

**NEW YORK'S PERSISTENT DENIAL OF NEW YORK CITY  
EDUCATIONAL RIGHTS: TEN YEARS AFTER CAMPAIGN  
FOR FISCAL EQUITY V. NEW YORK**

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I. INTRODUCTION

New York City public schools are in the throes of a spiraling epidemic: overcrowding.<sup>1</sup> Thousands of students remain on waitlists uncertain of whether they can attend their uniquely zoned schools,<sup>2</sup> while those admitted are stuck in small classrooms with excessive class sizes and fatigued teachers.<sup>3</sup> The New York City Department of Education has attempted to cure this problem by readjusting its capital resources to create new space<sup>4</sup> and rezoning particular school districts to send students currently zoned in overcrowded schools to schools with open seats.<sup>5</sup> These rezoning efforts have not been without criticism. In particular, school rezoning has pitted parents whose students attend affluent, predominantly white schools against parents whose students attend neighboring majority-minority schools.<sup>6</sup>

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<sup>1</sup> Leslie Brody, *New York City Schools Plagued by Overcrowding*, WALL ST. J. (Mar. 3, 2015, 8:33 PM), <http://www.wsj.com/articles/new-york-city-schools-plagued-by-overcrowding-1425432802>; Leonie Haimson & Javier Valdés, *Addressing NYC's School Overcrowding Crisis*, GOTHAM GAZETTE (Mar. 8, 2016), <http://www.gothamgazette.com/city/130-opinion/6210-addressing-nycs-school-overcrowding-crisis>; Yasmeen Khan, *City Schools Are Overcrowded, With No End in Sight*, WNYC (Sept. 23, 2015), <http://www.wnyc.org/story/city-schools-are-overcrowded-no-end-sight/>.

<sup>2</sup> Amy Zimmer, *More than 1,200 Kindergarteners Shut Out of Their Zoned Schools*, DNAINFO (Apr. 15, 2015, 11:06 AM), <https://www.dnainfo.com/new-york/20150415/brooklyn-heights/more-than-1200-kindergarteners-shut-out-of-their-zoned-schools>.

<sup>3</sup> Brody, *supra* note 1; Haimson & Valdés, *supra* note 1; *see also* LEONIE HARMSON, CLASS SIZE MATTERS, SPACE CRUNCH IN NEW YORK CITY PUBLIC SCHOOLS 7 (2014), <http://www.classsizematters.org/wp-content/uploads/2014/06/SPACE-CRUNCH-Report-Final-OL.pdf>.

<sup>4</sup> Haimson & Valdés, *supra* note 1.

<sup>5</sup> Khan, *supra* note 1.

<sup>6</sup> For example, recently, two rezoning disputes have taken place at Upper West Side schools, P.S. 199 and P.S. 191 and Brooklyn Heights/Vinegar Hill schools, P.S. 8 and P.S. 307. P.S. 199 and P.S. 8 are two of New York City's premiere public schools, whose student bodies consist largely of predominantly white, economically advantaged students. In

Some white parents fear rezoning will cause their children to be forced into less advantaged or “persistently dangerous” schools, while some parents of color fear it will push their students out of “quality” schools.<sup>7</sup>

Readjusting capital resources to provide new space is challenging as projections are based on mere speculation that can quickly change with the addition of new housing projects.<sup>8</sup> One advocacy group determined that more than 100,000 new seats will be needed by 2021.<sup>9</sup> This number does not include seats that will be needed if and when New York City Mayor Bill de Blasio’s plan to build 160,000 market-rate housing units is implemented.<sup>10</sup> Although the number of waitlisted students decreased in 2016,<sup>11</sup> the city’s rezoning efforts are simply quick fix “band-aid” solutions that are not sustainable as both New York City and the demand for public education continue to grow at exponential rates.<sup>12</sup>

On the macro level, both overcrowding and failing schools result from insufficient state education funding.<sup>13</sup> Every state’s constitution includes an education clause that requires the state to maintain a system of free public education.<sup>14</sup> However, because the United States Supreme Court declined to

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comparison, the student bodies of P.S. 191 and P.S. 307 consist largely of minority students from economically disadvantaged backgrounds. The city’s goal was to minimize overcrowding at P.S. 199 and P.S. 8 and increase economic and racial diversity at each school. Katie Taylor, *Manhattan Rezoning Fight Involves a School Called ‘Persistently Dangerous’*, N.Y. TIMES (Oct. 27, 2015), [http://www.nytimes.com/2015/10/28/nyregion/manhattan-rezoning-fight-involves-a-school-called-persistently-dangerous.html?\\_r=1](http://www.nytimes.com/2015/10/28/nyregion/manhattan-rezoning-fight-involves-a-school-called-persistently-dangerous.html?_r=1); Harry MacCormack, *Boundary Issues: City Plans to Cut Dumbo, Vinegar Hill out of PS 8 School Zone*, BROOKLYN PAPER (Sept. 2, 2015), <http://www.brooklynpaper.com/stories/38/36/dtg-ps8-school-rezoning-2015-09-04-bk.html>.

<sup>7</sup> See Taylor, *supra* note 6; see also Kate Taylor, *2 Brooklyn Schools in Gentrifying Area Will Get New Zones*, N.Y. TIMES (Jan. 6, 2016), <http://www.nytimes.com/2016/01/06/nyregion/2-brooklyn-schools-will-get-new-zones.html>; Yasmeen Khan, *History Repeats Itself in Brooklyn School Rezoning*, WNYC (Sept. 30, 2015), <http://www.wnyc.org/story/history-repeats-itself-two-brooklyn-schools-changing-neighborhoods/>.

<sup>8</sup> See Amy Zimmer & Nikhita Venugopal, *Why New School Seats Aren’t Keeping Pace With City’s Housing Boom*, DNAINFO (May 18, 2016, 7:14 AM), <https://www.dnainfo.com/new-york/20160518/upper-east-side/why-new-school-seats-arent-keeping-pace-with-citys-housing-boom>.

<sup>9</sup> CLASS SIZE MATTERS, *supra* note 3, at 1.

<sup>10</sup> Brody, *supra* note 1.

<sup>11</sup> Amy Zimmer, *Kindergarten Waitlists Shrink 9 Percent, City Says*, DNAINFO (Mar. 16, 2016, 8:30 AM), <https://www.dnainfo.com/new-york/20160316/sunset-park/kindergarten-waitlists-shrink-9-percent-city-says>.

<sup>12</sup> MacCormack, *supra* note 6; see also Zimmer & Venugopal, *supra* note 8 (reporting that the New York City Department of Education has acknowledged that it is “not funding enough seats” to meet future public school demands).

<sup>13</sup> See generally CLASS SIZE MATTERS, *supra* note 3.

<sup>14</sup> *State Role in Education Finance*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/education/state-role-in-education-finance.aspx> (last visited Feb. 18, 2017).

acknowledge education as a fundamental right protected under the United States Constitution in *San Antonio Independent School District v. Rodriguez*,<sup>15</sup> states have the exclusive power to dictate the reach of their state constitutional education guarantees. In fact, not all state education clauses are equal.<sup>16</sup> Some state constitutions use specific controlling language to describe and reinforce education as a fundamental right.<sup>17</sup> Others use broad, often vague language that confers a minimal level of educational obligation on state legislatures.<sup>18</sup> Ultimately, after *Rodriguez*, plaintiffs have largely challenged state legislature's education funding practices as *inadequate*, as opposed to *unequal*, under the state's education clause.<sup>19</sup> State courts are then tasked with assessing the statutory meaning to determine whether the legislature has met its constitutional mandate.<sup>20</sup>

Plaintiffs that bring these "adequacy claims" argue that the state has failed to provide an "adequate education" to the state's public school students, and particularly seek to secure "more resources for the poorest districts"—typically more funding.<sup>21</sup> The idea is that even if the state finance distribution formula provides public school districts with an equal amount of revenue per pupil, insufficient additional funding to districts with a large proportion of high-need students has been linked to insufficient student outcomes.<sup>22</sup> Thus, as schools with underachieving students fail to meet state

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<sup>15</sup> *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. . . . [T]he undisputed importance of education will not alone cause this court to depart from the usual standard for reviewing a State's social and economic legislation.").

<sup>16</sup> One legal scholar identifies four different categories of state constitutional education clauses. The categories are grouped by the education clause's language and the affirmative duties imposed on the state legislature. Category I education clauses impose minimal obligation on the state while Category IV impose the greatest obligation on the state. See William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661–68 (1989).

<sup>17</sup> States that have declared education as a "fundamental right" include Arizona, California, Connecticut, Kentucky, Montana, West Virginia, Wisconsin, and Wyoming. R. CRAIG WOOD, *EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES* 50 (3d ed. 2007). See also Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 49 GA. L. REV. 949, 952 n.13 (2014) (explaining that some courts have held education as a fundamental right based on the state constitution's education clause).

<sup>18</sup> See Thro, *supra* note 16.

<sup>19</sup> See Jared S. Buszin, *Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy*, 62 EMORY L.J. 1613, 1619–21 (2013) (describing the "three waves" of school finance litigation).

<sup>20</sup> WOOD, *supra* note 17, at 51.

<sup>21</sup> DOUGLAS S. REED, *ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY* 11 (2001).

<sup>22</sup> WOOD, *supra* note 17, at 71.

education standards,<sup>23</sup> plaintiffs argue that the school finance distribution formula is unconstitutional as education quality substantially relies upon fiscal resources.<sup>24</sup>

New York's constitutional education article is among those that assign the least amount of educational obligation on the state legislature.<sup>25</sup> The New York State Education Article stipulates: "[t]he 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."<sup>26</sup> Facially, the article provides no guidance about the quality of education required or the means and method by which "free" public school education is to be funded. Nevertheless, New York State has been subject to education adequacy litigation brought by plaintiffs who challenged the school financing system as violating the state constitution's education clause.<sup>27</sup>

In 2006, after thirteen years of litigation, the New York Court of Appeals held that the State of New York failed to meet its constitutional education obligation as applied to New York City public school students in *Campaign for Fiscal Equity, Inc. v. State of New York* ("CFE")—its third and final opinion on the matter.<sup>28</sup> Accordingly, the Court of Appeals, after undergoing an arduous calculation, held that the state must provide an additional \$1.9 billion dollars in operating funds to New York City to meet its education burden.<sup>29</sup> Since the Court of Appeals handed down the final CFE decision ten years ago, New York State has failed to provide its schools, including New York City public schools, with this constitutionally mandated extra funding.<sup>30</sup>

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<sup>23</sup> In 2001 the No Child Left Behind Act (NCLB), signed into law by President George W. Bush, required states to create their own education proficiency standards. Under NCLB's standards-based accountability provisions, student progress is measured by performance on state-created testing in conformity with state education standards. LAURA S. HAMILTON ET AL., STANDARDS-BASED ACCOUNTABILITY UNDER NO CHILD LEFT BEHIND (2007), [http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND\\_MG589.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG589.pdf). Currently, Congress is in the process of revising NCLB. This Comment will not address the history of NCLB or its current developments. For a chronology of NCLB developments, see *No Child Left Behind*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/n/no\\_child\\_left\\_behind\\_act/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/n/no_child_left_behind_act/index.html) (last visited Feb. 18, 2017).

<sup>24</sup> WOOD, *supra* note 17, at 53, 71.

<sup>25</sup> See *State Role in Education Finance*, *supra* note 14.

<sup>26</sup> N.Y. CONST. art. XI, § 1.

<sup>27</sup> See Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661, 667 (N.Y. 1995) (hereinafter "CFE I").

<sup>28</sup> *Campaign for Fiscal Equity, Inc. v. State* (hereinafter "CFE III"), 861 N.E.2d 50 (N.Y. 2006).

<sup>29</sup> *Id.* at 60.

<sup>30</sup> See United Federation of Teachers, *Cuomo Pitches \$1B Hike in School Funding*, UFT (Feb. 2, 2017), <http://www.uft.org/news-stories/cuomo-pitches-1b-hike-school-funding> (noting that "New York City schools are owed \$1.9 billion" under the CFE lawsuit); see also

In 2014, New Yorkers For Students' Educational Rights (NYSER)<sup>31</sup> filed a lawsuit in the Supreme Court of New York, New York County on behalf of New York City public school students and their families.<sup>32</sup> NYSER's summary judgment motion argued that New York State has persistently failed to provide New York City public school children with a "sound, basic education"<sup>33</sup> ten years after the *CFE* litigation.<sup>34</sup> *NYSER v. State of New York* reopens the door for underachieving students to challenge the constitutionality of New York State's finance distribution formula.<sup>35</sup> A finding in favor of NYSER would require the state legislature to reexamine the amount of funding it allocates to New York City public schools under the *CFE* lawsuit.

Although necessary, this litigation is merely one step towards protecting New York City's high-need students' education rights. For instance, more funding is arguably not the lone equalizer of student achievement scores.<sup>36</sup> Increased education spending could be ineffective without the appropriate mechanisms in place to prioritize and allocate the funds.<sup>37</sup> At the local level, conflicts over New York City's limited school

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Karen DeWitt, *Cuomo's Budget Threatens School Aid Court Order, Say Critics*, WNYC (Jan. 26, 2017), <http://www.wnyc.org/story/cuomo-budget-proposal-threatens-fulfillment-court-order-school-aid-critics-say/> (describing arguments by critics of New York Governor Cuomo's new school budget plan, particularly that it will move further away from meeting its obligations under the *CFE* lawsuit).

<sup>31</sup> NEW YORKERS FOR STUDENTS' EDUC. RTS., <http://www.nyser.org/> (last visited Feb. 18, 2017).

<sup>32</sup> Michael A. Rebell, *NYSER Plaintiffs Ask Court to Restore Immediately \$1 Billion in State Aid to Education*, NEW YORKERS FOR STUDENTS' EDUC. RTS. (June 25, 2014), <http://nyser.org/nyser-plaintiffs-ask-court-to-restore-immediately-1-billion-in-state-aid-to-education/>.

<sup>33</sup> "Sound, basic education" was first coined by the New York Court of Appeals in *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (1982). See *infra* Part II.A.

<sup>34</sup> See *NYSER Plaintiffs File Summary Judgment Motion*, CAMPAIGN FOR EDUC. EQUITY (June 15, 2015), <https://educationalequityblog.org/2015/06/15/nyser-plaintiffs-file-summary-judgment-motion/>.

<sup>35</sup> New York State has stalled the *NYSER* lawsuit by filing a motion to dismiss and appealing a denial of that motion. In September 2016, a State intermediate appellate court affirmed the denial of the State's motion. *Aristy-Farer v. State*, 143 A.D.3d 101 (N.Y. App. Div. 2016). The State's appeal of this decision should be heard sometime in 2017. *New York, EDUC. L. CTR.*, <http://www.edlawcenter.org/states/newyork.html> (last visited Feb. 19, 2017).

<sup>36</sup> See Kevin Carey & Elizabeth A. Harris, *It Turns Out Spending More Probably Does Improve Education*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/ny-region/it-turns-out-spending-more-probably-does-improve-education.html> (noting that there are factors other than funding that also contribute to education results, including "student poverty, parental education and the ways schools are organized").

<sup>37</sup> See *id.* But see BRUCE BAKER, REVISITING THAT AGE-OLD QUESTION: DOES MONEY MATTER IN EDUCATION? 18 (2012), [http://www.shankerinstitute.org/sites/shanker/files/does\\_moneymatter\\_final%20April%20conversation.pdf](http://www.shankerinstitute.org/sites/shanker/files/does_moneymatter_final%20April%20conversation.pdf) (emphasis in original) ("It is certainly reasonable to acknowledge that money, by itself, is not a comprehensive solution for

budgets have sparked debate over the existence and effect of systemic problems entrenched in the city's public school structure, in particular, how the city's current expenditures and school zoning practices affect the resources available to students of color and/or lower socio-economic status.

This Comment argues that providing all New York City public school students with a constitutionally mandated education requires both state and district-wide change. Part II will examine the scope of New York State's power over education by recounting the two most prominent education clause challenges in New York's history: *Board of Education, Levittown Union Free School District v. Nyquist* ("Levittown") and the thirteen-year *CFE* litigation. This Part will also consider the Court of Appeals' role in defining the education guarantee and its order to the state legislature to fix the school funding system to comply with constitutional requirements. Part III explores the State of New York's failure to carry out the Court of Appeals' order. Part IV discusses the ramifications of this failure on New York City's public school students, particularly the harm caused to at-risk students. Part IV will also address how New York City allocates its funds, the school structure, and the inequities of the public school system.

Part V proposes that, absent New York's acknowledgement of education as a fundamental right, protecting New York City public school students' educational rights requires two approaches. First, New York State must follow the *CFE* litigation requirements and restructure its education finance distribution system to better equip New York City to address the varying needs of its diverse pool of public school students. Second, the New York City Department of Education can help address the needs of failing school districts and at-risk students by reallocating funding to high-need schools and rezoning school districts to integrate students from different socio-economic backgrounds.

## II. THE SCOPE OF NEW YORK STATE'S POWER OVER EDUCATION

The Supreme Court's *San Antonio Independent School District v. Rodriguez* decision cut off plaintiffs from pursuing school finance litigation in federal courts.<sup>38</sup> Instead, plaintiffs must file claims in state courts to challenge the constitutionality of state education funding formulas.<sup>39</sup> To challenge a state's public school finance distribution formula as violating a state's constitutional education clause, plaintiffs must be able to illustrate the

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improving school quality. Clearly, money can be spent poorly and have limited influence on school quality. Or, money can be spent well and have substantive positive influence. *But money that's not there can't do either.*")

<sup>38</sup> See Buszin, *supra* note 19, at 1619.

<sup>39</sup> *Id.*

extent of the educational guarantee.<sup>40</sup> Occasionally, when an education article is unclear, states' highest courts define its scope in precedential decisions used by future plaintiffs to bring challenges forward against the state.<sup>41</sup> For example, in 1982, the New York Court of Appeals extended the reach of the New York State Constitution's Education Article<sup>42</sup> in *Levittown*—although it declined to hold education as a fundamental right.<sup>43</sup> Arguably, the *Levittown* decision opened the door for the lengthy *Campaign for Fiscal Equity* litigation that followed.<sup>44</sup>

#### A. *Establishing the Right to a “Sound, Basic Education”*

Prior to 1982, the New York State Education Article remained unchallenged. The *Rodriguez* decision, along with ongoing education adequacy litigation in various states,<sup>45</sup> laid the foundation for plaintiffs to contest the school finance distribution formula in New York.<sup>46</sup> *Levittown* was the first step in the long road to defining what constitutes an adequate education under the New York State Constitution.

The original *Levittown*<sup>47</sup> plaintiffs filed suit against the New York State Commissioner of Education arguing that the state school finance distribution system violated the equal protection clauses of both the State and Federal Constitutions.<sup>48</sup> The plaintiffs' claim was based on the proposition that wealthier school districts are able to provide more thorough, “enriched education programs” funded by a greater local tax revenue collected from property taxes.<sup>49</sup> The plaintiff-intervenors, comprised of four of New York's largest cities, claimed their cities were similarly situated to the “property-

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<sup>40</sup> See *supra* notes 14, 16 and accompanying text.

<sup>41</sup> See, e.g., *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *Abbott v. Burke*, 798 A.2d 602 (N.J. 2002).

<sup>42</sup> N.Y. CONST. art. XI, § 1.

<sup>43</sup> *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982).

<sup>44</sup> See *infra* Part I.B.

<sup>45</sup> See, e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Robinson v. Cahill*, 202 A.2d 273 (N.J. 1973); see also WOOD, *supra* note 17, at 65–68 (describing the *Serrano* and *Robinson* decisions and their effect on subsequent state school finance litigation).

<sup>46</sup> See Fred R. Green, *Board of Education v. Nyquist: A Keen Eye Views the Problems in New York's Educational Finance System*, 3 PACE L. REV. 621, 632 (1983).

<sup>47</sup> Originally, the *Levittown* lawsuit was brought by the boards of education of 27 different “property-poor” school districts in the State of New York as well as 12 students residing in one of those districts. After filing, another group of school districts and students along with the mayor of New York City, the Mayor of Syracuse, and two other cities in the state requested to intervene as plaintiffs. *Levittown*, 439 N.E.2d at 361.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 362.

poor” school districts because “metropolitan overburden”<sup>50</sup> made them unable to provide the same quality of education as other state school districts.<sup>51</sup> Together, plaintiffs and plaintiff-intervenors asserted that their respective districts were significantly unequal to the wealthier school districts, and the state school financing system failed to remedy the damaging differences.<sup>52</sup> Finally, the plaintiffs argued that regardless of the New York Court of Appeals decision on the equal protection challenge, the state school financing system violated the State Education Article, and thus was unconstitutional.<sup>53</sup>

First, the Court of Appeals compared the challenge made by plaintiffs in *Rodriguez* to the *Levittown* plaintiffs’ challenge.<sup>54</sup> The majority acknowledged the clear parallels in the two cases and reasoned that those similarities suggested rational basis review should be applied to the finance system, as it applied to an equal protection violation under the United States Constitution.<sup>55</sup> Ultimately, the court held that the federal equal protection claim must fail under the rational basis standard of review.<sup>56</sup> Next, the court declared that education is not a fundamental right guaranteed under the New York State Constitution.<sup>57</sup> The court analyzed the “fundamental right” question similarly to the Supreme Court in *Rodriguez* to reach this conclusion.<sup>58</sup> After acknowledging the importance of education and its impact on state and local revenues, the court found that the state did not

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<sup>50</sup> “Metropolitan overburden” is based on the theories of “municipal overburden” and “educational overburden.” “Municipal overburden” is the theory that education is but one of many municipal services the city must levy taxes on property to provide to its citizens. Spending for other municipal services is relatively high in cities to address the needs of the city’s presumably large low income, aged, and minority populations. Moreover, cities extract education and other municipal financing from the same fixed fund. Accordingly, cities must oftentimes spend less on education to provide adequate funding for other municipal services. See *Bd. of Educ. v. Nyquist*, 408 N.Y.S.2d 606, 620 (N.Y. Sup. Ct. 1978); Harvey E. Brazer & Therese A. McCarty, *Municipal Overburden: an Empirical Analysis*, 5 ECON. OF EDUC. REV. 353 (1986), <http://deepblue.lib.umich.edu/bitstream/handle/2027.42/26403/0000490.pdf&embedded=true?sequence=1>. “Educational overburden” is the theory that because costs are higher in metropolitan areas, the city education dollar is worth less than the rural education dollar. Moreover, the high rates of absenteeism and special needs students in metropolitan schools requires the city to provide further educational assistance, which costs more municipal dollars. See *Bd. of Educ.*, 408 N.Y.S.2d at 620; Fred R. Green, *Board of Education v. Nyquist: A Keen Eye Views the Problems in New York’s Educational Financing System*, 3 PACE L. REV. 621, 626–627 (1983), <http://digitalcommons.pace.edu/plr/vol3/iss3/13>.

<sup>51</sup> *Levittown*, 439 N.E.2d at 362.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 364–65.

<sup>55</sup> *Id.* at 365.

<sup>56</sup> *Id.*

<sup>57</sup> *Levittown*, 439 N.E.2d at 366.

<sup>58</sup> *See id.*



target a distinct class of individuals for discrimination.<sup>59</sup> Instead, the court found that the plaintiffs' claim asserted a difference between "units of local government," i.e., school districts.<sup>60</sup> By framing the parties in this light, the majority declared rational basis review to be the appropriate level of judicial scrutiny and upheld the state school financing system as it applied to the state equal protection clause.<sup>61</sup>

Just as the court was unwilling to acknowledge education as a fundamental right under the New York State Constitution, it was unwilling to read "equality" into the New York State Constitution's Education Article.<sup>62</sup> After examining the Education Article's history, the court found that the legislature intended to establish a minimum standard of education to be met by all schools within the state, not to ensure that all school facilities and districts would be equal.<sup>63</sup> Furthermore, the majority defined the word "education" to connote "a sound, basic education," and under this definition, held that the state school finance system was adequate.<sup>64</sup>

The *Levittown* decision is troubling for a couple of reasons. First, in reaffirming *Rodriguez*, the Court of Appeals gave additional judicial support to the idea that education is not a fundamental right under the Federal Constitution. Second, by declining to find a distinct class of citizens targeted for discrimination, the court essentially closed the door on school districts looking to bring equal protection claims against the state on behalf of disadvantaged students. The majority's narrow identification of the parties as governmental entities rather than human beings is appalling; although the plaintiffs constituted "school districts," those school districts are comprised of parents and *students*. Indeed, without parents or students, school districts would not exist. Still, despite these shortcomings, the majority gave subsequent plaintiffs a new litigation strategy: the ability to challenge the state's school finance distribution system under the broad right to "a sound, basic education." It is unclear whether the Court of Appeals realized that by defining the word "education" in the Education Article to mean a "sound, basic education" that it would provide a legal basis for future school finance

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<sup>59</sup> *Id.* ("No classification of persons is present in the case now before us, in which the claimed unequal treatment is among school districts resulting from disparity as to revenue available for educational purposes in consequence of unequal tax bases or unequal demands on local revenue.").

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* ("The claim is of discrimination between property-poor and property-wealthy school districts. No authority is cited to us, however, that discrimination between units of local government calls for other than rational basis scrutiny.").

<sup>62</sup> *Id.* at 368 (stating that the state's constitutional Education Article language "makes no reference to any requirement that the education to be made available be equal or substantially equivalent in every district.").

<sup>63</sup> *Levittown*, 439 N.E.2d at 368.

<sup>64</sup> *Id.* at 369.

claims, particularly the thirteen-year long *CFE* litigation.

B. *Reaching for Adequacy: Campaign for Fiscal Equity Litigation*

Although *Levittown* articulated a new judicial standard to apply to New York Education Article challenges, the scope of “a sound, basic education” remained unclear and undefined. In 2003, the Court of Appeals was pressured to address the standard’s meaning when it was confronted with a lengthy school finance litigation challenge.<sup>65</sup> Before exploring the court’s 2003 holding, it is important to provide a brief historical roadmap leading up to the court’s decision to aid one’s understanding of *Campaign for Fiscal Equity* litigation claims and complexities.

In 1993, nearly ten years after *Levittown*, Campaign for Fiscal Equity (“CFE”), a non-profit organization, filed suit against the state on behalf of New York City public school students and parents.<sup>66</sup> CFE rejected the *Levittown* plaintiffs’ strategy of using the fiscal disparities between school districts as the foundation for its education adequacy claim.<sup>67</sup> Instead, the plaintiffs’ complaint argued that nearly 1.1 million New York City public school students were denied the opportunity of “a sound, basic education.”<sup>68</sup> Plaintiffs supported this argument with evidence of inadequate school funding, but focused on the disparity between actual funding given to New York City for education and the feasibility of achieving an adequate education as mandated by the state’s constitution.<sup>69</sup>

Ultimately, the Court of Appeals declined to partake in “an exhaustive discussion and consideration of the meaning of a ‘sound, basic education,’” until a more thorough fact record was established and remanded the matter to the trial court.<sup>70</sup> The majority presented a template for the trial court to use in determining whether the State met its constitutional educational obligation: “whether the children . . . are in fact being provided the opportunity to acquire the basic literacy, calculating, and verbal skills necessary to enable them to function as civil participants capable of voting and serving as jurors.”<sup>71</sup> The court also instructed the trial court to use

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<sup>65</sup> See *CFE I*, 655 N.E.2d 661 (N.Y. 1995).

<sup>66</sup> *Id.*

<sup>67</sup> Merri Rosenberg, *Seeking More Money for Local Schools*, N.Y. TIMES (Jan. 18, 1998) <http://www.nytimes.com/1998/01/18/nyregion/seeking-more-money-for-local-schools.html>.

<sup>68</sup> N.Y., EDUC. L. CTR., <http://www.educationjustice.org/states/newyork/> (last visited Feb. 18, 2017).

<sup>69</sup> *CFE I*, 655 N.E.2d. at 667.

<sup>70</sup> *Id.* at 666. The court was not clear about the facts necessary to find the state violated the Education Article, but found that if more facts were presented, the plaintiffs could have a viable claim. *Id.* at 667–68.

<sup>71</sup> *Id.* at 668.

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education system “essentials”<sup>72</sup> to gauge educational adequacy.<sup>73</sup> Although the court did not thoroughly define the education standard, its decision provided the groundwork for the *CFE* plaintiffs to subsequently prove their case.

Intensive discovery and fact investigation ensued for four years after the Court of Appeals remanded the case and before the lower court commenced trial.<sup>74</sup> Finally, in January 2001, the trial court, using the “sound, basic education” standard, issued its decision that New York had consistently violated its constitutional Education Article.<sup>75</sup> The Appellate Division reversed after rejecting the trial court’s “sound, basic education” articulation and its educational inputs and outputs findings.<sup>76</sup> Plaintiffs appealed the Appellate Division’s decision and, accordingly, the Court of Appeals was once again challenged to define the scope of the standard.<sup>77</sup>

The 2003 Court of Appeals *CFE II* ruling provided the “exhaustive discussion and consideration of the meaning of a ‘sound, basic education’”<sup>78</sup> that the majority declined to entertain in *CFE I*. The court’s first task was to determine what constituted an *adequate* education. Unlike the lower court, the Court of Appeals refused to equate education adequacy with attaining a particular grade level,<sup>79</sup> but rather, broadly concluded that public school students are entitled to “the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants.”<sup>80</sup> To further elaborate on this standard, the majority underwent a lengthy analysis of the New York City public school educational inputs it instructed the trial court to consider in *CFE I*.<sup>81</sup>

In all three educational input categories the court analyzed, New York

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<sup>72</sup> The Court of Appeals listed “inputs” as minimally adequate physical facilities and classrooms, instrumentalities of learning (i.e. desks, chairs, pencils, and reasonably current textbooks), reasonably up-to-date curricula, and minimally adequate teaching of the curricula. *Id.* at 666. Yet, the Court of Appeals did not instruct the trial court to rely on educational “outputs,” specifically, standardized testing, because outside factors could influence test results. *Id.*

<sup>73</sup> *Id.* at 666.

<sup>74</sup> Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 346 (N.Y. 2003) (hereinafter “*CFE II*”).

<sup>75</sup> *Id.* at 328.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 329.

<sup>78</sup> *CFE I*, 655 N.E.2d. at 666.

<sup>79</sup> The Appellate Division focused on a portion of the Court of Appeals’ *CFE I* template, namely that the education provided should “enable [the students] to function as civil participants capable of voting and serving as jurors” to peg sometime between the eighth and ninth grade as adequate enough to meet the Education Article requirement. *CFE II*, 801 N.E.2d at 331.

<sup>80</sup> *Id.* at 332.

<sup>81</sup> *Id.* at 332–36.

City's public schools were inadequate.<sup>82</sup> The court found that New York City public schools struggled to attract and retain certified, qualified teachers.<sup>83</sup> Particularly, the schools with the lowest teacher quality were the city's lowest performing schools.<sup>84</sup> The Court of Appeals noted that the teaching quality correlates to the education quality,<sup>85</sup> and held that New York City provided deficient teaching to its public schools students.<sup>86</sup> In addition, the court found that the public school facilities and instrumentalities of learning<sup>87</sup> were inadequate.<sup>88</sup> Class sizes were above the federal and state suggested average,<sup>89</sup> the library books were minimal and out-of-date,<sup>90</sup> and the scarce computers were not equipped to use current software.<sup>91</sup> It was clear to the court that the general quality of education received by New York City public school students did not prepare them to live and serve as productive citizens after graduation. Accordingly, the court held that the inadequate inputs correlate to a "systemic failure."<sup>92</sup>

Despite finding a systemic failure after analyzing educational inputs, the court still required plaintiffs to establish a causal link between the state's school funding distribution system and the failure to provide a sound, basic education to New York City public school students.<sup>93</sup> "Educational outputs"<sup>94</sup> were important in this context. The court reasoned that high test scores and graduation rates may imply that students are receiving a sound, basic education despite inadequate educational inputs.<sup>95</sup> However, New York City's educational outputs did not satisfy the court.<sup>96</sup> For example, the city's public schools had a high dropout rate, and its test score results were

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<sup>82</sup> *Id.* at 336.

<sup>83</sup> *Id.* at 334.

<sup>84</sup> *Id.* at 333.

<sup>85</sup> *CFE II*, 801 N.E.2d at 334.

<sup>86</sup> *Id.*

<sup>87</sup> *See supra* note 72.

<sup>88</sup> *CFE II*, 801 N.E.2d. at 336.

<sup>89</sup> At the time of the decision, the average class size in New York City was roughly 26 students, but many schools had class sizes over 30. The state and federal "suggested" average was 20. The Court of Appeals did not identify a specific class size that would be appropriate, but merely found this to be a persuasive supporting fact in plaintiff's argument, particularly the correlation between large class sizes and lower educational outputs. *Id.* at 335.

<sup>90</sup> *Id.* at 336 (noting that there is a difference between "classic" and antiquated books).

<sup>91</sup> Acknowledging that access to computers has become essential, the Court of Appeals found the fact that New York City had about half as many computers per pupil as did other cities in New York compelling. *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 340.

<sup>94</sup> Here, the court focused on school completion rates and standardized test results. *CFE II*, 801 N.E.2d at 336–40.

<sup>95</sup> *Id.* at 336.

<sup>96</sup> *Id.*

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less than satisfactory.<sup>97</sup> Based on the totality of evidence, the court held that “whether measured by the outputs or the inputs, New York City schoolchildren are not receiving the constitutionally-mandated opportunity for a sound basic education.”<sup>98</sup>

### C. *The Original Remedy*

Defining a “sound, basic education” was only the first step in the Court of Appeals’ education adequacy holding. After declaring that the state funding system had violated the New York State Constitution’s Education Article, the court was confronted with the difficult task of articulating a specific remedy that would enable the legislature to meet its constitutional mandate.<sup>99</sup> Successful education rights challenges often require complicated remedies,<sup>100</sup> particularly because state school finance reform litigation encourages the court to entertain and frequently make policy determinations in an area that requires technical expertise.<sup>101</sup>

In *CFE II*, the New York Court of Appeals adopted an arguably middle ground approach to establish a remedy. First, the court directed the state legislature to find the funding level necessary to provide all New York City public school students with a sound, basic education.<sup>102</sup> The court also noted that the educational inputs and outputs needed to be evaluated to determine whether there is an improvement such that each public school provides its students with the constitutionally required education opportunity.<sup>103</sup> Acknowledging that these tasks required time and planning, the court gave New York until July 30, 2004, about a year after its decision, to implement a system that meets its constitutional education standard.<sup>104</sup>

In 2006, the Court of Appeals reviewed the governor and state legislatures’ proposed financing system.<sup>105</sup> Ultimately, in *CFE III*, the court concluded that the state’s estimated roughly \$2 billion New York City public school funding amount met the constitutional education requirement.<sup>106</sup> The

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<sup>97</sup> *Id.* at 337–41.

<sup>98</sup> *Id.* at 340.

<sup>99</sup> *Id.* at 344–45.

<sup>100</sup> *See, e.g.*, *Abbott v. Burke*, 798 A.2d 602 (N.J. 2002); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *see also* Randall T. Shepard, *State Constitutional Remedies and Judicial Exit Strategies*, 45 NEW ENG. L. REV. 879 (2011) (describing the difficulty in finding an appropriate remedy to state constitutional challenges).

<sup>101</sup> ANNA LUKEMEYER, *COURTS AS POLICYMAKERS: SCHOOL FINANCE REFORM LITIGATION* 8 (Eric Rise ed., 2003). *See infra* Part IV.A.

<sup>102</sup> *CFE II*, 801 N.E.2d at 348.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 349.

<sup>105</sup> *CFE III*, 861 N.E.2d 50 (N.Y. 2006).

<sup>106</sup> *Id.* at 57.

court made this decision after reviewing the state's executive and legislative branches' processes used to identify the amount.<sup>107</sup> Proponents of this ruling argued that that the figure was not enough.<sup>108</sup> In fact, the acting governor proposed a plan to increase New York City funding over the constitutionally mandated minimum.<sup>109</sup> However, the *CFE* litigation did not prevent the state from issuing additional funding; it merely set the floor for the funding amount required to meet the state's educational obligation.<sup>110</sup> Indeed, the court asserted that it would defer to policy choices traditionally left to the other branches.<sup>111</sup> This holding reaffirmed the principle that school finance litigation required the court to focus on adequate educational opportunity under the state's constitution as opposed to equal educational opportunity. Moreover, it suggests the court's adherence to principles of separation of powers and showed its reluctance to engage in future policy determinations.

### III. NEW YORK'S FAILURE TO CARRY OUT ITS EDUCATION OBLIGATION

Nearly ten years have passed since the Court of Appeals' 2006 *CFE III* decision. Although the court accepted the state's \$2 billion suggestion as adequate to satisfy the "sound, basic education" standard, the court's *CFE III* decision made clear that the court would not impose on matters traditionally controlled by the state legislative and executive branches.<sup>112</sup> Consequently, the decision, grounded in principles of separation of powers, left the plaintiffs' remedy in the hands of the same governmental bodies that failed to provide New York City public school students with the constitutionally required education opportunity in the first instance. It is not surprising, therefore, that these state bodies have not met their obligation. New York State has persistently failed to provide New York City with the court ordered \$2 billion for over ten years.<sup>113</sup> This reality essentially means that the injury claimed and affirmed in the entire thirteen-year long *CFE* litigation was never remediated. New York City public school children are still not guaranteed the opportunity to achieve the constitutionally mandated

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<sup>107</sup> See *id.* at 53–57.

<sup>108</sup> *Id.* at 56 (referring to the "Referees" that proposed a capital funding program that recommended "9.179 billion in 2004–2005 dollars" over the following five years).

<sup>109</sup> *Id.* at 55.

<sup>110</sup> See *id.* (emphasis added) (stating that the Governor "made it clear that he intended New York City schools to receive additional funding that *exceeded the minimum cost of a sound basic education.*").

<sup>111</sup> *CFE III*, 861 N.E.2d at 58 ("When we review the acts of the Legislature and the Executive, we do so to protect rights, not to make policy.").

<sup>112</sup> *Id.*

<sup>113</sup> Daniel Dromm, *Time to Support New York Students with Billions Still Owed from Campaign for Fiscal Equity*, GOTHAM GAZETTE (Jan. 25, 2016), <http://www.gothamgazette.com/city/130-opinion/6110-time-to-support-new-york-students-with-44-billion-still-owed-from-campaign-for-fiscal-equity>.

“sound, basic education.” Additionally, students that have entered into and graduated from the school system within the past ten years have been completely denied this constitutional minimum—a denial that the state is unable to remediate at some later date.

Although the state has faced pressure from the New York City Department of Education<sup>114</sup> and the threat of potential lawsuits,<sup>115</sup> it asserts it has not neglected the *CFE III* order. Instead, current New York governor Andrew Cuomo argues that the state spends more than the national average per student as it is and suggests more money is not the solution to fixing the school system.<sup>116</sup> The governor’s policy concern, while valid, does not negate the overarching constitutional concern: that failure to provide New York City with the court-ordered funding denies New York City public school students the opportunity of a sound, basic education, at least as that constitutional standard is presently understood and defined. Until the Court of Appeals hears and decides another state school finance case that defines this standard differently, New York is required to meet its present constitutional mandate.

This Part provides examples of New York State’s failure to provide the constitutionally mandated school-funding amount to New York City. This Part begins by explaining the state’s school budget formula and the amount it provides to New York City and concludes with a discussion about the state’s excuses offered to explain its failure to provide the court-ordered \$2 billion.

#### A. *Contracts for Excellence and Foundation Aid Formula*

After *CFE III*, New York adopted the Foundation Aid Formula as an attempt to comply with the court’s order to provide New York City public school students with a sound, basic education.<sup>117</sup> The \$5.5 billion committed

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<sup>114</sup> See Ned Hoskin & Joe Loverde, *Mulgrew, Farina Jab Cuomo in Albany*, UNITED FED’N OF TCHRS. (Feb. 5, 2015), <http://www.uft.org/news/mulgrew-farina-jab-cuomo-albany>; see also Jillian Jorgensen, *Bill de Blasio Touts Early Progress at Struggling City Schools*, OBSERVER (Mar. 10, 2015, 6:00 PM), <http://observer.com/2015/03/bill-de-blasio-touts-early-progress-at-struggling-city-schools/>.

<sup>115</sup> Currently, a new lawsuit attacking the state school finance distribution system has been filed in the Supreme Court of New York, New York County. *NYSER v. State of New York* seeks to reopen the argument that the state continues to deny New York City public school students their educational rights. See *infra* Part IV for a more thorough explanation of the NYSER lawsuit.

<sup>116</sup> See Matthew Hamilton, *Cuomo Dismisses Calls for More Education Funding, Quieter on Common Core*, CITY & ST. (Jan. 20, 2014), <http://archives.cityandstateny.com/cuomo-dismissed-calls-for-more-education-funding-quieter-on-common-core/>.

<sup>117</sup> *New York: ELC Advocacy for Education Rights*, EDUC. L. CTR., <http://www.edlawcenter.org/about/initiatives/new-york-elc-advocacy-for-education-rights.html> (last visited Feb. 18, 2017).

to Foundation Aid was to be distributed, per the formula, based on “student need factors including poverty, English language learner status, number of students with disabilities, as well as local level of poverty or wealth, based on income and property values.”<sup>118</sup> Part of Foundation Aid funding received by New York City is subject to the state’s “Contracts for Excellence.”<sup>119</sup> Under Contracts for Excellence, the city is required to direct the funds in three ways. First, the funds must support specific program initiatives, including reducing class sizes and investing more time in developing and retaining quality teachers.<sup>120</sup> Second, the funds must go to students with the highest educational need.<sup>121</sup> Finally, “the funds must supplement, not supplant.”<sup>122</sup> In other words, the New York City Department of Education remains responsible for providing funding for schools outside of the amount it receives from the state. Nonetheless, the state is required to provide the \$2 billion dollars ordered by the court to meet its constitutional obligation.

Instead of directing the money outright, the state adopted a “phase-in” program to allocate the funds over four years.<sup>123</sup> This program was never completed.<sup>124</sup> “Massive cuts” made for the 2010–2011 school year caused New York’s education funding to stagnate.<sup>125</sup> Under the current funding system, foundation aid is essential because it provides necessary funding to high-needs school districts.<sup>126</sup> Without this aid, New York City is unable to implement the Contracts for Excellence program.<sup>127</sup> Over the years, New York has offered various excuses for its reason to cut foundation aid, including the 2008 recession’s effect on its budget.<sup>128</sup>

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<sup>118</sup> MARINA MARCOU-O’MALLEY, BILLIONS BEHIND: NEW YORK STATE CONTINUES TO VIOLATE STUDENTS’ CONSTITUTIONAL RIGHTS (2014), <http://www.aqeny.org/wp-content/uploads/2014/08/REPORT-NY-Billions-Behind.pdf>.

<sup>119</sup> *Contracts for Excellence*, N.Y.C. DEP’T OF EDUC., <http://schools.nyc.gov/AboutUs/funding/c4e/default.htm> (last visited Apr. 18, 2017).

<sup>120</sup> N.Y.C. DEP’T OF EDUC., CONTRACTS FOR EXCELLENCE PROPOSED PLAN FY15 (2015), <http://schools.nyc.gov/NR/rdonlyres/CC107727-59A2-4311-A7B2-6DCA0DB0AFE4/165836/2015C4EBoroughPresentationFINALrev61814.pdf>.

<sup>121</sup> Students with the “greatest educational need” include English language learners, students in poverty, students with disabilities, and students with low academic achievement or at risk of not graduating. *Id.* at 4.

<sup>122</sup> *Id.*

<sup>123</sup> Michael A. Rebell, *CFE v. State of New York: Past, Present and Future*, 13 GOV’T L. & POL. J. 24 (2011).

<sup>124</sup> Commentary, Michael Borges, *Students Deserve the Benefit of Foundation Aid Funding*, TIMESUNION (Jan. 31, 2017, 3:18 PM), <http://www.timesunion.com/tuplus-opinion/article/Students-deserve-the-benefits-of-Foundation-Aid-10897674.php>.

<sup>125</sup> MARCOU-O’MALLEY, *supra* note 118, at 8.

<sup>126</sup> See *New York’s Students Need a Foundation for Success and Opportunity*, N.Y. ST. EDUC. CONF. BOARD, <http://www.nyscoss.org/img/uploads/file/ECB-School-Finance-Paper-2016.pdf> (last visited May 12, 2017).

<sup>127</sup> *Contracts for Excellence*, *supra* note 119.

<sup>128</sup> Borges, *supra* note 124.



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*B. The Recession Excuse*

In New York, the 2008 economic recession caused declines in employment and income, which in turn decreased the amount of tax revenue collected by the state.<sup>129</sup> Additionally, with more people out of work, the demand for social services increased.<sup>130</sup> Prior to the recession, New York relied heavily on tax revenue collected from the financial industry as well as personal income taxes.<sup>131</sup> Because the recession hurt both the financial industry and employment, New York was faced with the challenge to readjust its budget to address large budget gaps that resulted from these consequences.

New York froze foundation aid funding as a response to the economic concerns trickling down from the 2008 financial crisis.<sup>132</sup> The state's decision to freeze foundation aid deferred the scheduled payments it originally promised to New York that would be fulfilled by 2011.<sup>133</sup> As of this writing, the state owes New York City and other state school districts foundation aid funding totaling \$4.3 billion.<sup>134</sup> For New York City, this number totals above \$2 billion.<sup>135</sup>

New York has cut more than foundation funding from its school budget. Two years after the economic recession began, the state enacted the "Gap Elimination Adjustment" (GEA) as a measure to close New York's budget deficit.<sup>136</sup> The GEA was a formula that divided the state's school funding deficit among all state school districts by reducing each district's aid.<sup>137</sup> Consequently, the GEA caused state public schools to lose approximately \$8.5 billion in promised funding.<sup>138</sup> A report compiled by several educational coalitions indicates that high-needs school districts are most

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<sup>129</sup> Richard Dietz, et al., *The Recession's Impact on the State Budgets of New York and New Jersey*, 16 CURRENT ISSUES IN ECON. AND FIN. 1 (2010), [http://www.newyorkfed.org/research/current\\_issues/ci16-6.pdf](http://www.newyorkfed.org/research/current_issues/ci16-6.pdf).

<sup>130</sup> *Id.* at 3.

<sup>131</sup> *Id.* at 4.

<sup>132</sup> See OFFICE OF THE STATE COMPTROLLER, NEW YORK STATE SCHOOL AID: TWO PERSPECTIVES 4 (2016), <https://www.osc.state.ny.us/localgov/pubs/research/schoolaid2016.pdf>.

<sup>133</sup> See Rebell, *supra* note 123.

<sup>134</sup> See *FACT SHEET: Cuomo's Proposal to Repeal the Foundation Aid Commitment*, ALLIANCE FOR QUALITY EDUC. (Jan. 20, 2017), <http://www.aqeny.org/2017/01/fact-sheet-cuomos-proposal-to-repeal-the-foundation-aid-commitment/> (citing a figure calculated by the Board of Regents).

<sup>135</sup> See MARCOU-O'MALLEY, *supra* note 118.

<sup>136</sup> CAPITAL REGION BIOCES COMM. SERV., NEW YORK STATE GAP ELIMINATION ADJUSTMENT (2014), [http://www.greenisland.org/budget/PDFs/GEA\\_fs2014.pdf](http://www.greenisland.org/budget/PDFs/GEA_fs2014.pdf).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

impacted by the state's funding cuts.<sup>139</sup> Compared to New York's "Big Five" cities,<sup>140</sup> New York City experienced a more significant loss.<sup>141</sup> Specifically, the state owes New York City twice as much in unallocated funding than wealthier school districts.<sup>142</sup>

When the state gives less funding to school districts to provide for education, district leaders are forced to make difficult decisions about which educational programs to cut.<sup>143</sup> Public school principals are challenged to make cuts in their particular schools to minimize the state budget's impacts on education quality provided to their students.<sup>144</sup> Like smaller municipalities, many principals have had to cut various educational inputs described by the *CFE II* court, like teachers and new textbooks.<sup>145</sup> To avoid cutting these court-identified educational inputs, principals have been forced to eliminate other programs, including after-school activities, school-provided tutoring,<sup>146</sup> and arts and foreign language education.<sup>147</sup>

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<sup>139</sup> See *Rebell supra* note 123, at 5.

<sup>140</sup> The cities characterized as the "Big Five" in New York are New York City, Yonkers, Buffalo, Syracuse, and Rochester. See OFF. OF THE N.Y. ST. COMPTROLLER, FINANCING EDUCATION IN NEW YORK'S "BIG FIVE" CITIES (2005), <https://www.osc.state.ny.us/localgov/pubs/research/financingeducation.pdf>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Several school superintendents in the Southern Tier of New York, made up of the southern New York counties that border Pennsylvania, have argued that the GEA shifted the burden from the state to the municipalities to provide additional funding necessary to run their schools. Because education funding in smaller New York municipalities is funded through property taxes, the burden is actually shifted to the taxpayers. To lessen the burden, these districts have cut educational inputs (qualified teachers, new textbooks, up-to-date computers and technology). *Falling into the Gap: Local Schools Struggle with the Gap Elimination Adjustment*, MYTWINTIERS.COM (May 2, 2014, 6:56 PM) <http://www.mytwintiers.com/news/local-news/falling-into-the-gap-local-schools-struggle-with-the-gap-elimination-adjustment>.

<sup>144</sup> In 2011, Mayor Bloomberg introduced a plan to give principals more autonomy in their schools. One responsibility principals received as a result of more autonomy was the decision about what to cut to make up for budget deficiencies. See Fernanda Santos, *Lessons in Austerity: How City Principals Make Budgets Work*, N.Y. TIMES, (Aug. 17, 2011), <http://www.nytimes.com/2011/08/18/nyregion/five-new-york-city-school-principals-talk-budget-cuts.html?r=0>.

<sup>145</sup> *Id.*

<sup>146</sup> For example, tutoring program cuts have caused parents at Bedford Academy High School to initiate fundraising to restore its previously mandatory Saturday tutoring program, which purportedly increased school test scores. See Camille Bautista, *Brooklyn Parents Fundraise After Budget Cuts Slash Weekend Tutoring Program*, DNAINFO (Apr. 20, 2015, 4:10 PM), <http://www.dnainfo.com/new-york/20150420/bed-stuy/brooklyn-parents-fundraise-after-budget-cuts-slash-weekend-tutoring-program>.

<sup>147</sup> *Id.*; see also *Budget Cuts and Teacher Layoffs Threaten Arts Education in New York City Schools*, NY METRO PARENTS, <http://www.nymetroparents.com/article/Budget-Cuts-and-Teacher-Layoffs-Threaten-Arts-Education-in-New-York-City-Schools> (last visited Feb. 18, 2017); Winnie Hu, *Foreign Languages Fall as Schools Look for Cuts*, N.Y. TIMES (Sept. 11, 2009), <http://www.nytimes.com/2009/09/13/education/13language.html>.

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New York continued to use the GEA in its budget calculations for five years after it was enacted.<sup>148</sup> The GEA was intended to be a temporary response to the recession's impact on the state, and the districts were supposed to get the lost funding back the *following year*.<sup>149</sup> The state's 2015–2016 budget partially reduced the GEA,<sup>150</sup> and the recently enacted 2016–2017 budget projects to restore lost funding for every state school district by 2018.<sup>151</sup> Arguably, the GEA's elimination will alleviate some of the fiscal burden put on municipalities. But the GEA's elimination does not put municipalities in a better financial place than they were pre-GEA enactment—it merely puts them back in a pre-recession position.

In its explanation of the 2015–2016 school budget, the New York City Department of Education contended that New York State has and will continue to provide the city with \$2 billion *less* per year than the 2006 mandated *CFE* level.<sup>152</sup> The state has failed to provide the funding even after promising to phase-in the additional revenue over a four-year period.<sup>153</sup> In a “Contracts for Excellence” report for the 2014–2015 school year, the New York City Department of Education stated that its overall loss of *CFE* funds totaled \$15.1 billion.<sup>154</sup> With a total that high for New York City alone, it is highly unlikely that the state will ever realistically be able to make up the lost funds.

The new 2016–2017 budget is a step in the right direction, but only if the state follows through with its promises. Moreover, the budget's total increase in education expenditures is roughly \$400 million *less* than education expenditures in the 2008 budget.<sup>155</sup> Thus, the 2016–2017 budget does not restore education spending back to pre-recession levels, which were likewise below the constitutionally required amount. Even if the state could

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<sup>148</sup> *State Aid for Education: A Constitutional Analysis of the Enacted 2015-2016 New York State Budget*, CAMPAIGN FOR EDUC. EQUITY (Apr. 22, 2015), [http://educationalequityblog.org/2015/04/22/state-aid-for-education-a-constitutional-analysis-of-the-enacted-2015-2016-new-york-statebudget/?preview=true&preview\\_id=394&preview\\_nonce=931c5de85c](http://educationalequityblog.org/2015/04/22/state-aid-for-education-a-constitutional-analysis-of-the-enacted-2015-2016-new-york-statebudget/?preview=true&preview_id=394&preview_nonce=931c5de85c).

<sup>149</sup> See Dietz et al., *supra* note 129.

<sup>150</sup> Stephen King, *Budget Rundown: Reaction from Around the State*, EDUC. SPEAKS (Apr. 1, 2015), <http://educationspeaks.org/category/gap-elimination-adjustment/>.

<sup>151</sup> GOVERNOR ANDREW M. CUOMO, BUILT TO LEAD: FY 2017 EXECUTIVE BUDGET 60 (2016), <https://www.budget.ny.gov/pubs/archive/fy17archive/eBudget1617/fy1617littlebook/BriefingBook.pdf>.

<sup>152</sup> *2015-2016 School Budgets & Weighted Student Funding*, N.Y.C. DEP'T OF EDUC. (Apr. 2015), [http://schools.nyc.gov/offices/d\\_chanc\\_oper/budget/dbor/Budget\\_Publication/2016\\_Budget\\_Publication/2016\\_FSF\\_Proposal.pdf](http://schools.nyc.gov/offices/d_chanc_oper/budget/dbor/Budget_Publication/2016_Budget_Publication/2016_FSF_Proposal.pdf).

<sup>153</sup> *Id.*

<sup>154</sup> See N.Y.C. DEP'T OF EDUC., *supra* note 120, at 5.

<sup>155</sup> *Alliance for Quality Education: 2016-17 New York State Enacted Budget Analysis*, LONG ISLAND EXCHANGE (Apr. 11, 2016), <https://www.longislandexchange.com/press-releases/alliance-for-quality-education-2016-17-new-york-state-enacted-budget-analysis/>.

distribute the money historically lost and owed, that effort alone would not address meeting the needs to combat projected, rising amounts of overcrowding in New York City public schools. Likewise, restoring the lost funding would not relieve the state of its failing to provide a *CFE* defined adequate education to students that have already PASSED through New York City's education system.

#### IV. RAMIFICATIONS OF NEW YORK'S UNCONSTITUTIONAL PRACTICE ON NEW YORK CITY HIGH-NEEDS PUBLIC SCHOOL STUDENTS

New York's failure to meet its constitutional educational funding obligation disproportionately burdens New York City's high-needs public school students. According to the United States Department of Education, "high-needs students" include "students who are living in poverty, who attend high-minority schools . . . who are homeless, who are in foster care, . . . who have disabilities, or who are English language learners."<sup>156</sup> High-needs students generally fall into the category of "at-risk" because they have particular characteristics that increase their likelihood of failing or dropping out of school.<sup>157</sup> These students typically need additional resources to achieve academic success or to even compete on the same level as students who are not similarly situated.<sup>158</sup> A lack of educational resources is even more significant for students that have several intersecting "high-needs" characteristics where the degree of needed educational support is more likely to be much higher.<sup>159</sup>

Because of the high correlation between race and socio-economic status, African-American and Latino students are more likely to attend underfunded, majority-minority schools.<sup>160</sup> High-poverty, predominately minority student schools are more likely to have lower teacher quality,

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<sup>156</sup> *Race to the Top District Competition Draft: Definitions*, U.S. DEP'T OF EDUC., <http://www.ed.gov/race-top/district-competition/definitions> (last visited Feb. 18, 2017).

<sup>157</sup> One report done by the National Center for Educational Statistics identifies seven conceptual factors that relate to a student's at-risk status: student demographic background, family background, parental involvement, student academic history, student behavior, teachers' perceptions of the student, and school characteristics. See PHILLIP KAUFMAN ET AL., CHARACTERISTICS OF AT-RISK STUDENTS IN NELS:88 (1992), <http://nces.ed.gov/pubs92/92042.pdf>.

<sup>158</sup> CAMPAIGN FOR EDUC. EQUITY, REVIEWING RESOURCES ASSESSMENT OF THE AVAILABILITY OF BASIC EDUCATIONAL SOURCES IN HIGH-NEEDS NEW YORK CITY SCHOOLS 10–12 (2012), <http://www.equitycampaign.org/publications/safeguarding-students-educational-rights/Reviewing-Resources-Educational-ResourcesNYCSchools.pdf>.

<sup>159</sup> For example, an impoverished, homeless English-language learner will most likely need several different resources to support his or her competing educational needs (i.e. tutoring, free or reduced price lunch, etc.).

<sup>160</sup> See Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1474 (2007) (arguing that poverty conditions and law achievement levels of minority students correlates to higher dropout rates).

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inadequate funding, and higher dropout rates.<sup>161</sup> Thus, New York's failure to deliver the constitutional minimum amount of *CFE* funding falls disproportionately on New York City's large minority student population.

In *CFE II* the Court of Appeals clarified that the opportunity of "a sound, basic education" must be made available to all public school students of all socio-economic backgrounds.<sup>162</sup> Moreover, New York cannot recoil from this responsibility merely because socioeconomic factors independent of schools influence a child's ability to learn or because there are other legislative alternatives to addressing the student's needs.<sup>163</sup> New York, however, has failed the students that need them the most.

In 2015, New York State listed 178 "failing schools" in its 2015 Failing Schools Report.<sup>164</sup> Of those students that attend New York's failing schools, ninety-three percent are students of color and eighty-two percent are eligible for free or reduced lunch.<sup>165</sup> Sixty-two of those named failing schools are located in New York City.<sup>166</sup> Many high-needs students attend New York City's failing or low-performing schools, where the resources needed to guarantee them an adequate education are lacking. The state specifically intended to use its Contracts for Excellence program to increase the amount of funding and resources available to students with the highest educational need.<sup>167</sup> However, because New York froze foundation aid funding in 2010 and has yet to provide it to its public schools, thousands of New York City high-needs students have gone through the school system without the additional resources required for their success.

#### V. STATE AND DISTRICT-WIDE CHANGE

In the technological age, societal norms change and adjust to the influx of new advancements introduced each year. As societal norms change, so do our collective standards and understanding of rights, including our understanding of what constitutes an "adequate" education. Not

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<sup>161</sup> STILL SEGREGATED: HOW RACE AND POVERTY STYMIE THE RIGHT TO EDUCATION, THE LEADERSHIP CONFERENCE EDUCATION FUND 7 (2013), [http://civilrightsdocs.info/pdf/reports/Still\\_Segregated-Shadow\\_Report.pdf](http://civilrightsdocs.info/pdf/reports/Still_Segregated-Shadow_Report.pdf).

<sup>162</sup> Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 337 (N.Y. 2003).

<sup>163</sup> *Id.* at 341.

<sup>164</sup> THE STATE OF NEW YORK'S FAILING SCHOOLS: 2015 REPORT, OFFICE OF GOVERNOR ANDREW M. CUOMO 8, <http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYSFailingSchoolsReport.pdf>.

<sup>165</sup> *Id.*

<sup>166</sup> See Patrick Wall, *The State Names 62 NYC Schools That Must Quickly Improve or Face Takeover*, CHALKBEAT (July 16, 2015, 10:04 PM), <http://ny.chalkbeat.org/2015/07/16/the-state-names-62-nyc-schools-that-must-quickly-improve-or-face-takeover/#.VkZwI9-rRE4>.

<sup>167</sup> *Contracts for Excellence*, N.Y.C. DEP'T OF EDUC., <http://schools.nyc.gov/AboutUs/funding/c4e/default.htm> (last visited Apr. 18, 2017).

surprisingly, New York City is much different today than it was nearly ten years ago when the Court of Appeals handed down its *CFE III* decision. The cost of education per pupil has increased.<sup>168</sup> As of 2015, roughly seventy-seven percent of New York City school students were classified as living in poverty.<sup>169</sup> Moreover, most of New York City's public school students are minority students, and many of them attend de facto segregated schools.<sup>170</sup>

These observations are important in assessing the appropriate method to address the educational inequities that persist in New York City's education system. First, in terms of funding, because the cost of education has increased, it is most likely that the amount necessary to provide students with a sound, basic education has also increased. Thus, even if New York were to provide the New York City Department of Education with its long-overdue court-ordered \$2 billion dollars, the educational quality for many students will almost definitely fall short of the constitutional standard.

The pending *NYSER v. State of New York* lawsuit, if successful, will most likely bring these issues to the court's attention. NYSER filed suit against New York State to revive the *CFE* litigation's goal of holding the state accountable for not providing its students with the constitutionally mandated sound, basic education.<sup>171</sup> NYSER's goals are state-focused by seeking to

win a rapid court decision that will (1) provide immediate relief for schools by forcing the state to end unconstitutional practices that currently limit adequate funding for schools and (2) order new reforms to state education law and the state's school financing system to guarantee that now and for the future every school is provided the necessary funding, and every child receives a meaningful educational opportunity.<sup>172</sup>

This lawsuit is a necessary step in making sure the state complies with its constitutional obligation. However, the NYSER litigation's specific state focus does not address New York City's role in the funding scheme. State and district-wide change are necessary to address the long-standing and current challenges facing New York City's public school system and to

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<sup>168</sup> THE STATE OF NEW YORK'S FAILING SCHOOLS: 2015 REPORT, *supra* note 164, at 4.

<sup>169</sup> Suchi Saxena, *New York Public Schools: Small Steps in the Biggest District*, THE CENTURY FOUND. (Oct. 14, 2016), <https://tcf.org/content/report/new-york-city-public-schools/>.

<sup>170</sup> See MICHAEL HOLZMAN, A ROTTING APPLE: EDUCATION REDLINING IN NEW YORK CITY (2012), <http://www.otlcampaign.org/sites/default/files/resources/redlining-full-report.pdf>.

<sup>171</sup> *New Yorkers For Students' Educational Rights (NYSER) v. State of New York Frequently Asked Questions*, NYSER, [http://www.nycoss.org/img/uploads/file/NYSER\\_v\\_State\\_FAQs\\_2-10-14.pdf](http://www.nycoss.org/img/uploads/file/NYSER_v_State_FAQs_2-10-14.pdf) (last visited Feb. 18, 2017).

<sup>172</sup> *Id.*

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ensure that students are being afforded their constitutional educational rights. This is especially true because the NYSER litigation has not produced its desired “rapid” result.<sup>173</sup>

A. *The State*

New York spends more per pupil than any other state in the country.<sup>174</sup> Nevertheless, the state fails to meet its constitutional educational obligation for New York City public schools. Over ten years ago, the *CFE II* majority suggested that the New York Constitution’s Education Article does not compare the education of New York students to those in other states or the “national norm.”<sup>175</sup> Instead, the state’s success or failure to meet its constitutional educational obligation is based entirely on whether the state provides its students with a sound, basic education.<sup>176</sup> Thus, any statements made by the state regarding the amount New York spends on each student as compared to other states is completely irrelevant in determining whether New York has met its constitutional obligation.

The Court of Appeals did not indicate whether the constitutionally required \$2 billion was the appropriate amount for only a certain number of years, and after that time expired, the amount must be reconsidered. New York took it upon itself to create the phase-in program for funds calculated by the foundation aid formula,<sup>177</sup> but those four years have long since passed and the state has still not provided the funding.<sup>178</sup> Putting the phase-in program aside, the state has several different issues to address before it can implement a new funding plan.

First, the state must determine how much money will be adequate to meet its constitutional obligation. This number needs to take into account various factors that have caused the general cost of education to rise. For example, the number of public school students in New York City has increased since the 2003 decision, and will continue to increase over time.<sup>179</sup> Likewise, additional public schools have been created to address

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<sup>173</sup> NYSER’s Amended Complaint was filed on March 28, 2014. Amended Complaint, *NYSER v. State of New York*, (Sup. Ct. N.Y. 2014) (County Index No. 650450/2014), <http://nyser.org/wp-content/uploads/2015/12/NYSER-Complaint.pdf>. As of the date of this writing, the last update on the NYSER litigation was a blog post that described a public hearing to be held on the matter. *NYS Supreme Court Hearing on Students’ Educational Rights*, THE CAMPAIGN FOR EDUC. EQUITY (Oct. 19, 2015 1:38 PM), <http://www.equitycampaign.org/article.asp?id=10087>. Almost two years have passed since the original filing of the lawsuit.

<sup>174</sup> See THE STATE OF NEW YORK’S FAILING SCHOOLS: 2015 REPORT, *supra* note 164, at 4.

<sup>175</sup> *CFE II*, 801 N.E.2d at 339.

<sup>176</sup> *Id.*

<sup>177</sup> See *Rebell*, *supra* note 123 and accompanying text.

<sup>178</sup> See *Borges*, *supra* note 124.

<sup>179</sup> CLASS SIZE MATTERS, *supra* note 3, at 10–11.

overcrowding in original schools.<sup>180</sup> Both of these raise additional funding concerns that need to be taken into account when drawing up a new funding plan to ensure constitutional compliance.

Second, the state can consider passing additional legislation to address concerns it raised in the *CFE* litigation. One concern was that high-needs students come to school with preexisting conditions, such as socioeconomic disadvantage.<sup>181</sup> This concern points to a characteristic factor outside of the school system. The Court of Appeals has held that despite socioeconomic status and other at-home challenges students face, students do not come to school “uneducable” or “unfit to learn.”<sup>182</sup> Investing money in family is a policy option that the state and/or district may consider.<sup>183</sup> However, shifting some responsibility onto the family for poor educational outputs does not eliminate the state’s obligation to meet its constitutional requirements.<sup>184</sup> The state can introduce legislation to improve home-life conditions, such as directing state funding to anti-poverty efforts, increasing revenue for human service programs, and raising the state minimum wage.<sup>185</sup> However, in addition to its legislative efforts outside of school funding, the state must ensure it is meeting its constitutional *CFE* requirements.

Most importantly, the state must recognize that additional educational funding given to low performing, or “failing,” schools must be used thoughtfully by its municipalities to increase student achievement. New York should provide oversight to municipal education departments so the government is aware of how the funding is being allocated and should remain active in understanding local level allocation even when it provides the mandated *CFE* funds. Otherwise, the state could be held responsible for any municipal failings in providing students a sound, basic education.

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<sup>180</sup> See CLASS SIZE MATTERS, *supra* note 3, at 2 (noting the “hundreds of small schools . . . most of which have been inserted into existing buildings” that have been created in New York City).

<sup>181</sup> *CFE II*, 801 N.E.2d at 341.

<sup>182</sup> *Id.*

<sup>183</sup> See *id.* (“Decisions about spending priorities are indeed the Legislature’s province . . .”).

<sup>184</sup> This argument was raised in the trial court proceedings after *CFE I*. The Appellate Division acknowledged that the argument was compelling because it suggested that spending more money on education was not enough. Rather, curing educational inequities requires remedying socio-economic conditions facing at-risk New York City public school students. Campaign for Fiscal Equity, Inc. v. State, 744 N.Y.S.2d 130, 144 (N.Y. App. Div. 2002).

<sup>185</sup> *The State of New York “IS” Failing Schools New York Should Address the Major Reason Schools “Fail” – Child Poverty*, FISCAL POL’Y INST. (Mar. 17, 2015), <http://fiscalpolicy.org/wp-content/uploads/2015/03/Schools-and-poverty-brief-final-031715.pdf>.



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*B. The City*

In *CFE II*, the Court of Appeals asserted that, because New York City and its Department of Education are “agents of the state,” the state remains liable for any failures of the city to provide students with a sound, basic education.<sup>186</sup> Thus, the state must ensure New York City is doing its part to educate its citizens under the constitutional standard. Underlying this understanding of delegation is the presumption that the state is providing the city with the tools it needs to comply with constitutional requirements. Since the state has not met its own burden, one may argue that the city is unable to meet its burden. Although the state is not relieved of the responsibility to provide New York City with the appropriate funding to ensure a sound, basic education for all students, the city can take remedial measures to lessen the impact of the denial while it waits for the state to comply.

First, New York City must assess its own funding system. Specifically, where the city is directing the funding it actually receives from the state. New York City, like every school district, has an interest in ensuring its schools succeed. New York City, as a “failing” school district, receives more funding for schools than other districts in the state.<sup>187</sup> This fact, however, does not mean that the city is receiving the funding it needs to adequately address the competing educational needs of its students.<sup>188</sup> When New York City receives inadequate funding, it must make difficult decisions about where to direct resources and what resources to cut.<sup>189</sup> This task is challenging considering the city’s diverse pool of public school students.<sup>190</sup> Particular attention must be paid to school-level allocation, rather than district-wide allocation, to address the competing needs of students with different characteristics, especially poor, disabled, and English language learners, who may require various resources to achieve educational output goals.<sup>191</sup> Because of these varying needs, providing all students with a sound, basic education requires more than a blank check written out to each public school. Instead, New York City must address its educational input problem,

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<sup>186</sup> *CFE II*, 801 N.E.2d at 343.

<sup>187</sup> See THE STATE OF NEW YORK’S FAILING SCHOOLS: 2015 REPORT, *supra* note 164, at 9.

<sup>188</sup> This is especially true because this city has yet to receive its court-mandated CFE funds.

<sup>189</sup> See Fernanda Santos, *supra* note 144.

<sup>190</sup> See *Demographics of NYC Public Schools*, HUNTER C., <http://www.hunter.cuny.edu/school-of-education/ncate-accreditation/electronic-exhibit-room/standard-4/repository/files/demographics-of-nyc-public-schools> (last visited Feb. 15, 2016); see also *Diversity in New York City’s Schools*, DNAINFO N.Y., <https://editorial-ny.dnainfo.com/interactives/2014/12/diversity/diversity-frame.html> (last visited Feb. 15, 2016).

<sup>191</sup> AMY ELLEN SCHWARTZ ET AL., WHY DO SOME SCHOOLS GET MORE AND OTHERS LESS? AN EXAMINATION OF SCHOOL-FUNDING IN NEW YORK CITY 3 (2009), <http://steinhardt.nyu.edu/scmsAdmin/uploads/005/823/Why%20Do%20Some%20Schools%20Get%20More%20and%20Others%20Less.pdf>.

especially in high-needs schools: inadequate and poorly trained teachers, lack of minimal instructional time in basic subjects, lack of necessary books and technology, unsafe school environments, and lack of extra school support personnel.<sup>192</sup>

To better equip high-needs students with the educational resources needed to succeed in the competitive school choice system, New York City can address its current school structure, namely the zoning practices it uses to place students in public schools. Although New York City is the most diverse school district in the country, it is also the most segregated.<sup>193</sup> New York City's school zoning practices have generally—particularly for elementary and middle schools—kept impoverished students and students of color in underfunded and often failing schools.<sup>194</sup> A New York City public school student's educational success is largely determined on where he or she lives.<sup>195</sup> Not surprisingly, one report has demonstrated that the poorest New York City neighborhoods contain most of the city's low-performing schools<sup>196</sup> A student from a poor neighborhood, having no choice regarding where to attend elementary school, is most often sent to a school in the neighborhood where he or she lives. Statistics show that at schools identified as “failing,” “on average, less than eight percent of children were reading at grade level in 2015; eighty-eight percent of students were black or Latino; and students were also poorer, more likely to have learning disabilities, and less likely to be fluent in English than students at other city schools.”<sup>197</sup> Thus, low-income public school students are essentially placed on a disadvantaged track before they reach middle school.

New York City is divided into thirty-two geographic districts, which

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<sup>192</sup> MICHAEL REBELL ET AL., DEFICIENT RESOURCES: AN ANALYSIS OF THE AVAILABILITY OF BASIC EDUCATIONAL RESOURCES IN HIGH NEEDS SCHOOLS IN NEW YORK STATE SCHOOL DISTRICTS 58 (2013).

<sup>193</sup> See HOLZMAN, *supra* note 170; see also JOHN KUCSERA & GARY ORFIELD, NEW YORK STATE'S EXTREME SCHOOL SEGREGATION vi (2014), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norfler-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf>

<sup>194</sup> Some advocates explain school zoning as a “significant driver” behind school segregation. See Elizabeth A. Harris, *New York City Council to Look at School Segregation*, N.Y. TIMES (Oct. 21, 2014), <http://www.nytimes.com/2014/10/22/nyregion/new-york-city-council-to-look-at-school-segregation.html>.

<sup>195</sup> *Id.* (describing the “Opportunity to Learn Index,” which calculates educational success based on a student's residence and school district).

<sup>196</sup> See LOCAL 32BJ, FALLING FURTHER APART DECAYING SCHOOLS IN NEW YORK CITY'S POOREST NEIGHBORHOODS (2013), <http://www.seiu32bj.org/wp-content/uploads/2013/05/falling-further-apart1.pdf>.

<sup>197</sup> Meredith Kolodner, *The Convoluted Path to Improving New York City's Schools*, THE ATLANTIC (Feb. 9, 2017), <https://www.theatlantic.com/education/archive/2017/02/the-renewal-school-gamble/515985/>.

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are further divided into smaller zones.<sup>198</sup> These zones are used to determine the location and reach of public schools.<sup>199</sup> Zoned schools are “commonly found for elementary or middle schools,” which means students are placed in public schools found in their corresponding zone, typically the school closest to their place of residence.<sup>200</sup> Accordingly, students and parents of students living in these zones do not have a choice in determining where their child will spend their early years developing important literacy, mathematical, analytical, and social skills.

Only three New York City districts (Districts 1, 7, and 24) are designated “choice districts” that do not contain any zoned elementary and/or middle schools.<sup>201</sup> Students in these districts may rank their preferred schools in the district and are placed based on their applications according to “Admissions Priorities.”<sup>202</sup> The New York City Department of Education website and choice district directories do not describe how these choice districts were chosen.<sup>203</sup> However, each school choice district directory contains a section entitled “Meeting Your Child’s Needs” that describes how New York City public schools all have different programs and resources and stresses the importance of making a choice that would be best suited for an individual child’s needs.<sup>204</sup> Despite this emphasis by the city’s own education department, parents of students in zoned school districts do not have the option of choosing a public school that is best suited to serve their child’s educational needs. Instead, students in zoned school districts rely on forced chance: the slim possibility of attending a public school that may respond to their various educational needs.

Because the majority of New York City public elementary and middle schools fall into zoned school districts, parental “school choice” can only extend as far as uprooting to a zoned district with reportedly “good” zoned

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<sup>198</sup> *Guide to Understanding New York City Schools*, WNYC, <http://www.wnyc.org/schoolbook/guides/understanding/> (last visited Feb. 14, 2016).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> See DISTRICT 1 2015 KINDERGARTEN DIRECTORY, N.Y.C. DEP’T OF EDUC. (2015), [http://schools.nyc.gov/NR/ronlyres/2F286B2F-6EC5-4854-B4E7-C168A3367261/0/2015KChoiceDirectory\\_D1\\_010515.pdf](http://schools.nyc.gov/NR/ronlyres/2F286B2F-6EC5-4854-B4E7-C168A3367261/0/2015KChoiceDirectory_D1_010515.pdf); DISTRICT 7 2015 KINDERGARTEN DIRECTORY, N.Y.C. DEP’T OF EDUC. (2015), [http://schools.nyc.gov/NR/ronlyres/B0314F40-DD36-40F0-AC45-9E0B696806FF/0/2015KChoiceDirectory\\_D7\\_010515.pdf](http://schools.nyc.gov/NR/ronlyres/B0314F40-DD36-40F0-AC45-9E0B696806FF/0/2015KChoiceDirectory_D7_010515.pdf); DISTRICT 23 2015 KINDERGARTEN DIRECTORY, N.Y.C. DEP’T OF EDUC. (2015), [http://schools.nyc.gov/NR/ronlyres/24EEEB8D-41D5-4C60-916F-77E9984DF767/0/2015KChoiceDirectories\\_D23.pdf](http://schools.nyc.gov/NR/ronlyres/24EEEB8D-41D5-4C60-916F-77E9984DF767/0/2015KChoiceDirectories_D23.pdf).

<sup>203</sup> See THE N.Y.C. DEP’T OF EDUC., <http://schools.nyc.gov> (last visited Feb. 14, 2016); see also *id.*

<sup>204</sup> See, e.g., *supra* note 202.

schools,<sup>205</sup> switching to private school, or sending an application for their child in to a charter school.<sup>206</sup> Some parents have gone so far as renting apartments in zones where higher performing schools are located for a couple years—not surprisingly in higher-income neighborhoods (Upper East Side, Upper West Side, West Village, Midtown East, Tribeca)—to lock their children into a “good” school.<sup>207</sup> Once their children are locked in, these parents can move to a more affordable neighborhood, while their children remain at their original school.<sup>208</sup> This practice has caused school overcrowding in the city’s most coveted and financially savvy neighborhoods such that some zoned schools are forced to put students on a waitlist.<sup>209</sup> Nevertheless, relocating to a “good” school zone remains a popular option for middle to upper class parents who seek to avoid the trickle down effects of the state and the city’s inability to provide adequate education resources to all New York City public schools.<sup>210</sup>

But moving to a different area in the city is not an option for the majority of parents that live in areas zoned for low performing New York City public schools. In fact, sixty-seven percent of New York City public school students are eligible to receive free or reduced-price lunch,<sup>211</sup> which serves as an indicator of students living in families below the \$24,300 federal poverty line.<sup>212</sup> It is no surprise that indigent families cannot afford to rent even the smallest apartment in a neighborhood like the Upper West Side—where the average *studio* costs a little over two thousand dollars a month<sup>213</sup>—

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<sup>205</sup> Lucy Cohen Blatter, *The Buyer’s and Renter’s Guide to the NYC Elementary School Game*, BRICKUNDERGROUND (Dec. 31, 2015, 2:28 PM), [http://www.brickunderground.com/blog/2013/03/buyers\\_and\\_renters\\_guide\\_to\\_NYC\\_grade\\_schools](http://www.brickunderground.com/blog/2013/03/buyers_and_renters_guide_to_NYC_grade_schools).

<sup>206</sup> A thorough discussion on charter schools is outside of the scope of this Comment. For more information about New York City charter schools, see *About Charters: What Are Charter Schools*, THE N.Y.C. DEP’T OF EDUC., <http://schools.nyc.gov/community/charters/about/what.htm> (last visited Feb. 16, 2016).

<sup>207</sup> In New York City, a child is “locked” into a school once they are registered and start at that school. That means, as long as the student is brought to school and picked up, they can remain at that school until graduation—even if the child’s family moves. In other words, “once you’re in, you’re in.” See Blatter, *supra* note 205; see also Michelle Higgins, *The Get-Into-School Card*, N.Y. TIMES (May 3, 2013), [http://www.nytimes.com/2013/05/05/real-estate/your-address-as-get-into-school-card.html?\\_r=0](http://www.nytimes.com/2013/05/05/real-estate/your-address-as-get-into-school-card.html?_r=0).

<sup>208</sup> Blatter, *supra* note 205.

<sup>209</sup> Higgins, *supra* note 207.

<sup>210</sup> *Id.*

<sup>211</sup> NORM FRUCHTER ET AL., DEMOGRAPHICS AND PERFORMANCE IN NEW YORK CITY’S SCHOOL NETWORKS: AN INITIAL INQUIRY 42 (2015), <http://annenberginstitute.org/sites/default/files/product/697/files/NYCNetworksRpt2015.pdf>

<sup>212</sup> See *School Breakfast and Lunch Programs*, N.Y. ST., [http://otda.ny.gov/working\\_families/schoollunch.asp](http://otda.ny.gov/working_families/schoollunch.asp) (last visited Feb. 15, 2016); see also *Federal Poverty Level*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/federal-poverty-level-FPL/> (last visited Feb. 15, 2016).

<sup>213</sup> See, e.g., *Manhattan Rental Market Report*, MNS (Mar. 2017), <http://www.mns.com>

let alone send their children to private school.<sup>214</sup> The majority of these low-income families are minority groups. Thus, the effect of school zoning falls disproportionately on low-income, minority populations, who are most often forced to send their children to underperforming schools.

At the high school level, all New York City public school students purportedly participate in the “choice system.”<sup>215</sup> The choice system, implemented in 2004, eliminated the preexisting default school assignment system.<sup>216</sup> High school age students are now able to rank their top twelve programs they would like to attend.<sup>217</sup> One policy goal of the school choice plan was to achieve equity by providing disadvantaged families with the same opportunity as more advantaged families.<sup>218</sup> However, some reports indicate that the secondary school choice program has been compromised by the primary school zoning scheme.<sup>219</sup>

Like prestigious colleges, New York City’s high performing, specialized high schools typically choose students that will ensure this reputation stands and “disfavor those who are not high achieving or have behavioral problems, more often historically marginalized students.”<sup>220</sup> Instead of achieving equity, this system tends to perpetuate racial segregation in schools.<sup>221</sup> Not surprisingly, high-needs students are matched, on average, to lower performing schools more often than other students who grew up better positioned to meet demanding specialized high school standards.<sup>222</sup> Consequently, high-needs students, already disadvantaged by sub-par elementary and middle school education as well as the impediments placed upon them from socio-economic status and/or race, are further isolated by

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<sup>214</sup> Tuition for private kindergarten in New York City ranges between \$40,000–45,000. See Blatter, *supra* note 205.

<sup>215</sup> GROVER WHITEHURST & SARAH WHITFIELD, SCHOOL CHOICE AND SCHOOL PERFORMANCE IN NEW YORK CITY PUBLIC SCHOOLS – WILL THE PAST BE PROLOGUE? 5–6 (2013), <http://www.brookings.edu/~media/research/files/reports/2013/10/08-school-choice-in-new-york-city-whitehurst/school-choice-and-school-performance-in-nyc-public-schools.pdf>.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 6.

<sup>218</sup> *Id.* at 8.

<sup>219</sup> See Maurice Frumkin, *Why High School Admissions Actually Doesn’t Work For Many City Students – and How it Could*, CHALKBEAT N.Y. (Aug. 7, 2015), <http://ny.chalkbeat.org/2015/08/07/why-high-school-admissions-actually-doesnt-work-for-many-city-students-and-how-it-could/#.VsJjJMrJE4>.

<sup>220</sup> KUCSERA & ORFIELD, *supra* note 193, at 23.

<sup>221</sup> *Id.*

<sup>222</sup> LORI NATHANSON ET AL., HIGH SCHOOL CHOICE IN NEW YORK CITY: A REPORT ON THE SCHOOL CHOICES AND PLACEMENTS OF LOW-ACHIEVING STUDENTS (2013), <https://steinhardt.nyu.edu/scmsAdmin/media/users/ggg5/HSChoiceReport-April2013.pdf>.

the school choice system.<sup>223</sup> This systemic problem will not be fixed by increased funding alone. If New York City does not consider changing its school zoning structure and/or the “once you’re in, you’re in” policy<sup>224</sup> at the elementary level, low-income and minority students will likely still be denied the sound, basic education they are constitutionally guaranteed even after the city receives its court-mandated *CFE* school funding from the state.

Although New York City does not bear the ultimate burden of providing its public school students with a sound, basic education under the state’s constitution, the city cannot itself violate the students’ constitutional rights. The city has an interest in making a good faith effort to comply with the constitutional mandate. If it does, when the state falls short on funding, the city can point to the state for its own failure. If it does not, the state can hold the city responsible for its failure in ways that do not violate the constitution, like cutting money that the city receives for other municipal uses.<sup>225</sup> Most importantly, the New York City Department of Education is responsible for the roughly 1.1 million students in its school district.<sup>226</sup> This responsibility includes enforcing the rights guaranteed to its students. The city must address discrepancies in school-level allocation and how students are selected to attend particular public schools to ensure the implementation of *CFE* funding improves educational adequacy in the city’s lowest-performing schools.

## VI. CONCLUSION

In her *CFE II* majority opinion, Judge Kaye declared that attaining a high school level education “is now all but indispensable” for students to compete for jobs that enable them to support themselves.<sup>227</sup> This powerful assertion is more relevant today than it was in 2003. In an ever-growing, technology-dependent economy, attaining at least an *adequate* education is not only important, but also necessary to ensure each student will be able to compete for vocational opportunities in the global marketplace. As the current education system in New York stands, low-income, minority students are most at risk for being denied the chance to succeed. This chilling reality can be seen most significantly in New York City where the difference between the quality of life of the upper-class and the indigent is

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<sup>223</sup> *Id.*

<sup>224</sup> Higgins, *supra* note 207.

<sup>225</sup> See generally N.Y.C. BUDGET OFF., UNDERSTANDING NEW YORK CITY’S BUDGET A GUIDE (2013), <http://www.ibo.nyc.ny.us/iboreports/understandingthebudget.pdf> (indicating 17% of city budgetary money comes from “State Categorical Grants”).

<sup>226</sup> *About Us*, THE N.Y.C. DEP’T OF EDUC., <http://schools.nyc.gov/AboutUs/default.htm> (last visited May 12, 2017).

<sup>227</sup> *CFE II*, 801 N.E.2d 326, 331 (N.Y. 2003).

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apparent to anyone that takes the A train from East New York to the Upper West Side.

The educational outputs from underfunded, mismanaged, failing schools—lower test scores and higher dropout rates—are correlated to New York’s failure to address the education inequities that were brought to light thirteen years ago when the *CFE* plaintiffs filed suit. The state’s Foundation Funding and Contracts for Excellence plans have been nothing more than empty promises for thousands of students that have gone through the New York City public school system that lack the agency and political power to demand their constitutional right to adequate education. Until the New York legislative and executive branches overhaul the state’s funding system to address educational inequities and New York City changes its school zoning structure, many more New York City public school students will leave the system without the most basic skills required to be “productive” citizens and to “compete for jobs that enable them to support themselves.”<sup>228</sup>

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<sup>228</sup> *Id.*