FILED: APPELLATE DIVISION - 1ST DEPT 08/18/2023 02:42 PM 2022-02719
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 08/18/2023

*To be Argued by:*
MELISSA COLÓN-BOSOLET
*(Time Requested: 15 Minutes)*

# New York Supreme Court

## Appellate Division—First Department

INTEGRATENYC, INC., COALITION FOR EDUCATION JUSTICE, P.S. 132 PARENTS FOR CHANGE, A.C., H.D. ex rel. W.D., M.G. ex rel. M.G., L.S. ex rel. S.G., C.H. ex rel. C.H., Y.K.J. ex rel. Y.J., A.M., V.M. ex rel. J.M., R.N. ex rel. N.N., M.A. ex rel. F.P., S.S. ex rel. M.S., S.D. ex rel. S.S., K.T. ex rel. F.T. and S.W. ex rel. B.W.,

*Plaintiffs-Appellants,*

– against –

THE STATE OF NEW YORK, KATHY HOCHUL, as Governor of the State of New York, NEW YORK STATE BOARD OF REGENTS, NEW YORK STATE EDUCATION DEPARTMENT, BETTY A. ROSA, as New York State Commissioner of Education, BILL DE BLASIO, as Mayor of New York City,

*(For Continuation of Caption See Inside Cover)*

**Appellate Case No.: 2022-02719**

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New York County Clerk's Index No. 152743/21

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NEW YORK CITY DEPARTMENT OF EDUCATION and MEISHA PORTER, as Chancellor of the NEW YORK CITY DEPARTMENT OF EDUCATION,

*Defendants-Respondents,*

– and –

PARENTS DEFENDING EDUCATION,

*Intervenor-Defendant-Respondent.*

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## PRELIMINARY STATEMENT

Plaintiffs' opening brief, and supporting *amici*, showed that the IAS Court erred by dismissing for lack of justiciability a complaint that pleads classic civil rights claims involving hyper-segregation by race, exclusion of Black and Latinx students from particular schools and programs, and unsound educations and deficient educational outcomes for protected groups of students. *See, e.g.*, Pls.'-Br. 10-32; City Bar Ass'n Br. 3-12; NYCLU Br. 1-5, 7-21. This State's courts have long adjudicated such claims on the merits at the liability phase.

Plaintiffs showed, and Defendants fail to refute, that the IAS Court's justiciability dismissal both put the cart before the horse and completely misunderstood that cart. That is, the court (i) dismissed claims as to which City and State Defendants could be found *liable* for constitutional and statutory violations solely by pre-determining whether certain *remedies* would be justiciable, and (ii) even if remedies were now relevant (they aren't) ignored that New York law holds that any remedy *pleaded* is non-exclusive and non-binding. Beyond being contrary to law, the IAS Court's approach would make justiciability a matter of guesswork; courts would need to speculate about remedial outcomes long before merits rulings have been litigated. Reversal is required because there is no way to say at this stage that *any* remedy for proven constitutional violations would be non-

justiciable (indeed, the Complaint requests declaratory relief and injunctive relief, leaving the court to define what would be equitable based on the violations proven).

Defendants reveal the weakness of their justiciability argument by devoting much of their briefs to an independent ground for dismissal not reached below, namely failure to state a claim. *See infra* §II. But because *no Defendant* cross-appealed, failure to state a claim issues are not properly before this Court. *Infra* §II.A. Lack of justiciability, like lack of standing generally, results in dismissal *without* prejudice, but failure to state a claim is a merits ruling that results in dismissal *with* prejudice. Absent cross-appeal, a party cannot seek an affirmative or enlarged judgment, which converting dismissal without prejudice to dismissal with prejudice would be. Thus, Defendants' failure to state a claim arguments should be dismissed for lack of appellate jurisdiction. *Infra* §II.A. And, in any event, Defendants' failure to state a claim arguments are wrong on the merits. *Infra* §II.B.

## ARGUMENT

### I. THE IAS COURT ERRED IN HOLDING THAT PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE.

None of Defendants' arguments disturb Plaintiffs' showings that the IAS Court erred in dismissing liability phase claims and this entire action based on purported justiciability deficiencies as to *potential remedies* that Plaintiffs (non-exclusively) pleaded in the Complaint. *See* Pls.'-Br. 10-15 (justiciability at the pleadings stage is based on causes of action pleaded, not what remedies might be

sought); *id.* at 16-27 (claims pleaded are justiciable). Even if it were appropriate to assess potential remedies, the court erred again by ignoring that any remedy request in a complaint is non-binding and, in any event, various remedies pleaded here create no justiciability concern identified by Defendants. *Id.* §I.B.

Preliminarily, PDE's justiciability arguments are not properly before the Court, as they were "raised for the first time on appeal." *E.g.*, *Nash v. Druyan*, 183 A.D.3d 469, 470 (1st Dep't 2020). Unlike the City and State, PDE failed to argue justiciability below. PDE moved to dismiss solely based on Plaintiffs' alleged failure to state a claim. Mem. Law Supp. Mot. Dismiss, No. 152743/2021, NYSCEF Doc.121 ("PDE MTD"). PDE *never* said "justiciability." *See id.*; PDE Reply, NYSCEF Doc.184.[1] Thus, this Court should, consistent with its usual practice, decline to consider PDE's arguments newly raised on appeal to the extent they differ from those of the City and State. *E.g.*, *Nash*, 183 A.D.3d at 469.[2]

[1] At most, in arguing that particular aspects of Plaintiffs' Education Article count failed to state a claim, PDE offered a solitary sentence tangential to justiciability: "Plaintiffs' curriculum claims are policy claims, not constitutional claims." PDE MTD 9; *id.* (concluding the Education Article "does not mandate Plaintiffs' preferred curriculum in every New York school" and relying on *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 317 (1995) ("*CFE I*"), a non-justiciability decision).

[2] The case for considering new arguments by an intervenor is even weaker than for an original party, especially where the defendants have preserved an issue. *Cf., e.g.*, *Custom Topsoil, Inc. v. Buffalo*, 12 A.D.3d 1168, 1169 (4th Dep't 2004) (declining to consider intervenor's newly raised standing challenge).

### A. The IAS Court's evaluation of potential remedies was premature upon motions to dismiss.

First, with respect to Plaintiffs' showings that the IAS Court decided justiciability solely on the bases of (perceived) requested remedies and that doing so was legally improper, *see* Pls.'-Br. 1, 8-16, 27-32, Defendants really have no rejoinder. Instead, Defendants double-down on the notion that it is proper to consider potential remedies in assessing whether liability claims can be dismissed on the pleadings. *See* State Br. 12, 20-21 (discussing relief sought, despite failing to cite any case affirming pleadings-based dismissal based on potential remedy); City Br. 28-32 (similar). But that flies in the face of the cases Plaintiffs identified and even those on which Defendants rely. For example, the City and State repeatedly cite the Court of Appeals' *CFE* cases in arguing against justiciability, *see* State Br. 17, 22-23, 27-28, 30; City Br. 23-24, and do likewise with *Center for Independence of the Disabled v. Metropolitan Transportation Authority*, 184 A.D.3d 197 (1st Dep't 2020), *see* State Br. 21 n.6; City Br. 25-26, 31. But they somehow overlook (despite Plaintiffs' showings, *see* Pls.'-Br. 12-13, 15) that:

(1) *CFE I* held, upon a motion to dismiss, that discussion of remedy "is premature, because the only issue before the Court at this time is whether [P]laintiffs have pleaded a viable cause of action…. The question of remedies is not before the Court," 86 N.Y.2d at 316 n.4; and

(2) *Center for Independence of the Disabled* found justiciability and criticized the State defendants precisely for founding their justiciability arguments "only on [an] aspect of plaintiffs' prayer for relief." 184 A.D.3d at 208.

These and other such authorities remain dispositive.[3]

Likewise badly off-base is Defendants' reliance on *Klostermann v. Cuomo*, 61 N.Y.2d 525 (1984). Invoking *Klostermann*, they claim that dismissal for lack of justiciability was appropriate because (i) it is improper for courts to "intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches," and (ii) courts supposedly "have long refrained from intervening in disputes" involving educational issues. State Br. 13; *see* City Br. 10, 23. This is all wishful thinking and ignores Plaintiffs' showings. To begin, Plaintiffs showed (and Defendants cannot contest) that *Klostermann reversed* the dismissal of claims for lack of justiciability and did so even where remedy was squarely at issue because plaintiffs had filed a petition seeking a "declaratory judgment and mandamus." 61 N.Y.2d at 537; *see* Pls.'-Br. 13-14. Moreover, as Plaintiffs showed,

[3] *See, e.g.*, Pls.'-Br. 13-17 (collecting similar); *Red Oak Fund, L.P. v. MacKenzie Partners, Inc.*, 90 A.D.3d 527, 529 (1st Dep't 2011) ("premature" to consider proof of damages upon motion to dismiss). As for the State's assertion that "the remedies sought by plaintiffs highlight the lack of judicially manageable standards to redress the *harms alleged*," State Br. 20, the IAS Court's one-paragraph decision struck no such nuance. Regardless, the State's assertion is wrong insofar as many of the standards relevant here are straightforward to judicially administer (*e.g.*, whether students of color are being admitted to specialized high schools and enhanced programs, whether those students are graduating, etc.).

*Klostermann* paused only on whether particular remedies would be justiciable, but held that where plaintiffs, as here, "seek a declaration and enforcement of their rights," "there is nothing inherent... that renders the controversy nonjusticiable." 61 N.Y.2d at 537.[4] Consistent with that and contrary to Defendants' suggestion that New York's courts presumptively duck education-related claims on justiciability grounds, the Court of Appeals and the Appellate Division have found disputes similar to this one justiciable at the pleadings stage. *See, e.g., Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 39 (1982); *Davids v. State*, 159 A.D.3d 987, 991 (2d Dep't 2018) (plaintiffs' claims that they were being denied a "sound basic education" because the City allowed ineffective teachers to remain in place "present a justiciable controversy").[5]

[4] The State inexplicably asserts that *Klostermann* does not support justiciability here either because it was solely related to funding, or because the plaintiffs there sought reforms to a particular program. State Br. 20 n.6. *Klostermann* on its face was not so limited, nor does it support the notion that the State may somehow immunize itself from discrimination claims so long as the discrimination is severe enough to require far-reaching remedies. *See generally* 61 N.Y.2d at 537.

[5] Defendants downplay *Davids* as a mere dispute over a tenure statute or claims of ineffective teaching, State Br. 22 n.8; City Br. 31-32, but that does not distinguish its justiciability holding. Rather, *Davids* involved a challenge to the constitutionality of the relevant statute, thus implicating constitutional rights and obligations like Plaintiffs' claims here. *See* 159 A.D.3d at 990-91. Defendants also suggest *Davids* is inapplicable because those plaintiffs sought declaratory relief, not injunctive relief. *See* PDE Br. 32; City Br. 31, 37; State Br. 22 n.8. But, here, Plaintiffs plead requests for injunctive *and*/or declaratory relief, *see* Pls.'-Br. 3, 8, 13, 29, thus Defendants tacitly concede that at least Plaintiffs' declaratory relief request *is* justiciable.

Defendants' further reliance on *Matter of N.Y. State Inspection v. Cuomo*, 64 N.Y.2d 233 (1984), confirms their argument's speciousness. Based on it, Defendants say that "claim[s] [are] nonjusticiable where … [the] remedy … would embroil the judiciary in the management and operation of the State correction system." City Br. 27; *see* State Br. 13-14, PDE Br. 15. But *N.Y. State Inspection* is distinguishable because it was an appeal from an injunction that petitioners sought *and obtained*. 64 N.Y.2d at 238. The remedy's justiciability was ripe and unavoidable, in contrast to the posture here. Even so, the Court of Appeals reiterated that it is "within the power of the judiciary to *declare the vested rights* of a specifically protected class of individuals," *id.* at 239-40 (emphasis added) (citing *Klostermann*), emphasizing that "[w]e do not, by our decision today, suggest that petitioners' claims seeking safe working conditions are strictly beyond the realm of judicial consideration," *id.* at 241. All of that supports justiciability on the pleadings here.

Finally, Defendants fail to refute Plaintiffs' showings that the IAS Court exacerbated its erroneous focus on remedy by relying on (at Defendants' erroneous invitation) the Complaint's prayer for relief. Plaintiffs showed that "[a] prayer for relief … is not controlling and may even be disregarded." Pls'-Br. 28 (quoting *Erbe v. Lincoln Rochester Tr. Co.*, 3 N.Y.2d 321, 325-26 (1957)). The State and PDE offered no argument in response. The City protests that Plaintiffs "are simply wrong." City Br. 29-30. But the City fails to distinguish the Court of Appeals'

holding in *Erbe* or other cases Plaintiffs cited, and it cites no case supporting its position. *Ipse dixit* cannot cure the IAS Court's legal error.

Defendants also have no rejoinder to Plaintiffs' showings that the IAS Court exacerbated its error by blatantly mischaracterizing the prayer for relief. *See* Pls.'-Br. 12 n.3, 29-30 & n.6. It incorrectly claimed that Plaintiffs pleaded relief that they did not, and ignored requests for declaratory relief and a court-approved "'plan'" "'desi[gned] to cure … Defendants' violations of law.'" *Id.*

### B. Defendants' non-remedy cases also demonstrate that Plaintiffs' claims are justiciable.

When Defendants abandon (as they should) justiciability arguments about remedy, nothing they cite helps their position. For instance, PDE relies on *Ware v. Valley Stream High School District*, *see* PDE Br. 17-18, but the Court of Appeals analyzed on the merits (not as to justiciability) whether "denial of a total [religious] exemption" for students as to an AIDS-related curriculum "burdens their constitutional right of free exercise." 75 N.Y.2d 114, 124-31 (1989). Not only did *Ware* adjudicate claims on the merits, it *reversed* the complaint's dismissal. *Id.* at 122; PDE Br. 32 (acknowledging *Ware* "adjudicat[ed] … [a] religious exemption").

Additionally, to the extent that analyses in *Jones v. Beame*, 45 N.Y.2d 402 (1978), and *Donohue v. Copiague Union Free School District*, 47 N.Y.2d 440 (1979), survive *Klostermann*, *Levittown*, and the *CFE* line of cases, they are not analogous to Plaintiffs' claims and do not support Defendants' arguments. *See* State

Br. 15; City Br. 22, 27-28; PDE Br. 27 (conceding, as to *Jones*, that justiciability "has … moved … with the passage of time"). *Donohue* concerned an "educational malpractice" claim, State Br. 15, a cause of action not recognized in New York. Therefore, *Donohue* is more akin to a dismissal for failure to state a claim than anything sounding in justiciability. *See* 47 N.Y.2d at 445. *Jones* similarly concerned allegations that were not "recognized separately litigable matters"; it turned on "legal insufficiency" (*i.e.*, failure to state a claim), not justiciability concepts. *Jones*, 45 N.Y.2d at 406, 409. Here, Plaintiffs' discrimination and Education Article claims are well-established.

Defendants thus have no meaningful answer to controlling case law that makes clear that the judiciary may "define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them," particularly with respect to constitutional and statutory discrimination claims in the educational context. *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 925 (2003) ("*CFE II*"); Pls.'-Br. 11, 16-26. Plaintiffs repeatedly allege exactly that.

Indeed, despite all their handwaving about lack of justiciability in the education context, the State and City concede that "courts have generally held that constitutional claims and statutory discrimination claims are justiciable." City Br. 30; *see* State Br. 22 ("[t]o be sure, the Education Article empowers courts to assess whether schools are providing 'minimally acceptable educational services and

facilities'"). The same result should follow here. The time for identifying proper remedy is down the road, after the courts have adjudicated the merits of the claims presented here, certainly not today. Nothing about this case's current posture nullifies the Court of Appeals' directive that "it is the province of the Judicial branch" to adjudicate alleged violations of constitutional and statutory rights. *See CFE II*, 100 N.Y.2d at 925; *accord Levittown*, 57 N.Y.2d at 39.

## II. DEFENDANTS' FAILURE TO STATE A CLAIM ARGUMENTS ARE NOT PRESERVED FOR APPEAL AND, IN ANY EVENT, ARE MERITLESS.

### A. Because Defendants neglected to cross-appeal, this Court lacks appellate jurisdiction to consider Defendants' failure to state a claim arguments.

The order under review resolved only justiciability and did not reach Defendants' arguments on failure to state a claim. R.8. Plaintiffs appealed regarding justiciability. Without cross-appeals, Defendants nevertheless ask this Court to dismiss this action on an entirely different basis—failure to state a claim—that would trigger an entirely different judgment (dismissal *with*, not *without* prejudice). State Br. 25; City Br. 35; PDE Br. 36. This Court lacks appellate jurisdiction to consider Defendants' efforts to obtain that different judgment.

Appellate review is "generally limited to those parts of the judgment that have been appealed and that aggrieve the appealing party" and courts do not grant "affirmative relief to a non-appealing party[.]" *Hecht v. City of N.Y.*, 60 N.Y.2d 57,

60-61 (1983). Cross-appeal is necessary for appellees to seek affirmative relief. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151 n.3 (2002); *Jennings v. Stephens*, 135 S.Ct. 793, 798 (2015) ("[A]n appellee who does not cross-appeal may not 'attack the decree with a view ... to enlarging his own rights thereunder....'") (citations omitted).

Converting a dismissal without prejudice to one with prejudice constitutes affirmative relief. *See, e.g., Burnett v. Warner Bros. Pictures*, 113 A.D.2d 710, 712 (1st Dep't 1985) (explaining that plaintiffs' appeal argued that their causes of action should not have been dismissed "without prejudice, for lack of subject matter jurisdiction," whereas "on *their cross-appeal* [defendants argued] that plaintiffs' complaint should have been dismissed *with prejudice*") (emphases added), *aff'd*, 67 N.Y.2d 912 (1986); *9 Montague Terrace Assoc. v. Feuerer*, 191 Misc. 2d 18, 19 (2d Dep't 2001) ("The Housing Court dismissed … but provided that the dismissal was without prejudice. Tenants appeal, arguing that the dismissal should have been with prejudice….").

But that is precisely what Defendants attempt to do, despite failing to cross-appeal. As the Court of Appeals' decision in *N.Y. State Inspection*—upon which PDE heavily relies—makes clear, a justiciability dismissal constitutes a dismissal for lack of subject matter jurisdiction. 64 N.Y.2d at 241 n.3 ("Since nonjusticiability, whether by reason of political question or non-ripeness, implicates the subject matter

jurisdiction of the court, respondents properly predicated their motion to dismiss upon CPLR 3211[a][2].…") (cleaned up). This is fatal to Defendants' ability to raise any failure to state a claim-related issue here because dismissals for lack of subject matter jurisdiction are *without* prejudice.

For example, where "the parties dispute[d] whether the action should be dismissed with or without prejudice," this Court held that "the action was correctly dismissed without prejudice, because the dismissal is based on lack of standing, not on the merits." *B & H Fla. Notes LLC v. Ashkenazi*, 182 A.D.3d 525, 526 (1st Dep't 2020) (collecting authority). Many decisions are in accord, including those addressing justiciability. *See, e.g.*, *Schultz v. Port Jervis*, 242 A.D.2d 699, 700-01 (2d Dep't 1995) ("[W]e find that no justiciable controversy is presented at this juncture.… We do so, however, without passing on the merits of the plaintiffs' constitutional claims … and *thus without prejudice* to the rights of the plaintiffs to seek administrative and/or judicial review of any future controversies relating to the enforcement of the ordinance that may arise.") (emphasis added); *People v. La Roda*, 282 A.D. 818, 818 (3d Dep't 1953) (affirming dismissal "without prejudice to a further application upon showing a justiciable issue"); *Bailey v. Fish & Neave*, 2005 WL 1148691, at *4 (Sup. Ct. N.Y. Cnty. May 12, 2005) ("dismiss[ing], *without prejudice*, for failing to present a *justiciable controversy*") (emphases added); *Hosp. Ass'n of N.Y. State v. Axelrod*, 145 Misc.2d 345, 349 (Sup. Ct. Albany Cnty. 1989)

("dismiss[ing] *without* prejudice to any relief which may be appropriate upon commencement of further litigation which properly *pleads a cause of action justiciable in nature* and ripe for review") (emphases added), *aff'd*, 164 A.D.2d 518, 523-24 (3d Dep't 1990).

Because Defendants needed cross-appeals to seek to convert a justiciability-based dismissal without prejudice into a failure to state a claim-based dismissal with prejudice, this Court lacks appellate jurisdiction to consider failure to state a claim. *See Burnett*, 113 A.D.2d at 712 (converting, on defendants' *cross-appeal*, judgment from one without prejudice to one with prejudice); *Universal Inv. Advisory SA v. Bakrie Telecom PTE, Ltd.*, 154 A.D.3d 171, 182 (1st Dep't 2017) (finding "no appealable determination … to consider" where "[a]lthough plaintiffs argue the merits of this claim on appeal, the motion court did not dismiss this cause of action" and instead was simply unable to "'determine whether there [was] a justiciable controversy'"); *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 697 (7th Cir. 2015) (defendant "attempts to argue … that the plaintiffs failed to state a claim …. Their problem is … that the ground on which [the court] resolved the case [standing] … necessarily resulted in a dismissal without prejudice. A dismissal [for failure to state a claim], in contrast, is a dismissal with prejudice. If [defendant] had wanted this additional relief, it needed to file a cross-appeal.").

### B. Even if this Court had appellate jurisdiction to consider failure to state a claim, Plaintiffs properly plead their claims.

New York imposes only a minimal burden for surviving a motion to dismiss for failure to state a claim, which Plaintiffs meet. This Court accepts Plaintiffs' factual claims as true and "determine[s] only whether the facts as alleged fit within any cognizable legal theory." *CFE I*, 86 N.Y.2d at 318 (internal quotation marks omitted). This Court "must afford the pleadings a liberal construction," giving Plaintiffs "the benefit of every possible inference." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). So long as Plaintiffs "can succeed upon any reasonable view of the facts stated," "the complaint [is] legally sufficient." *Aristy-Farer v. State*, 29 N.Y.3d 501, 509 (2017).

#### 1. Plaintiffs state an Education Article claim.

Indicative of the weakness of their arguments, Defendants advance a hodgepodge of largely non-overlapping grounds for dismissing Plaintiffs' Education Article claim. All fail.

***First***, the City and PDE argue that Education Article claims can only be brought about funding deficiencies. *See* City Br. at 35-44; PDE Br. at 36-44; *cf.* State Br. 16-17, 21-22 (similar argument but limited to justiciability). That is wrong. Nothing in the Education Article is textually limited to funding deficiencies, N.Y. Const. art. XI §1, and *no court* has imposed such a limitation. Instead, as City Defendants admit (at 37 n.7), the Second Department has found cognizable claims

that had nothing to do with inadequate funding. *Davids*, 159 A.D.3d at 987-89 (finding colorable claims predicated on ineffective teachers because "teachers are a key determinant of the quality of education students receive"). Likewise here, Plaintiffs allege deficiencies that are key to the quality of students' education. *See infra*; R.18-19 ¶6, R.28 ¶16, R.50-51 ¶85, R.61-63 ¶¶100-01, R.64-65 ¶103 (physical facilities); R.18-19 ¶6, R.27-28 ¶15, R.28 ¶16, R.61-62 ¶100, R.64-65 ¶103, R.73-75 ¶¶115-17 (learning instrumentalities); R.14-15 ¶3, R.16-19 ¶¶5-6, R.27-28 ¶15, R.42 ¶68, R.46-47 ¶80, R.68-69 ¶109, R.71 ¶112, R.75-82 ¶¶118-32, R.83-84 ¶¶135-36, R.85-86 ¶140, R.87-89 ¶¶144-45 (teaching); R.16-19 ¶¶5-6, R.27-28 ¶15, R.28-29 ¶17, R.65-75 ¶¶104-17 (curriculum). There is no reason for this Court to split with the Second Department.

Unable to distinguish the outcome in *Davids* from the one that should follow here, Defendants try to convert out-of-context discussions about funding from *CFE I*, *Paynter v. State*, 100 N.Y.2d 434 (2003), and *Aristy-Farer* into holdings that the Education Article only governs funding. *See* City Br. 37; PDE Br. 38, 45. Because those cases arose in the funding context or were discussing funding cases, they naturally have funding-focused language. However, nothing in them *limits* the Education Article to funding claims. Actually, the cases reflect the opposite.

*CFE I* made clear that it was addressing what was necessary "[i]n order to succeed *in the specific context of this case*," one premised on funding. 86 N.Y.2d at

318 (emphasis added). *Paynter* recognized that funding deficiencies were just one avenue for pursuing relief, noting that plaintiffs made "no assertion that these [poor educational] results are caused by any deficiency in teaching, facilities or instrumentalities of learning, *or* any lack of funding." 100 N.Y.2d at 440 (emphasis added). And the passage of *Aristy-Farer* that Defendants invoke, *see* City Br. 37; PDE Br. 46-47, is inapposite as it focused on whether Education Article claims are cognizable against unspecified districts or individual schools, not whether claims are limited to funding deficiencies. Moreover, *Aristy-Farer* emphasized that prior decisions "do not 'delineate the contours of all possible Education Article claims.'" 29 N.Y.3d at 511.

***Second***, City Defendants and PDE argue that Plaintiffs' allegations are insufficient to demonstrate cognizable deficiencies in the minimum "inputs" required for a "sound basic education." City Br. 38-44; PDE Br. 38-49. To state a claim, plaintiffs must plead: (1) the denial of a sound basic education, and (2) causation. *CFE II*, 100 N.Y.2d at 905, 919. In *CFE I*, the Court held that plaintiffs sufficiently alleged both by identifying deficient educational outcomes (outputs) and inadequate educational tools (inputs) provided by defendants. 86 N.Y.2d at 318-19.

The Court of Appeals has repeatedly defined a "sound basic education" primarily by reference to outcomes: individuals prepared to "function productively as civic participants." *CFE I,* 86 N.Y.2d at 316; *see CFE II,* 100 N.Y.2d at 905

(sound basic education "conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society"); *Paynter*, 100 N.Y.2d at 440; *Aristy-Farer*, 29 N.Y.3d at 505. This outcome-focused perspective is significant because Defendants never challenged that Plaintiffs sufficiently pleaded outputs. *See, e.g.*, Mem. Law Supp. Mot. Dismiss, No. 152743/2021, NYSCEF Doc.160 ("State MTD") 6 (acknowledging Plaintiffs plead output deficiencies regarding "school admissions, academic performance, and graduation rates"); PDE MTD 11-12 (similar). That is, the New York City schools are (as the State and City Council admitted pre-litigation, *see* Pls.'-Br. 6; R.18-19 ¶6) failing a great number of their students, particularly Black and Latinx students, as to their ability to meaningfully participate in contemporary society, and on basic measures including graduation rates, Regents diplomas, exclusion from certain schools and programs, excessive discipline, etc. *See* R.14-15 ¶3, R.16-19 ¶¶5-6, R.20-28 ¶¶8-16, R.44-46 ¶¶78-79, R.51-60 ¶¶86-99, R.63-68 ¶¶102-07, R.70-71 ¶¶111-12, R.78 ¶124.[6]

[6] Despite conceding below the sufficiency of Plaintiffs' output-related allegations, the City (at 38-41) now swipes at some pleaded outputs, suggesting that the Education Article guarantees only "basic academic skills." But the Education Article provides a right to more. *CFE I*, 86 N.Y.2d at 316 ("function productively as civic participants"); *id.* at 318-19 (plaintiffs stated a claim based on denial of opportunities "to ... be knowledgeable about political, economic and social institutions and procedures in this country and abroad" and "to acquire the skills, knowledge, understanding and attitudes necessary to participate in democratic self-government"); *supra* pp.16-17.

Thus, Defendants' attack on inputs alone means that they are simply challenging *causation, i.e.*, whether the allegedly deficient inputs are a proximate cause of undisputedly deficient outputs. This is dispositive because "[t]he question of proximate cause is generally a question of fact for a jury." *Gonzalez v. City of N.Y.*, 133 A.D.3d 65, 67 (1st Dep't 2015); *accord Mirand v. City of N.Y.*, 84 N.Y.2d 44, 51 (1994). The failure to state a claim arguments should be swiftly rejected as a result.

Moreover, Plaintiffs allege numerous deficient inputs and their causal roles, namely that the racialized tracking, skewed curriculum, teaching deficits, and racially hostile environments harm students of all racial backgrounds who are deprived of meaningful ability to engage in the modern City's democratic society and specially harm Black and Latinx students who disproportionately experience negative measurable outcomes (*e.g.*, graduation rates). More specifically, Plaintiffs allege deficiencies in, *inter alia*,

> **physical facilities**, especially in overcrowded, polluted, vermin-infested unscreened schools to which Black and Latinx students are generally relegated. R.18-19 ¶6, R.28 ¶16, R.50-51 ¶85, R.61-63 ¶¶100-01, R.64-65 ¶103; *see CFE II*, 100 N.Y.2d at 911 n.4 (lack of spaces to pursue supplemental educational opportunities);[7]

[7] City Defendants and PDE claim that Plaintiffs' allegations mirroring the categories in *CFE I* are largely limited to one school and do not allege systemic failures. City Br. 42-43; PDE Br. 39. Not so. The Complaint addresses the "City's unscreened schools" generally and cites studies and statistics covering many schools. *See, e.g.*,

**instrumentalities of learning**, including outdated, dilapidated, and insufficient numbers of textbooks and lack of basic classroom materials and supplies, R.18-19 ¶6, R.28 ¶16, R.61-62 ¶100, R.64-65 ¶103; *see also* R.27-28 ¶15, R.73-75 ¶¶115-17.

**teaching**, including inadequate recruitment, retention, and support of teachers, especially as to teachers of color, R.14-15 ¶3, R.16-19 ¶¶5-6, R.27-28 ¶15, R.42 ¶68, R.46-47 ¶80, R.68 ¶109, R.71 ¶112, R.75-82 ¶¶118-32, R.83-84 ¶135, and exposure to teachers who make or condone racially demeaning and hostile remarks, R.16-19 ¶¶5-6, R.27-28 ¶15, R.42 ¶68, R.79-80 ¶127, R.81-82 ¶¶129-31, R.84 ¶136, R.85-86 ¶140, R.87-89 ¶¶144-45; *see also* R.27-28 ¶15, R.85-86 ¶140, R.88-89 ¶145 (problems exacerbated by staff deficiencies); and

**curriculum**, including examples of ignoring or demeaning culture of students of color, hindering their learning. R.16-19 ¶¶5-6, R.27-28 ¶15, R.28-29 ¶17, R.65-75 ¶¶104-17.

In sum, whether the deficient outputs that everyone admits that Plaintiffs have sufficiently alleged are caused by the deficient inputs presents a quintessential fact question, and the deficient inputs Plaintiffs identify are many. Again, there is no basis for dismissal.

***Finally***, the State and City Defendants are properly named. While both disclaim responsibility for the schools' failures, State Br. 26-30; City Br. 36, the Court of Appeals has recognized that such finger-pointing "more properly concern[s] the apportionment of responsibility among various government actors than causation." *CFE II*, 100 N.Y.2d at 920. Whereas, taken together, the State's and

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R.18-19 ¶ 6, R.28 ¶ 16, R.50-51 ¶ 85, R.61-65 ¶¶ 100-03; R.61 n.115 (citing article discussing air pollution at 244 schools).

City's arguments are that *no* government entity is responsible for ensuring a sound basic education, that is not the law.

As the *CFE II* Court explained, the State's attempt to pin responsibility on City decisionmakers "fails for a ... basic reason": "both the Board of Education and the City are 'creatures or agents of the State,' which delegated whatever authority over education they wield." 100 N.Y.2d at 922. Statewide "oversight of the public school system" stands "vested in the Regents." *Id.* at 904. "Thus, the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights." *Id.* at 922.

Likewise, the City's argument that "Education Article claims run against the State, not individual school districts, like New York City" is contrary to precedent. City Br. 36; *see, e.g.*, *CFE II*, 100 N.Y.2d at 904, 922; *Davids*, 159 A.D.3d at 988 (allowing claims against City Defendants); *F.C. v. N.Y.C. Dep't of Educ.*, 2016 WL 8716232, at *20 (S.D.N.Y. Aug. 5, 2016) (denying motion to dismiss Education Article claim). Although the State bears "ultimate[]… responsibility" for constitutional compliance, its responsibility coexists with the City's obligation to constitutionally carry out responsibilities delegated to it. *N.Y. Civ. Liberties Union v. State*, 4 N.Y.3d 175, 182 (2005).

For all these reasons, Plaintiffs sufficiently plead an Education Article claim.

### 2. Plaintiffs state an Equal Protection claim.

Plaintiffs allege that Defendants violated New York's Equal Protection Clause by racially dividing students and creating inferior opportunities and outcomes for certain students. R.91-93 ¶¶153-59. This is a prototypical Equal Protection claim. Nonetheless, the City Defendants and PDE say that the claim fails because Plaintiffs do not sufficiently allege intentional discrimination, *see* City Br. 44-50, PDE Br. 51-61, and State Defendants contend that they do not have a role in any violations, State Br. 25-32. Defendants are incorrect.

To state a claim, Plaintiffs must plead that the Defendants' policies and actions resulted in a disparate impact on a suspect class and intentional discrimination. *CFE I*, 86 N.Y.2d at 321 (citing, *inter alia*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 240 (1976)). Plaintiffs need only plead that a discriminatory purpose has been *a* "motivating factor" for the Defendants' actions, not that discriminatory intent was "dominant" or "primary." *Arlington Heights*, 429 U.S. at 265-66.

Defendants do not dispute that Plaintiffs have sufficiently alleged that disparate impacts befall Black and Latinx students. Defendants, however, are wrong that Plaintiffs have not sufficiently pleaded discriminatory intent. *See* City Br. 45-46 (arguing Plaintiffs insufficiently allege disparate impacts are "because of," "not merely in spite of," Defendants' actions); PDE Br. 55-56 (same). The City seems to

suggest that without outright admissions by the City of such intent, allegations of intentional discrimination fail where challenged policies are "facially neutral." *See* City Br. 45-46. These arguments are incorrect on the law, unfairly characterize the pleaded facts, and essentially ask this Court to resolve factual disputes against Plaintiffs.

To begin, Defendants mis-frame the overarching standards for assessing intent. An invidious discriminatory purpose "may often be *inferred* from the totality of the relevant facts, including … that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976) (emphasis added). The law "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. "[D]iscriminatory intent is rarely susceptible to direct proof." *Davis v. City of N.Y.*, 959 F. Supp. 2d 324, 360 (S.D.N.Y. 2013).

Thus, courts consider many non-exhaustive factors, including disparate impact, historical background, the sequence of events leading up to the challenged action, the defendant's departures from normal procedures or substantive departures, and the relevant legislative or administrative history. *Arlington Heights*, 429 U.S. at 266-68. The "foreseeability of a segregative effect" is relevant to discriminatory intent, *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1227 (2d Cir. 1987),

as are the inadequacy of defendants' remedial steps to stop racial disparity and their "aware[ness]" or "notice" of discrimination, *Davis*, 959 F. Supp. 2d at 360-64.

Plaintiffs state a claim under this framework. This is the unusual modern case in which Plaintiffs have alleged *overt* discriminatory intent. Plaintiffs allege that the Hecht-Calandra Act, a state law governing admissions to the City's Specialized High Schools, was enacted to stymie efforts to study discrimination in admissions testing for specialized schools. *See, e.g.*, R.24-26 ¶12, R.55-56 ¶94, R.60 ¶99 n.107, R.92-93 ¶158; John Kucsera et al., *New York State's Extreme School Segregation*, at 19-20 (Mar. 2014), http://www.nysed.gov/common/nysed/files/kucsera-new-york-extreme-segregation-2014.pdf; *see generally Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985) (finding discriminatory intent based on legislative history). Defendants acknowledge that these allegations establish "conduct motivated by race," City Br. 48, but insist that the allegations are "insufficient," PDE Br. 56, or are "undermined by [the] legislative history," City Br. 49. On the contrary, Hecht-Calandra was just one outgrowth of the racial resentment that put City schools on the path to the hyper-segregation and inequality that persist today. *See, e.g.*, R.18 ¶6 n.12, R.24-26 ¶12. Indeed, elected officials have stated of Hecht-Calandra that it "was racist then [when enacted] and it's racist now."[8]

[8] N.Y. State Assembly Standing Committee on Education, Public Hearing, *Specialized High Schools*, at 64:13-14 (May 10, 2019), https://nystateassembly.

Moreover, the Complaint heightens the inference of intent by alleging, for instance: (i) the longstanding persistence of profoundly disparate impacts (particularly as to admissions to advanced or specialized programs, continued relegation to segregated schools, and educational outcomes);[9] (ii) Defendants foresaw such segregation and adverse outcomes among minority students;[10] (iii) the historical background factor supports finding intent because such policies were put into place, for instance, to protect white students' access to specialized schools;[11] (iv) Defendants maintain a racialized pipeline in schooling, including through the use of single and unvalidated tests as the exclusive mechanisms for admission in the Specialized High Schools (and formerly gifted and talented programs), despite being well-aware that this exacerbated segregation and unequal outcomes;[12] and (v) that despite remaining "on notice" and "aware" of racial segregation and severely unequal outcomes, Defendants resisted remedial measures entirely[13] or enacted

granicus.com/MinutesViewer.php?view_id=8&clip_id=5117&doc_id=af69c1d7-8c4c-11e9-848a-0050569183fa.

[9] S*ee*, *e.g.*, R.18-19 ¶6, R.22-23 ¶10 n.26, R.41 ¶66, R.43-44 ¶77, R.51-52 ¶86, R.60 ¶99 (hyper-segregation); R.48, ¶82 (disparate police interventions); R.48-49, ¶83 (graduation rates); R.61-62 ¶100, R.64-65 ¶103 (school conditions and overcrowding).

[10] R.18-19 ¶6, R.20-21 ¶8 n.21, R.45-46 ¶79, R.60 ¶99.

[11] R.14-15 ¶3 n.6, R.20-21 ¶8 n.21, R.52-53 ¶¶88-89.

[12] R.20-21 ¶8 n. 17, R.24-25 ¶12, R.50-51 ¶85 n. 79, R.57 ¶95.

[13] R.26 ¶13 ("Every year … the acceptance of just a handful of Black and Latinx students to the City's elite high schools reliably sends shock waves through the City and country, prompting expressions of outrage and calls for reform."); R.26-27 ¶14

ineffectual measures,[14] evincing "indifferen[ce]." *See Davis*, 959 F. Supp. 2d at 361-63.

Defendants' arguments, which improperly ask this Court to resolve factual questions concerning intent, provide no basis for dismissal.[15]

### 3. Plaintiffs state a claim under the State Human Rights Law.

Consistent with the Equal Protection claims, Plaintiffs state a claim under the State Human Rights Law ("NYSHRL"). R.93-95 ¶¶160-67; *see* Exec. Law §296(4) (making it an "unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, ... [or] national origin").

("former New York City Schools Chancellor Richard Carranza called the specialized high schools 'the elephant in the room.'").

[14] R.18-19 ¶6 (increased segregation in 2021, notwithstanding new policies); R.48 ¶82 (increased police-involved incidents as to Black and Latinx students despite new policy); R.60 ¶99 (representation of Black and Latinx students "fell further" in 2021 in specialized schools); R.65-68 ¶¶104-07 (Defendants' failure "to take affirmative measures or adopt any system of accountability to ensure" that the State's published Culturally Responsive-Sustaining Education Framework is met); R.75-76 ¶118 (the City's average ratio of one white teacher for every four white students, but only one teacher of color for every 30 students of color, despite the Education Department's recognition that recruiting and hiring practices must be culturally responsive).

[15] PDE insists that Plaintiffs' equal protection claim should be dismissed because courts could not grant allegedly unconstitutional "race-based" relief and "race-balancing." PDE Br. 59-60. Not only, as shown *supra* §I, is it premature to dismiss claims because of a purported hypothetical remedy, but also race-neutral remedies are readily available, particularly as to school admissions.

Defendants' dismissal arguments fail. *See* State Br. 26, 32; City Br. 50-54; PDE Br. 61-67.

***First***, there is no merit to State Defendants' claim that the NYSHRL does not apply to them because they do not constitute "educational institution[s]." State Br. 32. "[A] statute is to be construed according to the ordinary meaning of its words," *Sega v. State*, 60 N.Y.2d 183, 190-91 (1983), and the "provisions of the [NYSHRL] must be liberally construed," *Cahill v. Rosa*, 89 N.Y.2d 14, 20 (1996). Defendants include the New York State *Education* Department and the State Board of Regents, which are both "educational" and "institution[s]" as those words are ordinarily understood. *See* Merriam-Webster Dictionary ("institution": "an established organization or corporation ... especially of a public character"); *see also, e.g.*, R.30-31 ¶¶20-24, R.55-56 ¶94 (discussing State Defendants' roles). In *Cahill*, the Court rejected that the NYSHRL excluded dental offices despite not being expressly listed among covered entities. 89 N.Y.2d at 23 ("To hold otherwise would impute to the Legislature approval of legal discrimination by dentists … a result wholly inconsistent with the purposes of the Human Rights Law"). There is similarly no basis for believing that the Legislature intended to exempt the State, particularly given the State Defendants' central role in educational practices.

***Second***, the mix of substantive dismissal arguments Defendants make as to Plaintiffs' discrimination claims lack merit. City Defendants and PDE are wrong that

Plaintiffs have not pleaded the denial of the use of facilities. City Br. 51-53, PDE Br. 61-65. Plaintiffs plead that students of color have been denied access to schools and programs, *see, e.g.*, R.94 ¶164, and this Court has recognized that the denial of admissions or continued schooling is actionable under NYSHRL §296(4). *N.Y. Univ. v. N.Y. State Div. of Hum. Rts.*, 84 Misc.2d 702, 706 (Sup. Ct. N.Y. Cnty. 1975), *aff'd*, 49 A.D.2d 821 (1st Dep't 1975); *Stein v. 92nd St. YM-YWHA, Inc.*, 273 A.D.2d 181, 182 (1st Dep't 2000) (denying dismissal of claims relating to defendant's denial of the use of its facilities to plaintiff by reason of her disability). Defendants instead make the radical argument that Plaintiffs do not have a claim unless they have been denied to *all* City schools. City Br. 51-52; PDE Br. 62, 64-65. This is as shocking as it is meritless; it maintains nothing less than that the separate but equal doctrine rendered unconstitutional in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), nonetheless would not violate the NYSHRL.

Less offensive but no more correct is City Defendants' and PDE's contention that the NYSHRL does not recognize disparate impact claims. PDE Br. 62-64; City Br. 51. Defendants concede that disparate impact claims lie in the employment context, *see* PDE Br. 63, but there is no basis for a different result as to education-related claims. The NYSHRL's employment and education subsections are framed the same way and prohibit the same thing: unlawful discrimination because of race. *See* Exec. Law §§296(1)(a), (4). The Court of Appeals also has broadly stated that

"a disparate impact upon a protected class of persons violates the Human Rights Law," *People v. N.Y.C. Transit Auth.*, 59 N.Y.2d 343, 348-49 (1983), and that the "standards for recovery under the [NYSHRL] are in nearly all instances identical to title VII and other federal law," which recognize disparate impact, *Margerum v. Buffalo*, 24 N.Y.3d 721, 731 (2015).

***Finally***, City Defendants and PDE fail in attacking Plaintiffs' harassment-related theory as insufficiently pleaded. City Br. 53-54; PDE Br. 65-67. Contrary to the argument that only a "handful" of instances of hostility are alleged, City Br. 53 (citing R.84-89), the Complaint identifies broader race-based harassment in City schools. *See* R.18-19 ¶6, R.42 ¶68, R.84-89 ¶¶136-46. It is for the fact-finder to determine whether this proves a sufficient pattern for harassment-based liability and whether Defendants authorized, condoned, or acquiesced to the challenged conduct. City Br. 53-54; PDE Br. 65-67. At the pleading stage, the Complaint alleges Defendants' awareness and failure to act, including in response to specific reports. *See* R.42 ¶68; R.87-88 ¶144.[16] Nothing more is required.

[16] To the extent City Defendants seek dismissal of Plaintiffs' harassment claims as time-barred, they bear the burden under CPLR 3211(a)(5) of "establishing prima facie that the time in which to sue has expired." *Sabadie v. Burke*, 47 A.D.3d 913, 914 (2d Dep't 2008) (internal quotations and citations omitted). The City has not done so. *See Wint v. Fields*, 177 A.D.2d 425, 425 (1st Dep't 1991) (affirming, in relevant part, the denial of limitations-based motion to dismiss).

For all these reasons, even if the failure to state a claim arguments were preserved for appeal (they are not) and this Court elected to reach them, Defendants' arguments for dismissal all fail.

## CONCLUSION

For the reasons set forth above and in the opening brief, the Court should reverse the IAS Court's order dismissing this entire action as non-justiciable.

Dated: August 18, 2023
New York, New York

Respectfully submitted,


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## PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

*Type.* A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

*Word Count.* The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, and this Statement, is 6915.

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