prior year levels. *Id* at 8, 23. The $1.5 billion increase included, among other things:

- $627 million increase in Foundation Aid, including a $100 million set-aside for Community Schools funding, for a total of $16.5 billion;

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[12] *Available at* https://www.osc.state.ny.us/reports/budget/2015/2015-16_enacted_budget.pdf

[13] *Available at* https://www.budget.ny.gov/pubs/archive/fy17archive/enactedfy17/FY2017FP.pdf

- $434 million for complete elimination of the Gap Elimination Adjustment for all school districts;
- $344 million for increased reimbursement in expense-based aid programs, such as transportation and school construction, other miscellaneous aid categories;
- $75 million for Community Schools grants to assist the transformation of failing schools into community hubs; and
- $22 million to expand pre-kindergarten programs for three-year-old children.

In addition, the budget funded the following initiatives, among other things:

- $340 million for the Statewide Universal Full-Day Pre-Kindergarten initiative; and
- $20 million for the "My Brother's Keeper" program to improve outcomes for boys and young men of color.

Id. at 90; *see* Comptroller, *Report on the State Fiscal Year 2016-17 Enacted Budget*, at 19-20.[14]

2017-18

The recently enacted 2017-18 budget (S.2006-C, A.3006-C) invests a new record $25.7 billion in school aid, an increase of $1 billion—or 4.2%—over 2016-17. DOB, *FY 2018 Enacted Budget Financial Plan, at 34, 97.*[15] Again, overall state spending was held to 2% growth, and thus the legislation "continues the growth of education funding at twice the rate of the rest of the

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[14] *Available at* https://www.osc.state.ny.us/reports/budget/2016/2016_17_enacted_budget_report.pdf

[15] *Available at* https://www.budget.ny.gov/pubs/archive/fy18archive/enactedfy18/FY2018EnactedFP.pdf

budget." Senate, *The 2017-18 State Budget, Get the Facts*, at 7 (Apr. 9, 2017).[16] The $1 billion increase includes, among other things:

- $700 million increase in Foundation Aid, including a $150 million Community Schools set-aside, for a total of $17.2 billion;
- $288 million for increased reimbursement in expense-based aid programs, such as transportation and school construction, other miscellaneous aid categories; and
- $50 million in new competitive grant programs, including $35 million for the Empire State After-School Program in communities with high rates of poverty and $5 million to expand pre-kindergarten programs for three- and four-year-old children in high-need school districts.

In addition, the budget funded the following initiatives, among other things:

- $340 million for the Statewide Universal Full-Day Pre-Kindergarten initiative;

DOB, *FY 2018 Enacted Budget Financial Plan, supra*, at 34, 97.

* * *

Thus, the increases in state education funding over the last several years have been remarkable, especially when compared to the modest increases in overall state spending. Since 2012, while overall state spending has been held to 2% or less annual growth, "education aid has increased by $6.2 billion, or 32 percent, over six years." DOB, *Governor Cuomo Announces*

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[16] *Available at* https://www.nysenate.gov/newsroom/articles/senate-passes-2017-18-state-budget-protects-taxpayers-provides-record-investments

Passage of the FY 2018 State Budget, at 1, 3.[17] As of the 2016-17 school year, New York State spent more money per-pupil on education than any other state in the nation, an average of $20,610, which is 87% above the national average of $11,009. Governor Andrew M. Cuomo, *2017 State of the State,* at 105.

ARGUMENT

POINT I

SUPREME COURT'S MERITS DETERMINATION WAS NOT CONTROLLED BY LAW OF THE CASE ARISING FROM THE MOTION TO DISMISS THE COMPLAINT

Supreme Court's determination on the merits—deferring, as in *CFE III*, to the political branches' rational, statewide response to *CFE* through enactment of the Foundation Aid reforms and other non-fiscal educational measures—was not barred by law of the case arising from the decisions on the State's initial motion to dismiss the complaint. The law of the case does not attach to a prior ruling on a different issue in a different procedural posture. Thus, the decision, at the motion to dismiss stage, that plaintiffs' claims were not facially unripe or moot had no preclusive effect on Supreme Court's determination of the merits after trial.

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[17] *Available at* https://www.budget.ny.gov/pubs/press/2017/pressRelease17_enactedPassage.html

The decisions on the motion to dismiss determined only that plaintiffs' complaint was not subject to dismissal on its face as unripe or moot. The State moved under CPLR 3211 to dismiss the complaint on these grounds, arguing that plaintiffs' claims were based on pre-2007 data before the enactment of the Foundation Aid reforms, and that until those reforms were fully implemented and their effects measured, plaintiffs could not state a justiciable claim. This Court affirmed Supreme Court's denial of the motion to dismiss, because "if plaintiffs [were] successful in proving the allegations in their complaint that [the Foundation Aid reforms] 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." 81 A.D.3d at 136-37. The Court of Appeals affirmed in a short decision, noting that the merits of the complaint were not before it:

> Plaintiffs' claims are neither moot nor unripe for review. The merits of the controversy are not before us.

19 N.Y.3d at 900.

Contrary to plaintiffs' contention, the Court of Appeals' holding, in the context of a motion to dismiss, that the complaint stated claims that were neither moot nor unripe had no preclusive effect on Supreme Court's determination of the merits after trial. The law of the case doctrine does not

apply to a subsequent ruling where there is a "difference in procedural posture." *Bodtman v. Living Manor Love, Inc.*, 105 A.D.3d 434 (1st Dep't 2013) (court's prior denial of motion to dismiss did not constitute law of the case for purposes of summary judgment motion). Thus, "[i]t is axiomatic that a motion addressed to the face of a complaint, wherein the motion court must construe all facts in a light favorable to the plaintiff, cannot control the outcome of a case once the facts are finally determined." *Feinberg v. Boros*, 99 A.D.3d 219, 225 (1st Dep't), *lv. denied*, 21 N.Y.3d 851 (2012); *see 191 Chrystie LLC v. Ledoux*, 82 A.D.3d 681 (1st Dep't 2011) ("Our holding in relation to the prior motion to dismiss was based on the facts and law presented by the parties in that procedural posture, and no more."); *see also* Weinstein, Korn & Miller, New York Civil Practice: CPLR P 5011.09 (2016) (quoting *Feinberg* and explaining that applicability of the law of the case depends on "[t]he stage of litigation and the evidentiary burden on the parties"). Accordingly, the decision on the motion to dismiss in that preliminary procedural posture did not establish law of the case binding a merits determination after trial.

Moreover, "[t]he doctrine of law of the case applies to the same question in the same case." *Tillman v. Women's Christian Ass'n Hosp.*, 272 A.D.2d 979, 980 (4th Dep't 2000) (internal quotation marks omitted). Questions of

ripeness and mootness are, by definition, not merits issues, and thus a decision on them cannot control the different question of whether plaintiffs sustained their constitutional claim on the merits.

For these reasons, plaintiffs incorrectly rely (Br. at 33-34) on *J-Mar Serv. Center, Inc. v. Mahoney, Connor & Hussey*, 45 A.D.3d 809 (2d Dep't 2007). There, after the Appellate Division affirmed a denial of the defendants' motions to dismiss the complaint on the ground of collateral estoppel, defendants moved again in Supreme Court to dismiss the complaint on the same ground, and this time Supreme Court granted the motions. *Id.* at 809-10. The Appellate Division reversed, holding that its prior determination of the same issue in the same procedural context was law of the case, "absent a showing of subsequent evidence or change in law." *Id.* at 809 (internal quotation marks omitted). Here, Supreme Court's merits determination was in a different procedural context than the prior motion to dismiss, and it followed a trial on the merits at which evidence was subsequently adduced. Thus, *J-Mar Serv. Center* does not support plaintiffs' argument that Supreme Court's merits determination was in any manner controlled by the denial of the motion to dismiss.

Notably, the appellate decisions on the motion to dismiss acknowledged that Supreme Court might ultimately decide the merits as it did. This Court

stated that, after further proceedings, the State might "be able to demonstrate that the 2007 [Foundation Aid] legislation will ameliorate the defects and discrepancies that plaintiffs allege exist." 81 A.D.3d at 137. The Court of Appeals noted that "[t]he merits of the controversy are not before us," 19 N.Y.3d at 900, but Judge Ciparick was more specific in her concurrence. Judge Ciparick explained that because plaintiffs on remand faced "the 'formidable burden of proof imposed on one who attacks the budget plan,'" *"the trial court may very well determine that the State has met its constitutional obligations through the enactment of the 2007 Foundation Aid reforms."* *Id.* at 906-07 (Ciparick, J., concurring) (quoting *CFE III*, 8 N.Y.3d at 29) (emphasis added).

On remand, Supreme Court determined exactly what Judge Ciparick foresaw that it might. Plaintiffs incorrectly state that Supreme Court, in its decision, "held the matter lacks justiciability" and that "[t]he merits of Plaintiffs' claims and whether there was a constitutional violation was never explicitly addressed" (Br. at 35, 43). To the contrary, after hearing extensive evidence about the Foundation Aid formula, accountability reforms, and other state, local and federal funding for educational services provided in plaintiffs' districts, Supreme Court found that "plaintiffs have failed to establish their claim that the State has not met its constitutional obligation

to provide the students in the eight small city school districts with the opportunity for a sound basic education" (18). Applying *CFE*, the court found—as the *CFE III* Court held with respect to the Governor's proposal for additional funding in the New York City schools—that the Governor and Legislature's enactment of the Foundation Aid and other non-fiscal educational reforms in response to *CFE* was a rational determination of the funds and programs even greater than necessary to assure the opportunity for a sound basic education in plaintiffs' districts, warranting separation of powers deference from the Judiciary. The court further held that "plaintiffs have not met their burden of demonstrating that the State's actions in reducing Foundation Aid [due to the financial crisis and Great Recession] was unconstitutional" (19). Thus, the court plainly resolved the merits of plaintiffs' constitutional claim and, as set forth below, the court's determination was correct.

POINT II

AS IN *CFE III*, SUPREME COURT PROPERLY DEFERRED TO THE EXECUTIVE AND LEGISLATURE'S RATIONAL, STATEWIDE RESTRUCTURING OF EDUCATION FUNDING AND PROGRAMS IN RESPONSE TO *CFE*

In *CFE II*, after finding that the state education aid to the New York City schools did not provide students the opportunity for a sound basic

education, the Court of Appeals endeavored to "fashion an outcome that will address the constitutional violation instead of inviting decades of litigation," 100 N.Y.2d at 931, like the decade-long litigation in this case. Invoking separation of powers concerns, the Court declined to order a specific funding remedy. Instead, it fixed "signposts" and directed the Executive and Legislature to ascertain the cost of providing the opportunity for a sound basic education in the New York City schools, while inviting the political branches to "address statewide issues" in school funding. *Id.* at 928, 932; *see also CFE III*, 8 N.Y.3d at 33 (Rosenblatt, J., concurring) (suggesting "a statewide approach that is also best left to the Executive and Legislature"). In *CFE III*, again applying separation of powers principles, the Court deferred to the Governor's proposal for the additional funds required in New York City on the ground that it was not "patently *irrational*." 8 N.Y.3d at 29 (emphasis in the original).

In 2007, the Executive and Legislature responded to the invitation for statewide reforms, and did so in a manner that benefited high-need, low-resource districts like plaintiffs' by adjusting for a district's number of low-income, English language learners or other special-need students, local costs to provide services and ability to raise local taxes. The Foundation Aid formula was enacted, along with other educational reforms designed to

strengthen educational accountability, which provided for increased statewide education funding even beyond the Governor's proposal to which the Court deferred in *CFE III*. Although the State's unprecedented and precarious budget deficit caused by the financial crisis and Great Recession slowed the implementation of Foundation Aid, in the wake of the economic downturn, state education funding, including funding outside of the Foundation Aid formula, has dramatically increased to the highest level in New York State history.

Under these circumstances, as the Court of Appeals did in *CFE III*, Supreme Court properly deferred to the political branches' rational statewide budget determinations and correctly concluded that the current education funding landscape does not present the "narrowest of instances," *CFE III*, 8 N.Y.3d at 29, where judicial intervention under the Education Clause is warranted.

A. Supreme Court Correctly Applied the CFE Precedents

Supreme Court correctly applied the *CFE* precedents in determining that the political branches' statewide education reforms in response to *CFE* were rational estimates of the funds and programs even greater than necessary to provide the opportunity for a sound basic education in school districts statewide, warranting judicial deference. In deferring to the

Executive and Legislature's statewide reforms, the court did nothing different than the *CFE III* Court did when it deferred to the Executive's rational proposal for the New York City schools. *CFE III*, 8 N.Y.3d at 29-31.

Plaintiffs acknowledge that "the courts in *CFE* gave the State the opportunity to fashion their [sic] own reasonable remedy to ensure students were provided the constitutionally required educational opportunities" (Br. at 48). Plaintiffs further concede, as alleged in the amended complaint, that the "major reform in education aid" in 2007, consisting of the Foundation Aid and other initiatives, "was the Legislature's and Governor's response to the Court of Appeals decisions in the CFE case, and was intended not only to remedy the education funding shortfall for NYC but also for the entire state" (32-33). *See Hussein*, 81 A.D.3d at 135 n.2 ("Foundation Aid was enacted in response to the *CFE* cases" and "purports to correct funding deficiencies throughout the state"). Under these circumstances, consistent with *CFE III*'s "deference to the Legislature in matters of policymaking, it was incumbent upon Supreme Court to begin by making a finding as to whether the State's estimate of the cost of providing a sound basic education [statewide] was a *reasonable* estimate." *CFE III*, 8 N.Y.3d at 29 (emphasis in the original). The *CFE III* Court held that, unless plaintiffs sustain a "formidable burden" to show that the political branches' response is "patently *irrational*," judicial

review is at an end and deference is warranted. *Id.* (emphasis in the original; internal quotation marks omitted).

Plaintiffs agree that Supreme Court "applied *CFE III*'s standard of review in approving the State's education funding scheme," but argue this was error "given the procedural posture of this case" (Br. at 43). Plaintiffs argue that "[t]his is not a situation where suit was filed, the legislature addresses the subject of the claim, and the court must defer to the legislative solution" (Br. at 49). But Supreme Court could not properly disregard this deferential standard of review simply because plaintiffs filed suit in 2008, shortly after the Foundation Aid and other reforms were enacted in 2007. Where, as here, the Legislature has undisputedly addressed the subject of the claim, the judicial deference due the political branches' reasonable funding decisions is not dependent on particular moment that a plaintiff files suit.

Rather, it is plaintiffs who misconstrue *CFE III* as only a "remedy stage" (Br. at 43), requiring no deference to the rational statewide reforms at issue here. In fact, *CFE II* was the "remedy stage" in the *CFE* litigation. *See CFE II*, 100 N.Y.2d at 925 (addressing "the final question: remedy"). Seeking a remedy "less entangling for the courts," the Court only directed the political branches to ascertain the cost of providing a sound basic education in New York City, noting that "the State may of course address statewide

issues if it chooses." *Id.* at 925, 928. Plaintiffs assert that "[o]nly 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" (Br. at 45-46). But the political branches did respond to *CFE* with statewide reforms including a new funding formula designed to assist high-need and high-cost districts, plaintiffs dispute the adequacy of that response, and thus Supreme Court properly assessed whether that response was rational and entitled to judicial deference.

Supreme Court's decision does *not*, as plaintiffs overstate, "bar any challenge to the constitutionality of educational funding" and "insulate[] from judicial review" the political branches' funding decisions under the Education Article (Br. at 3) (emphasis in the original). To the contrary, the court properly reviewed the statewide reforms under the deferential standard employed in *CFE III*, heeding the Court of Appeals' admonition "for courts to tread carefully" in exercising review of the State's education financing reforms. 8 N.Y.3d. at 28. As explained below, applying that standard, the court correctly found that the Executive and Legislature had rationally restructured education aid statewide in a manner warranting judicial deference.

B. The Enactment of the Foundation Aid and Other Education Reforms Reflect the Executive and Legislature's Rational Determination of the Funds and Programs Even Greater Than Necessary to Ensure the Opportunity for a Sound Basic Education Statewide, Warranting Judicial Deference

On the prior motion to dismiss the complaint in this case, Judge Ciparick, the author of *CFE I*, observed that after further proceedings, "the trial court may very well determine that the State has met its constitutional obligations through the enactment of the 2007 Foundation Aid reforms." 19 N.Y.3d at 906-07 (Ciparick, J., concurring). After trial, Supreme Court correctly did exactly that. The court correctly found that the Executive and Legislature's statewide response to *CFE*, enacting a new funding formula designed to provide significantly greater state aid to high-need and/or high-cost districts, was a rational exercise of the political branches' discretion under the Education Article, warranting judicial deference. The court also correctly held that the State's delayed implementation of the funding reform while the State confronted and recovered from the financial crisis and Great Recession (implementation which has since accelerated) was not constitutionally defective, but rather involved the very type of fiscal policy decisions in precarious circumstances that are within the domain of the Executive and Legislature.

1. The Foundation Aid Reforms Reflect the Executive and Legislature's Determination To Exceed the Constitutional Minimum Required by the Education Article

In holding that judicial deference to the political branches' Foundation Aid reforms was warranted, Supreme Court correctly found that those reforms reflected a rational determination by the Executive and Legislature of funding and programs that would provide *greater than* the constitutional minimum necessary to provide the opportunity for a sound basic education statewide. *See CFE III*, 8 N.Y.3d at 33 (Rosenblatt, J., concurring) (envisioning "a statewide approach that is also best left to the Executive and Legislature" and noting "there is every indication that the amounts dedicated will be well above the constitutional floor"). Thus, contrary to plaintiffs' contention, those reforms could not, and did not, fix a constitutional minimum that could not be altered regardless of the State's dire financial circumstances during the financial crisis and Great Recession.

This conclusion flows from both the Court of Appeals' decision in *CFE III* and the legislative history of the Foundation Aid reforms. The Foundation Aid formula enacted in 2007 called for an increase of $5.5 billion in state education aid statewide, to be phased in over four years (in addition to the other distinct state aid such as universal pre-kindergarten aid, BOCES aid, high cost excess cost aid, hardware and technology aid, software, library

and textbook aid, transportation aid and building aid). In 2006, in *CFE III*, the Court of Appeals deemed reasonable, warranting judicial deference, the Governor's proposal for an additional $2.5 billion in state, federal and local education revenues statewide over five years, including $1.93 billion for New York City schools. 8 N.Y.3d at 30. The Court explicitly noted that the Governor's proposal for a funding increase over the $1.93 billion for New York City "amounted to a policy choice to exceed the constitutional minimum." *Id.* at 27; *see also id.* at 33 (Rosenblatt, J., concurring) (additional $2.45 billion statewide "reflect[ed] the constitutional *minimum* for a sound basic education") (emphasis in the original). Thus, as Supreme Court explained, the Court of Appeals' finding that a much lower amount of proposed statewide funding increases was constitutionally adequate rebuts plaintiffs' contention that the enacted Foundation Aid reflects a constitutional minimum.

And the history of the Foundation Aid legislation also refutes plaintiffs' assertion that the Executive and Legislature "designed Foundation Aid to calculate the minimum funding necessary to provide a sound basic education in the Maisto Districts and districts statewide" (Br. at 53). In January 2007, proposing $4.8 billion in what would be Foundation Aid over four years, the Governor stated that "[t]he Budget provides *more than sufficient funds* to

address the school funding needs highlighted by the [*CFE*] lawsuit" (DX V-1 p. 2) (emphasis added). And in its Staff Analysis of the 2007-08 Executive Budget, the Senate stated that the Governor's proposal "far surpasses the funding requirements of [*CFE*]" and "goes far beyond the November 2006 Court of Appeals ruling" (DX V-1, pp. 7, 66). Thus, the enacted Foundation Aid formula calling for $5.5 billion over four years—significantly higher than the Governor's proposal—plainly reflected the political branches' authorization of increased funding deemed to be over and above the constitutional floor required by the Education Article.

Moreover, plaintiffs' claim that the 2007 funding legislation somehow fixed the constitutional minimum required by the Education Article is at odds with fundamental separation of powers principles. A legislature cannot fix the meaning of a constitutional provision thorough legislation, because the ultimate arbiter of the scope of a constitutional right is the Judiciary. *See CFE II*, 100 N.Y.2d at 925; *Matter of Aliessa v. Novello*, 96 N.Y.2d 418, 432 n.14 (2001) ("Given our system of separation of powers, a lawmaking body may not legislatively declare that a statute meets constitutional criteria."). Thus, legislation cannot set a constitutional norm binding on future lawmakers. Nor can the Legislature mandate sums that a future Legislature is required to appropriate.

For these reasons, plaintiffs' reliance (Br. at 53 n.16) on general descriptions of the Foundation Aid formula by the Board of Regents and SED years later, in 2012 and 2014, is unavailing. As explained above, the contemporaneous statements of the Governor and Legislature, and the fact that the enacted legislation provided significantly greater aid than the statewide proposal viewed reasonable in *CFE III*, make clear that both political branches deemed the enacted Foundation Aid to be substantially in excess of the constitutional minimum.[18] Accordingly, Supreme Court properly assessed whether plaintiffs had sustained their heavy burden to establish that this statewide response to CFE, even though implemented more slowly than originally contemplated because of the financial crisis and Great Recession, was an irrational plan for providing the opportunity for a sound basic education in plaintiffs' districts and throughout the State. As explained below, plaintiffs failed to sustain that burden.

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[18] The statements cited by plaintiffs do not, in any event, demonstrate that the Governor and Legislature equated Foundation Aid with the constitutional minimum. The statement that the formula "has several goals including adequate funding for a sound basic education" (Br. at 53 n.16) is not inconsistent with the Executive and Legislature's goal to exceed the constitutional minimum.

2. Plaintiffs Failed to Sustain Their Formidable Burden to Establish that the Executive and Legislature's Statewide School Funding Response to *CFE*, or the Delayed Implementation of the Reforms as a Result of the Financial Crisis and Great Recession, Were Patently Irrational

In *CFE III*, as it deferred to the Governor's proposal for increased funding in the New York City schools, the Court of Appeals took the occasion to restate the separation of powers principles governing a challenge to the State's education budget plan. Observing, for the second time, that the Judiciary has "'neither the authority, nor the ability, nor the will, to micromanage education financing,'" *id.* at 28 (quoting *CFE II*, 100 N.Y.2d at 925), the Court reiterated that deference to the political branches "is especially necessary where it is the State's budget plan that is being questioned":

> Devising a state budget is a prerogative of the Legislature and Executive; the Judiciary should not usurp this power. The legislative and executive branches of government are in a far better position than the Judiciary to determine funding needs throughout the state and priorities for the allocation of the State's resources.

8 N.Y.3d at 28-29. Judicial deference to "education financing plans is justified not only by prudent and practical hesitation in light of the limited access of the Judiciary to the controlling economic and social facts," but by "respect for the separation of powers upon which our system of government is

based." *Id.* at 28 (internal quotation marks omitted). Thus, while it is the judicial function to declare and protect individual rights, "'the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government.'" *Id.* (quoting *Matter of New York State Insp., Sec. & Law Enf. Empls. v. Cuomo*, 64 N.Y.2d 233, 240 (1984)); *see also Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 38-39 (1982) (determining the amounts, sources and objectives of education funding, "especially at the State level, presents issues of enormous practical and political complexity, and resolution appropriately is largely left to the interplay of the interests and forces directly involved and indirectly affected, in the arenas of legislative and executive activity.").[19]

Accordingly, the *CFE III* Court cautioned, "[j]udicial intervention in the state budget may be invoked only in the narrowest of instances." *Id.* at 29 (internal quotation marks omitted). The Court stressed the "formidable burden of proof" that is "imposed on one who attacks the budget plan":

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[19] Plaintiffs fault Supreme Court for relying on *Matter of New York State Insp.*, arguing that the decision "is wholly inapposite and involves competing statutory and policy issues, not as in the instant case, constitutional rights" (Br. at 48 n.15). It was the Court of Appeals in *CFE III*, however, that quoted and relied on this precedent as requiring deference to the Governor's education funding plan for New York City. Thus, the decision, and its separation of powers rationale, is extremely pertinent to an Education Article claim.

Judicial deference will give way only if it is proven that the state financing plan is "patently *irrational*." *Id.* (emphasis in the original). The Court noted that this "need for deference, where appropriate, is no less important for this Court than it is for the Judiciary as a whole." *Id.* at 28.

Applying these principles, Supreme Court correctly held that plaintiffs had failed to sustain their formidable burden to establish that the Executive and Legislature's statewide education financing response to *CFE*, as initially implemented during the financial crisis and Great Recession, was patently irrational and presents the narrow instance where judicial intervention is warranted. As Supreme Court stressed, plaintiffs "'are not alleging that the current funding system (Foundation Aid) is itself inadequate to provide the opportunity for a sound basic education'" (18) (quoting Pls' Reply to Def's Post-Trial Mem at 46). Rather, plaintiffs' claim is that "the State's failure to fully fund the system" immediately following the financial crisis and Great Recession was unconstitutional. *Id.* But both the enactment of the Foundation Aid and its delayed implementation during the fiscal crisis were rational exercises of the Executive and Legislature's policy-making and budgetary prerogatives.

Plaintiffs rightly acknowledged below that the enacted Foundation Aid reforms were constitutional, reflecting the political branches' rational,

statewide restructuring of school funding and programs in response to *CFE*. Foundation Aid is determined by a formula, developed by the Board of Regents, which uses the same "successful schools" methodology that the Court of Appeals found reasonable in *CFE III*, and adjusts for a district's number of high- or special-need students, local costs and capacity to raise local taxes. *See* Education Law § 3602(4). A "foundation amount" is first determined by averaging the instructional costs of the school districts in the lower-spending half of school districts statewide that have successful track records. *See CFE III*, 8 N.Y.3d at 30 (finding this "cost-effectiveness filter" to be "rationally defensible"). Unlike the former scheme reviewed in *CFE II*, which the Court found provided aid that did "not bear a perceptible relation to the needs of [New York] City students," 100 N.Y.2d at 930, the amount is adjusted with district-specific factors based on the number of high- or special-need pupils in the district, such as low income students, English language learners and students with disabilities. *See CFE III*, 8 N.Y.3d at 31 (finding such district-specific weightings for high-need students to be reasonable). Also in contrast to the former scheme, which the *CFE II* Court found did "not take into account the high cost of running schools in [New York] City," 100 N.Y.2d at 930, a regional cost factor is applied that adjusts for the local costs of providing services in the district. As plaintiffs recognized below, a

conclusion that this new methodology is patently irrational and unconstitutional is untenable and foreclosed by *CFE III*.

For several reasons, Supreme Court correctly rejected plaintiffs' argument that the Executive and Legislature acted irrationally or unconstitutionally by slowing the implementation of the Foundation Aid in response to the 2007-08 worldwide financial crisis and the ensuing Great Recession. First, plaintiffs' argument proceeds from the faulty premise that the Foundation Aid reflected the Executive and Legislature's estimate of the constitutional minimum. As explained above, however (supra at 49-52), both political branches rationally deemed the formula to provide aid far surpassing the constitutional minimum. Thus, the mere fact that its implementation was delayed while the State weathered the financial crisis and recession cannot support a conclusion that the Executive and Legislature violated the Education Article.

Second, by focusing in their brief solely on the delayed implementation of Foundation Aid (Br. at 51-56), and not districts' other sources of school funding during those years, plaintiffs fail in their burden to demonstrate that the delayed implementation resulted in funding not rationally calculated to meet the minimum required by the Education Article. A "combination of local, state, and federal sources generates school funding." *CFE II*, 100

N.Y.2d at 904. In addition to Foundation Aid, state aid to districts includes distinct allocations of universal pre-kindergarten aid, BOCES aid, high cost excess cost aid, hardware and technology aid, software, library and textbook aid, transportation aid, building aid, and a myriad of grant programs. In fact, expense-based aids such as those for textbooks, student transportation and construction did not see major formula changes from 2006 to 2016 and thus these aids generally grew each year, unlike Foundation Aid. School districts also receive millions of dollars in federal funds under several statutory schemes (*see supra* at 24-25) , some of which offset the reductions of state aid during the fiscal crisis, and also raise significant local funding through the property tax. For example, as Supreme Court noted, "[i]t is undisputed that the reductions that resulted from the Deficit Reduction Assessment in 2009-2010 were counteracted by Federal funding as part of the American Recovery and Reinvestment Act" (10 n.2). Thus, as noted above (*supra* at 24-25), despite the constraints necessitated by the fiscal crisis, plaintiffs' districts' enacted budgets at the time of trial were still significantly higher than those before Foundation Aid was enacted.

Nor do plaintiffs' address the nonfiscal education reforms enacted after CFE, designed to increase student performance and to ensure accountability, such as the Contracts for Excellence program, the Diagnostic Tool for School

and District Effectiveness and the Annual Professional Performance Review program (*see supra*, at 18-20), all of which are important aspects of the State's efforts to ensure the opportunity for a sound basic education statewide. For these reasons, plaintiffs do not demonstrate that the fiscally cautious implementation of Foundation Aid during the economic crisis was, in isolation, a violation of the Education Article.

Third, and most fundamentally, the manner in which the State of New York responded to the 2007-08 worldwide financial crisis and ensuing Great Recession is a quintessential example of the difficult, discretionary policy-making decisions that are committed to the political branches. In 2009, the State was tasked with closing the "largest budget gap ever faced by the State"—totaling $20.1 billion—due to a "precipitous decline in projected receipts." 2009-10 Enacted Budget Financial Plan, *supra*, at 4.[20] Armed with "the controlling economic and social facts," *CFE III*, 8 N.Y.3d at 28, the Governor and Legislature were constrained to enact across-the-board gap-

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[20] As the Director of the Budget explained:

> To understand the impact of the downturn on income, a comparison to the last recession is instructive: New York State adjusted gross income fell by $28 billion in 2001 and another $21 billion in 2002, following the collapse of the high-tech/Internet bubble and the attacks of September 11. In contrast, gross income losses of $52 billion in 2008-09 and $53 billion in 2009-10 – or more than twice the last recession – are projected. *Id.*

closing measures including reductions in spending for health care, mental hygiene, public safety, human services, transportation and local government aid, in addition to increases in taxes and assessments. 2009-10 Enacted Budget Financial Plan, *supra*, at 4-15. Because school aid is "the single largest State-financed program," *id.* at 78, the Governor and Legislature exercised their discretion to hold Foundation Aid at 2008 levels for 2009-10 and 2010-11 and extended its phase-in period. In 2010, still facing a budget gap of $9.2 billion, the budget's gap-closing plan included "reductions in spending affect[ing] nearly every activity financed by State government," and the Gap Elimination Adjustment was enacted which assigned a portion of the State's funding shortfall to all school districts as individual reductions in state aid. 2010-11 Enacted Budget Financial Plan, *supra*, at 9-11, 80. In every year since 2012-13, however, the GEA has been reduced and it was eliminated altogether in 2016-17.

Even in normal circumstances, "[t]he legislative and executive branches of government are in a far better position than the Judiciary to determine funding needs throughout the state and priorities for the allocation of the State's resources." *CFE III*, 8 N.Y.3d at 29. Where the political branches are responding to a grave financial crisis and an unprecedented budget deficit, even greater judicial deference to the political

branches' discretionary actions to maintain the State's fiscal solvency is warranted. Along with the other across-the-board cuts to state spending during the crisis and recession, some temporary restraint in education spending—the largest component of the State's budget—was hardly "patently *irrational*." *Id.* at 29 (emphasis in the original). To the contrary, it was a permissible, if not imperative, exercise of "the policy-making and discretionary decisions that are reserved to the legislative and executive branches." *Id.* at 28. It is hard to conceive of a complex matter more within the policymaking, budgetary authority of the political branches—and outside of the right-defining, dispute-resolution domain of the judicial branch, *see id.*—than determining how the State should cope with a financial crisis of such magnitude. *See, e.g., Jones v. Louisiana Bd. of Supervisors*, 809 F.3d 231, 242 (5th Cir 2015) (State's reduction of funds for university system "served the legitimate state interest of addressing the grave economic crisis triggered by the Great Recession" and did not the violate the Contracts Clause). Plaintiffs' brief, which addresses the temporary reductions at length—but never once mentions the financial crisis and recession that made them necessary—does not demonstrate otherwise.

Notably, while a fiscal crisis cannot trump constitutional rights, the GEA, and its reduction and elimination over the succeeding years, were both

legislated in a reasonable manner consistent with State's obligation to provide the opportunity for a sound basic education in all school districts, by lessening its impact on high-need districts. Specifically, when it was enacted, the GEA was "limited to a lesser percentage of total General Fund expenditures for school districts designated as 'high-need' by SED, and districts deemed to be administratively efficient." 2010-11 Enacted Budget Financial Plan, *supra*, at 80. Thus, "[t]he progressive structure of the Gap Elimination Adjustment maintain[ed] a core principle of New York State school financing by ensuring that school districts with the greatest needs and limited ability to pay receive[d] the smallest reductions in aid." *Id.*

And when the GEA was reduced and eliminated in the 2012-13 through 2016-17 budgets, this was also done in a manner to reduce its effect on high-need districts faster. The restoration formula had different calculations in each year, but the net impact was to reduce the GEA's effect on high-need districts more quickly than on average or low-need districts. For example, in 2015-16, as with most high-need urban/suburban and rural districts, the districts at issue in this case had very low net GEA per-pupil, averaging -$36 per pupil. Thus, in maintaining the State's fiscal solvency during the financial crisis and restoring aid quickly in its aftermath, the political

branches acted with due sensitivity to the State's constitutional obligation under the Education Article, especially with respect to high-need districts.

For all of these reasons, Supreme Court correctly held that plaintiffs had failed to sustain their formidable burden to establish that the Executive and Legislature's statewide education reforms after *CFE*, as prudently implemented following the fiscal crisis and Great Recession, were irrational or unconstitutional. Accordingly, the court properly deferred to the political branches' budget prerogatives and declined to intervene.

C. The Recent Large Increases in State Education Funding Confirm the Propriety and Wisdom of Supreme Court's Deference

New York State's budget legislation since the 2013-14 school year encompassed by the trial, of which the Court can take judicial notice, *see* CPLR 4511(a), has consistently and dramatically increased education funding every year (in contrast to overall state spending), confirming the trial court's wisdom in deferring to the Executive and Legislature's education funding restructuring after *CFE*.

As detailed above (supra, at 32-37) , since 2012, the state budgets have held overall state spending to 2% or less annual growth. Not so with respect to education funding. Due to the Governor and Legislature's sustained

efforts to strengthen educational outcomes throughout the State, state education funding increased:

- 5.3% in 2014-15 (increase of $1.1 billion to $22.2 billion, including a $251 million increase in Foundation Aid);
- 6.1% in 2015-16 (increase of $1.4 billion to $23.5 billion, including a $428 million increase in Foundation Aid);
- 6.5% in 2016-17 (increase of $1.5 billion to $24.8 billion, including a $627 increase in Foundation Aid); and
- 4.2% in 2017-18 (increase of $1 billion to $25.7 billion, including a $700 million increase in Foundation Aid).

As a result, over the last six years, while overall state spending has been tightly restrained, state education spending—always the largest component of the budget—has increased a dramatic "$6.2 billion, or 32 percent," to the highest level in New York State history. DOB, *Governor Cuomo Announces Passage of the FY 2018 State Budget*, *supra*, at 3. Since 2006-07, despite the intervening financial crisis and Great Recession, Foundation Aid alone—apart from other state aid—has increased about $4.6 billion statewide, and has increased about $2 billion since the 2013-14 year encompassed by the trial. *See Foundation Aid History*, *at* http://sap.questar.org/districts.Php (enter code "999999" for statewide data). *Cf. CFE III*, 8 N.Y.3d at 30 (without knowledge of impending financial crisis, recession and highest budget gap in state history, deferring in 2006 to plan for additional

total statewide revenue—state, federal and local—of $2.5 billion over five years). This is not, under any view, a patently irrational education financing plan requiring judicial intervention under the Education Article.

As a result of these budget increases and the Foundation Aid formula providing upward adjustments for high-need and high-cost districts, the state education aid provided to the plaintiffs' districts has also dramatically increased since this lawsuit was brought:[21]

	2006-07 State Aid	2014-15 State Aid	2015-16 State Aid	2016-17 State Aid	2017-18 State Aid (estimated)
Poughkeepsie	$46,815,745	$57,298,669	$59,602,127	$63,641,330	$66,626,793
Utica	$76,331,493	$107,523,430	$126,778,658	$127,923,423	$143,182,201
Jamestown	$45,624,903	$57,044,306	$59,129,230	$63,520,830	$68,745,963
Kingston	$45,220,365	$51,003,044	$56,026,433	$58,125,342	$65,565,478
Niagara Falls	$82,191,086	$97,201,157	$102,298,652	$105,564,148	$111,602,764
Newburgh	$100,877,296	$136,330,680	$140,973,058	$147,706,870	$153,326,795
Port Jervis	$26,464,612	$33,892,030	$35,567,780	$38,490,403	$40,071,229
Mount Vernon	$71,526,518	$79,546,996	$87,576,520	$94,901,199	$100,817,033

[21] The following numbers do not include aid from grant programs and, of course, federal aid and local funding.

(PX 19 ["state aid runs" for 2006-07 to 2014-15(estimated at time of trial)], DX J-2 [increases from 2006-07 to 2014-15(estimated at time of trial)]).[22]

These dramatic funding increases, statewide and specifically for plaintiffs' districts, refute plaintiffs' contention that students in their districts have been "left behind by the politicians of this state" (Br. at 60). And the consistently accelerating increases in Foundation Aid—from a $251 million increase in 2014-15 to a $700 million increase in the recently enacted 2017-18 budget—refute plaintiffs' assertion that "funding of Foundation Aid in the absence of action by the courts is highly speculative" (Br. at 50). To the contrary, the budgets reflect that Foundation Aid is being aggressively implemented by the political branches without the need for judicial intervention, through a determined and successful effort to dramatically raise the level of state education aid in a short time period, underscoring the propriety of Supreme Court's deference to the political branches' reforms.

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[22] School districts' "state aid runs" for 2015-16, 2016-17 and 2017-18 are *available at* https://www.budget.ny.gov/pubs/archive/fy1516archive/enacted1516/2015-16SchoolAidRuns.pdf; https://www.budget.ny.gov/pubs/archive/fy17archive/enactedfy17/2016-17enactedSchoolAidRuns.pdf; and https://www.budget.ny.gov/pubs/archive/fy18archive/enactedfy18/2017_18SchoolAidRuns.pdf

POINT III

NO FURTHER FACTFINDING IS NECESSARY

Contrary to plaintiffs' contention (Br. at 57), there is no need for this Court to make new findings of fact in order to sustain Supreme Court's judgment. It is not true that Supreme Court deferred to the political branches' statewide education funding reforms "without actually reviewing the Maisto districts' input and outputs" (Br. at 16). As stated in its decision, the court "had a full opportunity to consider the evidence presented," including the evidence regarding the inputs and outputs in plaintiffs' districts during the years at issue (11). The court adopted and incorporated in its decision stipulated facts "for each of the school districts: enrollments, demographics, staffing counts/ratios, class sizes, per pupil expenditures, graduation rates, dropout and suspension rates, and test scores" (11). The court found that "[t]he performance of the children in these school districts [was] undeniably inadequate" during the years at issue (12). However, as explained above, Supreme Court also correctly made the dispositive findings that the Executive and Legislature's statewide education funding response to *CFE*, using a methodology similar to the proposal for New York City schools upheld in *CFE III*, was rational and within the political branches' domain, and that the fiscally prudent implementation of the reforms in response to

the financial crisis and Great Recession was constitutional. Thus, the court properly deferred to the political branches' determination that these reforms would provide funds and accountability that would exceed the minimum required by the Education Article and provide the opportunity for a sound basic education in all districts.

In any event, given the dramatic yearly increases in state education funding since the 2006-07 to 2013-14 years encompassed by the trial, any declaration that the educational inputs in plaintiffs' districts at that time were inadequate would serve no adjudicative purpose. That period encompassed the grave financial crisis and Great Recession and the application of the Gap Elimination Adjustment to resolve the State's unprecedented budget deficit. But the GEA has since been phased out and eliminated, and state education aid has markedly increased every year to the highest in State history. Plaintiffs acknowledge that the ultimate question is whether the students in plaintiffs' districts are "**currently** receiving an opportunity of a sound basic education" (Br. at 18) (emphasis in the original). Likewise, the purpose of a declaratory judgment is to "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation as to *present or prospective* obligations." *Walsh v. Andorn*, 33 N.Y.2d 503, 507 (1974) (emphasis added; internal quotation marks omitted). In light of the

large recent increases in state education funding, any declaration that the funding provided to plaintiffs' districts in 2013-14 or earlier was inadequate and a direction to the State to remedy any such violation would serve no practical purpose. *See id.* ("Where there is no necessity for resorting to the declaratory judgment it should not be employed.").

* * *

In *CFE II*, the Court of Appeals strove to devise a remedy that would address the constitutional violation it found in New York City "instead of inviting decades of litigation" on behalf of the 728 school districts across the State to challenge the constitutionality of each district's funding every year. 100 N.Y.2d at 931. The Court compared the experience in the New Jersey education funding cases, involving "more than a dozen trips" to that State's Supreme Court for "more focused directives," with other jurisdictions where "the process has generated considerably less litigation." *Id.* at 932. The *CFE II* majority was optimistic: It did "not share the dissent's belief that in New York any constitutional ruling adverse to the present scheme will inevitably be met with the kind of sustained legislative resistance that may have occurred elsewhere." *Id.* at 932. The majority's optimism was well founded. Not only did the political branches respond with the proposal for New York City schools to which the Court deferred in *CFE III*, they enacted a new

statewide funding formula to assist high-need and high-cost districts and, after fiscally prudent implementation during the financial crisis and Great Recession, have raised state education aid consistently and dramatically over succeeding years to new highs, bringing New York State's total per-pupil education funding to the highest of any state in the nation. Supreme Court correctly held that this meaningful response warrants the Judiciary's separation of powers deference and does not present the narrow instance where judicial intervention is necessary or warranted. This Court should affirm.

CONCLUSION

The order appealed from should be affirmed.

Dated: Albany, New York
May 30, 2017

Respectfully submitted,

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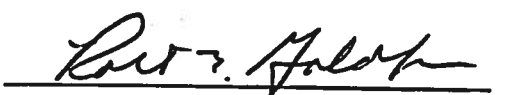
Attorney for Respondent

By: 
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