To be Argued by:

Mark Gimpel

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: FIRST DEPARTMENT

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CAMPAIGN FOR FISCAL EQUITY, INC., et al.,        :

     :

Plaintiffs-Respondents,             :                     New York County

     :                    Index No. 111070/93

-against-                                                  :

     :

THE STATE OF NEW YORK, et al.,                          :

     :

Defendants-Appellants.            :

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**REPLY BRIEF FOR DEFENDANTS-APPELLANTS**

ELIOT SPITZER

Attorney General of the

State of New York

Attorney for Defendants-Appellants

120 Broadway

New York, New York 10271

(212) 416-8020

CAITLIN J. HALLIGAN

Solicitor General

MARK GIMPEL                                                        Dated: October 15, 2001

Deputy Solicitor General

MELANIE L. OXHORN

ALLISON PENN

DEON J. NOSSEL

SACHIN PANDYA

DAVID LAWRENCE III

Assistant Solicitors General

Of Counsel

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**PRELIMINARY STATEMENT**

At the heart of this appeal lies an important question about the proper roles of the legislature and the judiciary in our constitutional democracy.  The Court of Appeals recognized this in Levittown, when it declared that the “ultimate issue” in discerning the reach of the Education Article “is a disciplined perception of the proper role of the courts in the resolution of our State’s educational problems.”  Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27, 50 n.9 (1982) (“Levittown”).

Here, as is often the case, the temptation to abandon that discipline surely arises from the most honorable motives -- to improve the lot of New York City’s public school children and “fix” certain perceived problems in the City’s school system.   But ultimately, this temptation leads the judiciary to substitute its own vision of good and just policy for that of the popularly elected Legislature.  This is just what the court below did.    Plaintiffs had the burden of proving the educational funding system unconstitutional, and they did not meet that burden.   In yielding to its own preferences, however well-intentioned they might be, the court handed down a decision that is not only legally incorrect, but constitutionally dangerous and fraught with the peril of unintended consequences.

The risk of unintended consequences is particularly palpable in this case, because it involves a vast, virtually unprecedented claim on the State fisc.  Even under the non-exhaustive and “conservative” estimates made by the court below and the plaintiffs regarding the cost of curing the purported absence of a sound basic education, the remedy would require the State to provide billions of additional dollars each year to the City’s public schools.[[1]](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn1%22%20%5Co%20%22)  To place this in some perspective, in the recent budget stalemate between the Governor and the Legislature, the entire difference in proposed spending between the Governor and Democratic legislators was $2 billion.   See “Pataki Calls Legislature Back to Albany for Budget Bills,” Associated Press, Aug. 30, 2001.   If Justice DeGrasse’s order had been immediately implemented, it would likely have consumed that amount of public money without a single vote.

And of course, that money would have to come from other places.  It might mean less money for other school districts and for programs whose constituencies are not represented here.   Less funding might flow to other projects that benefit children and other groups, both in New York City and statewide.  Implementation of the trial court’s order would also likely necessitate an infusion of additional revenue into the State’s coffers.  But the difficult and contentious process of ordering priorities for spending large sums of the public’s money is a task for the Legislature, not a single judge.

Such a sweeping judicial incursion into the legislative sphere cannot be justified.  As demonstrated in the State’s main brief and elaborated upon below, the plaintiffs have failed, on issue after issue, to make the factual showings required to prove that New York City public education is constitutionally inadequate.  But it is important to recognize at the outset what are  perhaps the two most fundamental misconceptions underlying plaintiffs’ argument, and the two on which most of their errors rest:  their refusal to accept the qualitatively minimal nature of the constitutional standard, and their insistence that the State is the sole and absolute guarantor of educational quality.

First, in a characteristically false dichotomy, plaintiffs claim that the standard for a sound basic education is either their standard or “no standard at all.” Pl. Br.[[2]](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn2%22%20%5Co%20%22) at 135.  They ignore the possibility, and the reality, that the Constitution can impose a standard that is truly modest.  Indeed, the other most prominent affirmative obligation imposed by the New York Constitution, the “Aid to the Needy Clause,” does just that; it requires that the Legislature must provide someaid to the needy, but leaves the level of that aid entirely in the discretion of the Legislature.  See Tucker v. Toia, 43 N.Y.2d 1, 8 (1977).

The fact that the Education Article was intended to operate in an analogous manner is manifest both in its legislative history -- which unmistakably shows that it was meant not to provide courts a wide berth to determine what makes an education sound, but to gu1[0](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn3%22%20%5Co%20%22)arantee that basic standards be applied statewide -- and in the clear language of the Court of Appeals.   While the Court has articulated the truly minimal character of the Educational Article’s standard in several ways, perhaps the most concise and vivid description of the standard is in the Levittown court’s statement (quoted in CFE I) that if what the system makes available “may properly be said to constitute an education,” the standard is met.  Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307, 337 (1995) (“CFE I”) (quoting Levittown, 57 N.Y.2d at 48 n.7).    Plaintiffs cannot elude this reality with transparent attempts to bend the Court of Appeals’ opinion in CFE I into conformity with the trial court’s decision.  Such efforts cannot mask the fact that it is the trial court that failed to conform its opinion to the mandates of CFE I.

The trial court’s unwillingness to apply the Court of Appeals’ standard of “minima[l] adequa[cy]” colored its assessment of the facts presented at trial. The State’s witnesses established that New York City’s schools more than satisfy this standard with respect to the three categories of resources identified by the Court of Appeals: teachers, facilities, and instrumentalities of learning.  The State also demonstrated that New York City students perform well in absolute terms, and compared with large urban districts in New York and across the nation.  This evidence was sufficient to prevent plaintiffs from prevailing on their claim of constitutional inadequacy, but the trial court instead ruled for plaintiffs, based on testimony indicating only that the City’s schools could do better.

Second, working hand in glove with plaintiffs’ unduly expansive vision of the Education Article’s qualitative standard is their insistence, in derogation of the clear teachings of New York law and history, that the State’s responsibility for education is all and the locality’s nothing at all.

As CFE I made clear, the Legislature’s obligation under the Education Article is one of reasonable funding, not an insurance policy for localities that either squander funds sufficient to support a sound basic education, or fail to provide adequate local funds in the first instance.  At the time of the Education Article’s adoption, the State contributed just 19 percent of all monies spent for education.[3](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn4%22%20%5Co%20%22)   It is unimagineable that the framers intended that the State, which now funds more than 50% of New York City’s education spending, be susceptible to constitutional liability based on the failings of its localities in the project of local education.

Not only should the trial courts’ findings on plaintiffs’ Education Article claim be reversed, but plaintiffs’ attempt to assert their Title VI disparate impact claim under § 1983, in the wake of a Supreme Court decision barring them from doing so under Title VI itself, should be rejected.   See Alexander v. Sandoval, 121 S. Ct. 1511 (2001).  Regulations cannot by themselves give rise to enforceable legal rights.  And Sandoval’s holding, equally applicable in this context, that the disparate impact regulations do not fall within Title VI’s statutory proscription against intentional discrimination, precludes them from bringing a § 1983 claim.

Accordingly, this Court should reverse the trial court’s decision on both of plaintiffs’ claims, and enter judgment for the State.   Even if the Court were to find a violation of the Education Article, it should set aside the expansive remedy ordered by the trial court.  The court’s order is overbroad, unduly intrudes on the prerogatives of the Legislature to order State priorities and set educational policy, and threatens to undermine the principle of local control upon which New York’s public school system has rested since its advent.

**POINT I
TO PREVAIL AT TRIAL, PLAINTIFFS WERE REQUIRED TO SHOW BEYOND A REASONABLE DOUBT THAT NEW YORK CITY DOES NOT OFFER STUDENTS “MINIMALLY ADEQUATE” RESOURCES OR THE
                        OPPORTUNITY TO OBTAIN “BASIC” SKILLS**

Both plaintiffs’ proposed standards of proof and appellate review, and the trial court’s decision, rest on several critical errors of law.  First, plaintiffs have misstated the applicable standard of review.  In this case, as in any constitutional challenge, plaintiffs have the burden of proving unconstitutionality beyond a reasonable doubt, and on appeal, both legal and factual findings are subject to review by this Court.

Second, the trial court went far beyond the Court of Appeals’ standard of “minimal[ ] adequa[cy]” and other legal guidelines in evaluating plaintiffs’ Education Article claim.  The trial court asked not whether New York City’s schools are “minimally adequate,” but whether all students in those schools will excel.  While the highest standards are an admirable objective for education policymakers, precedent makes clear that the Education Article is not intended to guarantee their attainment.  By failing to consider whether the teachers, facilities, and instrumentalities of learning in New York City’s schools are “minimally” sufficient, the trial court went astray.  Plaintiffs have offered no persuasive arguments to the contrary; they have instead mischaracterized the State’s position and the trial court’s analysis, without taking into account the strong historical evidence of the provision’s limited purpose.  Nor can plaintiffs explain away the trial court’s disregard of other important parameters set forth by the Court of Appeals that narrow a judicial inquiry under the Education Article.  Because the trial court’s legal errors pervade its analysis, the court’s ruling on plaintiffs’ Education Article claim must be set aside, and judgment entered for the State.

**A.     Plaintiffs Had the Burden of Proving Unconstitutionality Beyond a Reasonable Doubt and this Court Can Review the Trial Court’s Findings of Fact.**

Although plaintiffs attempt to dismiss as “boilerplate” the well-established standards of proof and review governing this case, Pl. Br. at 118, those standards remain central to how this Court should assess the decision below.

At trial, plaintiffs had the heavy burden of demonstrating the unconstitutionality of the education funding laws beyond a reasonable doubt.  See Pringle v. Wolfe, 88 N.Y.2d 426, 431 (1996); Trump v. Perlee, 228 A.D.2d 367, 367 (1st Dep’t 1996).  This burden has attached to constitutional challenges for over a century.  See, e.g., People ex rel. Carter v. Rice, 135 N.Y. 473, 484 (1892) (“Before courts will deem it their duty to declare an act of the legislature void as in violation of some provision of the Constitution, a case must be presented in which there can be no rational doubt.  The incompatibility of the legislative enactment with the Constitution must be manifest and unequivocal.”)  This requirement is applied with stringency in cases that challenge public funding programs.  See Schultz v. State, 84 N.Y.2d 231, 241 (1994).

While plaintiffs claim this rule is of “questionable relevance” here, Pl. Br. at 119, their suggestion is simply wishful thinking.  While a “preponderance of the evidence” standard applies at trial to pure findings of fact, such as the average number of students in a classroom, plaintiffs brought a constitutional challenge and thus were required to persuade the trial court beyond a reasonable doubt with regard to mixed questions of law and fact, such as whether physical facilities, instrumentalities of learning, curricula, and teachers fall below the “minimally adequate” level, or whether a causal link exists between the present funding system and the alleged lack of a sound basic education, see CFE I, 86 N.Y.2d at 317-319.  This strong presumption of constitutionality preserves the deference due to the Legislature, a “coequal branch of government,” Schultz, 84 N.Y.2d at 241, and thus safeguards fundamental values of our constitutional democracy.

Plaintiffs’ substantial burden does not disappear because of purportedly “unusual” features of this appeal -- that the Court of Appeals gave the trial court “specific direction” regarding the issues to resolve, and that the trial was lengthy, with a voluminous record.  See Pl. Br. at 118.  No court has ever held that the presumptions governing constitutional challenges change depending on the length of the record or trial.

Plaintiffs also obfuscate the standard governing this Court’s review of the trial court’s findings of pure fact.  Plaintiffs cannot dispute this Court’s authority to review questions of fact.  See CPLR § 5501(c).  To be sure, in a non-jury trial, this Court may defer to findings of fact that turn in large part on witness credibility unless those findings of fact obviously could not be reached based on a fair interpretation of the evidence.  See Ashland Management Inc. v. Janien, 190 A.D.2d 591, 591 (1st Dep’t), aff’d , 82 N.Y.2d 395 (1993).  However, “where the findings in a non‑jury trial are based upon considerations other than the credibility of witnesses, such as documentary evidence” -- the bulk of the evidence presented in this case -- this Court has the authority to draw inferences and make findings of fact based upon evidence in the record.  Abrahami v. UPC Constr. Co., 224 A.D.2d 231, 233 (1st Dep’t 1996); see also Sutton v. Bank of New York, 250 A.D.2d 447, 447 (1st Dep’t 1998); Redcross v. State, 241 A.D.2d 787, 790 (3d Dep’t 1997).  As with the burden of proof, this authority to review findings of fact does not wax or wane depending upon the number of exhibits at trial or the number of pages in the trial court’s opinion.

**B.        The Standard for a Sound Basic Education, As Set Forth By the
Court of Appeals, Is One of “Minimal Adequacy.”**

The Court of Appeals has already held in this case that the constitutional mandate imposed on the Legislature by the Education Article is one of “minimal[ ] adequa[cy].” CFE I, 86 N.Y.2d at 317.  Indeed, the Education Article could not reasonably be construed to impose a higher standard, in light of its text and history.   The education offered by New York City’s schools must be “sound,” but it need only be “basic.”   Plaintiffs try to sidestep the narrow scope of this legal standard, instead seeking to install the courts as education policymakers.  The question before this Court, however, remains one of constitutional law.   Because the trial court did not abide by the standard of “minimal[ ] adequa[cy],” this Court should reverse and find that the State has complied with its obligation under the Education Article.

Plaintiffs first suggest that the State’s adherence to the Court of Appeals’ template deprives the Education Article of all substantive meaning.  See Pl. Br. at 120-121, 135-136.  The Court of Appeals in CFE I, however, settled the question of whether the Education Article has a substantive component, and the State openly acknowledged this holding in its initial brief.  See Def. Br. at 47.  What is at stake here is not whether the obligation imposed by the Education Article includes a substantive component, but the scope of that obligation.

The Court of Appeals itself has already defined the parameters of that obligation.  The State must “offer all children the opportunity of a sound basic education . . . [that] consist[s] of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.”  CFE I, 86 N.Y.2d at 316.  In outlining the “essentials” that must be provided to achieve this goal, the Court of Appeals repeatedly referred to “minimally adequate” resources. Id. at 317.

As the State demonstrated in its opening brief, see Def. Br.[4](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn5%22%20%5Co%20%22) at 28-32, the text of the Education Article and the history of its enactment explain why this constitutional mandate has a narrow scope.  The provision itself directs the State to “provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. Const. Art. XI, § 1.   As compared with other state constitutions, which guarantee a certain quality of education, New York’s Education Article contains no such obligation on its face; the duty to provide the opportunity for a sound basic education is itself an interpretative gloss added by the Court of Appeals.  The historical context of the Education Article also confirms the appropriateness of the Court of Appeals’ “minimally adequate” standard.  Adopted against a backdrop of substantial local contributions to education financing and strong local control over the administration of public schools, the provision was intended to ensure that a free public education would be available to students in communities that were otherwise unable to establish any schools whatsoever.  While it may be appropriate to provide New York City’s students with resources that far exceed this constitutional floor, plaintiffs cannot rely on the Education Article to achieve this result.

Rather than grappling with these limits on the scope of the Education Article, plaintiffs respond only that it is “dynamic.”  Pl. Br. at 136-139.   However, “dynamic” constitutional interpretation cannot justify a complete rewriting of a constitutional provision.  It does not allow plaintiffs or the trial court to disregard the Court of Appeals’ determination that the Education Article imposes a “minimal,” rather than an expansive, obligation on the Legislature.

In short, plaintiffs appear to disagree with the Court of Appeals’ determination that the Education Article mandates a “minimally adequate” education. Their analysis proceeds as if the State sought to impose this limitation by dint of persuasion, rather than because the Court of Appeals has construed the Education Article in this manner.   The trial court’s effort to raise the bar is a fundamental error of law that irreparably flaws its consideration of plaintiffs’ claim.

In a similar manner, plaintiffs and the trial court also ignore Court of Appeals precedent requiring plaintiffs to demonstrate the existence of a “gross and glaring” inadequacy in educational resources and student performance to prevail on an Education Article claim.  See Levittown, 57 N.Y.2d at 48; Reform Educational Financing Inequities Today v. Cuomo, 86 N.Y.2d 279, 284 (1995) (“REFIT”).  Nowhere in the trial court’s decision does this standard appear, and the court has made no inquiry into whether the City’s schools are “gross[ly]” deficient.

Instead of attempting to reconcile the trial court’s expansive application of the Education Article with the narrow scope of its protections, plaintiffs erroneously claim that the State’s arguments conflict with the Court of Appeals’ instructions to the trial court.  See Pl. Br. at 121-122, 140-142.  In CFE I, the Court of Appeals stated that, in light of the procedural posture of the case (a motion to dismiss), it would not “definitively specify what the constitutional concept and mandate of a sound basic education entails.”  86 N.Y.2d at 317.  It further noted that “[o]nly after discovery and the development of a factual record can this issue be fully evaluated and resolved.  . . . The trial court will have to evaluate whether the children in plaintiffs’ districts are in fact being provided the opportunity to acquire [a sound basic education.]” Id. at 317-18.

Plaintiffs suggest that this instruction gave the trial court free rein to decide what a sound basic education required.  The Court of Appeals, however, unequivocally laid out specific parameters that the trial court was to follow in resolving plaintiffs’ claim.  “[W]e articulate a template reflecting our judgment of what the trier of fact must consider in determining whether defendants have met their constitutional obligation.”  Id. at 317-18.  Explicitly included in that template was a standard of “minimal adequacy.”  The template also identified three types of resources that should be provided as part of a sound basic education:

                    “minimally adequate physical facilities and classrooms”

                    “minimally adequate instrumentalities of learning,” and

                    “minimally adequate teaching of reasonably up-to-date basic curricula.”

Id. at 317.

The trial court, however, went beyond this template.  The court identified seven categories of resources that it deemed relevant to determining whether students have the opportunity to receive a sound basic education.  See CFE Trial, 187 Misc.2d at 114-15; see also Pl. Br. at 140.   It then proceeded to determine the level of resources it believed necessary to comply with the Education Article’s mandate.  Contrary to what plaintiffs suggest, CFE I did not permit the court to require a level of resources that far exceeds the “minimally adequate” standard imposed by the Court of Appeals.

This second error of law  -- mandating resources without due regard to the standard of “minimal[ ] adequa[cy]” -- characterizes much of the trial court’s analysis.  For example, the trial court concluded that students cannot adequately learn in class sizes of more than 20, see 187 Misc. 2d at 53, without anywhere determining that students cannot learn effectively in classes of 22, or 25, or 28.   It criticized the quality of teaching in the City’s schools, partly on the grounds that New York City’s teachers attended less competitive colleges than the average public school teacher in the rest of the State, while ignoring that a higher percentage of the City’s teachers have more than a masters degree than their counterparts across the state, see id. at 30.

Not only does this aspect of the trial court’s analysis deviate from the Court of Appeals’ template, it also impermissibly installs the court as policymaker, resolving debates between experts regarding, for example, what constitutes an acceptable class size, or what type of computers should be provided.  As the Court of Appeals has held, courts should avoid this role.  Such an approach “require[s] the courts not merely to make judgments as to the validity of broad educational policies -- a course we have unalteringly eschewed in the past -- but, more importantly, to sit in review of the day-to-day implementation of these policies.”  Donohue v. Copaigue Union Free Sch. Dist., 47 N.Y.2d 440, 445 (1979).

The trial court also went beyond the Court of Appeals’ template in terms of the skills it identified as essential to a sound basic education.  While CFE Iheld that students must have an opportunity to obtain skills necessary to vote and serve on a jury, see 86 N.Y. 2d at 316, the trial court included skills necessary to find employment in the “high technology sector.”  187 Misc. 2d at 17.  Plaintiffs’ arguments on this point, see Pl. Br. at 122-130, suggest that citizens employed in the service sector are not competent voters or jurors.

In a more specific attempt to defend the exceptionally high standard by which the trial court evaluated New York City student performance, plaintiffs mistakenly assert that the trial court did not rely on the Regents Learning Standards (“RLS”) as an indicator of whether New York City’s schools provide the opportunity to obtain a sound basic education.  While the trial court initially disavowed reliance on the RLS, its analysis of student performance relied heavily on Regents exam scores.  Indeed, in examining the various diplomas, the court concluded that only those students who received a Regents diploma “actually demonstrate[d] that they received a sound basic education.”  187 Misc. 2d at 63.  The court ultimately defined a sound basic education in terms of the skill level needed to pass the Regents exams and found that students receiving only a local diploma (or its equivalent, a GED) had not demonstrated that they had obtained a sound basic education.  See infra at Point II.A.  Yet the Regents exams and Regents diploma are gauged to the RLS, which even the trial court acknowledged to be aspirational in some respects.  This critical part of the trial court’s analysis simply does not comport with the Court of Appeals’ standard of “minimally adequate” resources necessary to attain “basic skills.”

Plaintiffs alternatively try to justify the trial court’s reliance on the RLS by noting that the State has indicated its intent to rely upon the Regents exams as a measure of graduation competency.  Pl. Br. at 131.  As discussed below, the RLS go far beyond the basic skills that graduation competency tests have traditionally measured.  While these efforts by New York’s educators to encourage students to achieve at the highest levels are laudable, the standards exceed the level of “minimal[ ] adequa[cy]” demanded as a matter of constitutional law.  Nor does their adoption by the Regents transform them into the constitutionally-mandated floor.  As the Court of Appeals stated in CFE I, “because many of the Regents and Commissioner’s standards exceed notions of a minimally adequate or sound basic education -- some are also aspirational -- prudence should govern utilization of the Regents’ standards as benchmarks of educational adequacy.”  CFE I, 86 N.Y.2d at 317.  Moreover, the RLS did not go into effect until 1996 and have still not been fully implemented.  Whatever a sound basic education might mean, the Education Article should not be construed to require the development of a greater range or level of basic skills than the State required for graduation during the relevant time period.

Finally, plaintiffs cannot explain away the trial court’s evasion of important constraints on adjudication of an Education Article claim.  As the State has already demonstrated, a judicial inquiry into the constitutional adequacy of a school system must be guided by four principles:

                    Plaintiffs must show that any deficiencies are the result of a systemic problem, rather than identifying isolated instances of problems in particular schools;

                    Plaintiffs may not rely on evidence of disparities among school districts;

                    Schools are not responsible as a matter of constitutional law for remedying all deficiencies in student performance that are attributable to factors external to the school system; and

                    Courts must adhere to a presumption that meeting statewide minimum requirements for school resources and performance demonstrates constitutional adequacy.

Def. Br. at 60-64.  For the reasons detailed in the opening brief, see id. at 63-64 and Pt. II, infra, the trial court did not adhere to these guideposts.

Plaintiffs’ efforts to dispute the validity of these principles or to portray the trial court as complying with them are not persuasive.  First, plaintiffs argue that the testimony of school superintendents and city officials constitutes “systemic” evidence, even though much of this testimony consisted of anecdotes offered by plaintiffs’ witnesses regarding conditions at particular schools -- some of which were at odds with other out-of-court statements made by those same witnesses.  Second, plaintiffs contend that the extensive evidence comparing New York City schools to their suburban counterparts, see CFE Trial, 187 Misc. 2d at 26-36, was “specific and limited,” Pl. Br. at 157.  The evidence of disparities relied upon by the trial court was far from limited, and when it is set to one side, the remaining evidence that the trial court referenced in support of its findings of inadequacy cannot pass muster.  Third, contrary to plaintiffs’ characterization, the State does not claim that New York City should “give up” on poor or disadvantaged children, Pl. Br. at 158, but instead demonstrates that the Education Article does not require schools, standing alone, to fully compensate for all external factors that may affect student achievement.  Fourth, as explained above, by relying upon the RLS  -- which still are not fully implemented -- as the relevant indicator of educational adequacy, the trial court ignored the minimum requirements -- the RCTs -- that were fully in place for the overwhelming duration of this litigation, and whose standards have consistently been met by New York City students.

In sum, the State agrees with plaintiffs that the Education Article does impose a substantive obligation to provide a sound basic education.  That obligation, however, is to make available “minimally adequate” educational resources.  Whatever policy experts may conclude about how we might best educate our children, the Constitution speaks only to this floor of “minimal[ ] adequa[cy],” and the Education Article cannot be stretched further.

**POINT II
THE EVIDENCE AT TRIAL DID NOT DEMONSTRATE A GROSS AND GLARING INADEQUACY IN THE CITY SCHOOL SYSTEM’S TEACHERS, FACILITIES, OR OTHER RESOURCES ESSENTIAL FOR AN EDUCATION**

            As described in the opening brief, the evidence at trial demonstrated the constitutional adequacy of teaching and learning in New York City’s schools -- a system that BOE chancellors and leaders have themselves described as “the finest large, urban public school system in the nation.”  DX 10136; T.2403-04 Spence; T.11339 Levy.  Plaintiffs failed to establish that any resource recognized by the Court of Appeals as essential to education was so grossly and glaringly deficient as to prevent teaching and learning of basic literacy, math, and verbal skills.  The State’s evidence showed that teachers in New York City were providing a sound basic skills education and were more than minimally qualified by any relevant measure, including evaluations of schools and of individual teacher performance, teaching licenses, educational background, experience, and teacher-student ratios.  Objective, system-wide data generated by or on behalf of BOE  showed that the City’s school facilities, while in need of repair, were on the whole in fair or better condition, could accommodate the student body, and provided a physical environment in which City students could learn.  Finally, the evidence showed that the quantity and quality of textbooks, classroom supplies and materials, libraries, and instructional technology had been evaluated positively by BOE and the Chancellor, were consistent with resources in schools nationwide, and were fully capable of supporting teaching and learning of basic literacy, math and verbal skills.

The trial evidence regarding student performance confirms this conclusion.  The evidence showed that City students performed near, at, or above the national average on nationally-normed tests aligned with BOE’s curriculum.  It also showed that the City’s students performed close to the statewide average on minimum competency tests used by the State to measure graduation skills, and better than average as compared with the State’s other large urban school districts.   Plaintiffs’ response -- to attempt to impugn the usefulness of such tests as indicators of minimum competency in basic skills -- ignores the fact that the State itself relied upon these tests during the time period in question.  Because student performance rebuts plaintiffs’ claim of a gross and glaring deficiency in educational resources, plaintiffs did not meet their burden of proving an Education Article violation.

**A.**       **The Evidence Regarding the City School System’s Teachers, Facilities, and Instrumentalities of Learning Failed to Conclusively Show a Gross and Glaring Inadequacy in Resources Essential for a Sound Basic Education.**

Far from conclusively establishing a gross and glaring deficiency in any resource that the Court of Appeals indicated was essential, the evidence below actually demonstrated that the teachers, curricula, facilities, class sizes, and instrumentalities of learning available in the City school system were fully capable of allowing students to obtain a sound basic education, and no less adequate than the resources generally available in large urban school districts throughout the country.  In fact, not only did BOE spend enough money to provide satisfactory basic resources, it also had the resources needed to make various special programs available to the City’s students.

**1.**        **Teachers and Curriculum**

Plaintiffs have failed to substantiate their claim that the City’s hardworking, dedicated “teaching force as a whole is not competent to do its job.”  Pl. Br. at 52.  Plaintiffs ask this Court to disregard BOE’s own evaluations which demonstrate that the City’s teachers are more than “minimally adequate.”  They would have this Court rely instead upon disparities between the credentials of City teachers and those of teachers in the rest of the State (as did the trial court), but this evidence cannot support an Education Article claim.   Nor was the direct evidence at trial regarding teacher qualifications sufficient to carry plaintiffs’ burden of showing that the City’s teachers are not “minimally adequate.”   Moreover, plaintiffs’ further attacks on BOE’s curriculum lack evidentiary support.

As the opening brief described, the only direct systemic observations of the quality of teaching in New York City’s public schools ‑‑ the PASS reviews and annual teacher performance reviews and the PASS reviews ‑‑ demonstrated that the teaching was adequate or better.  See Def. Br. at 67‑69.  The PASS reviews showed that, on average, schools were performing between an “exemplary” and “approaching exemplary” standard in the area of instruction. The teacher evaluations showed that less than one percent of all teachers were deemed “unsatisfactory” in their direct reviews.  Id. at 67-69.   As  BOE and Chancellor Levy have concluded elsewhere, “[t]he vast majority of teachers in the New York City public schools provide high quality educational experiences for their students,” and “the vast majority of [New York City’s] teaching force . . . are gifted professionals.”  DX 10453, p.2; DX 19469, p. 7.

Plaintiffs attack the PASS review process as created only for the purpose of evaluating low-performing schools, or as being highly subjective in nature,see Pl. Br. at 94, but they do  not address why these assertions are still valid following recent reforms of the PASS review process.  See  T.10644-45 Tobias; PX 2379, pp. 12-14.  Plaintiffs also claim that the standards for teacher evaluations are too low, see Pl. Br. at 65-66, but do not explain how they deviate from the Court of Appeals’ standard.

In the face of these favorable PASS reviews and teacher evaluations, plaintiffs identify several specific criteria as relevant to teacher quality, but with respect to each of these, plaintiffs did not demonstrate that the City’s teachers lack “minima[l] adequa[cy.]”  As the State previously demonstrated, Def. Br. at 69, the vast majority of City teachers were State-certified.  All persons allowed to teach in the City (including uncertified teachers) were licensed by the State and found “qualified” by BOE to teach in their assigned areas.  Id. at 70.  The City’s teachers are well-educated; approximately 75% have a Masters’ degree, as compared with 47% nationwide.  Id. at 71.  In addition, the City spent almost $3,000 per teacher per year on professional development, more than what other large urban districts spent.  Id. Finally, the City has a sufficient supply of teachers: there were enough available so that, even excluding uncertified teachers, there was one teacher available for every 14 students – a student teacher ratio lower than the national average and substantially lower than the ratio in many large urban districts.  DX 19048; T.16242 Murphy.

 Plaintiffs’ responses , see Pl. Br. at 51-66, are unavailing.  Plaintiffs contend that a higher percentage of City teachers are uncertified than in other parts of the State, that City teachers tend to have fewer years of experience and lower scores on certification exams, and that they come from “less-competitive” colleges than teachers in the rest of the State.  But this evidence of disparities cannot be relied upon to show a violation of the Education Article.  Nor do plaintiffs address how this evidence could demonstrate a gross and glaring deficiency.  For example, plaintiffs complain about the City teachers’ educational experience and background, but do not explain why a system in which teachers have 13 years of median experience, with 75% of the teachers attending “competitive” colleges, precludes “minimally adequate” teaching, but a system in which teachers have 16 years of median teaching experience, with 83% attending competitive colleges, is acceptable.  See Def. Br. at 70; T.4580 Lankford.

Moreover, plaintiffs ignore the fact that many decisions directly affecting the quality of teaching in New York City are made not by the State, but by local officials.  For example, according to plaintiffs’ own experts, as a result of BOE’s “dysfunctional and cumbersome” hiring procedures, “well-prepared teachers are discouraged from applying for jobs.”  DTEV Tab 10, ¶¶ 366-369; PX1870, p. 19; PX1874, p. 37.  Similarly, BOE is responsible for assigning its teachers to local districts and schools.  Rather than attempt to direct better-qualified teachers to low-performing schools, BOE permits experienced teachers to transfer out of schools that may be difficult to staff.  PX 1155, p. 116.

Finally, plaintiffs also attack BOE’s curriculum, on the ground that it is not adequately taught.  See Pl. Br. at 75-76.  For the most part, this argument simply amounts to a reiteration of their complaints about teacher quality, which are unpersuasive.  More specifically, plaintiffs also claim that the City’s schools lack enough qualified teachers to provide instruction for English Language Learners (“ELLs”) and special education students.  This argument mischaracterizes the evidence.  At trial, plaintiffs’ own witness, Dr. Lillian Hernandez, acknowledged that she had visited many bilingual and ESL classrooms in the City’s schools and found that “[t]he majority of the programs” “offer high caliber instruction”  “in alignment with the new standards” adopted by BOE.  T.9209-10 Hernandez.  Similarly, the evidence showed that BOE has been spending over 20 percent more per special education student than is spent in the rest of the State, and has been placing many non-disabled students in special education.  DX11170, p.1; DTEV Tab 10, ¶ 438.  Plaintiffs also claim that the City’s schools offer only limited instruction in non-core subjects like arts and physical education, but even plaintiffs acknowledge (as did the trial court) that these subjects are not required for a sound basic education, and that such instruction is available in many (if not all) schools.

**2.**        **Facilities and Classrooms**

While the evidence at trial showed that, as in any institution, regular maintenance of the City’s schools is required, and even that in certain cases schools may be more crowded or in need of repair than would be desirable, plaintiffs did not show that the City’s schools lack “minimally adequate” facilities necessary for children to learn.  In fact, their claim that the physical condition or capacity of the City’s school facilities as a whole is so deficient as to prevent students from obtaining an education was contradicted by the evidence at trial.

For example, as the State previously noted, see Def. Br. at 77, an exhaustive survey of the City schools completed for BOE (the “BCAS” survey) showed all but a small percentage of building components to be in at least fair condition.  This conclusion was independently confirmed by the State’s expert by analyzing the BCAS data on the basis of repair costs per square foot.  In addition, there was no evidence that even in those buildings most in need of repair, students could not learn basic skills as a result of poor facility conditions.  Moreover, relying on BOE studies, the State’s experts demonstrated at trial that City schools could reasonably accommodate the actual number of children in classrooms on a typical day (even if some schools were failing to utilize their space effectively).

            Plaintiffs’ responses, see Pl. Br. at 33-34, do not successfully rebut this evidence or allow them to meet their burden of proof.  Plaintiffs argue that the few building components rated less than fair in the BCAS survey might have been more important than the components rated fair or better, but it was plaintiffs’ burden to present concrete evidence that these components were so important (for example, roofs or boilers, as compared to more minor items) as to reveal a gross and glaring systemic deficiency.  Plaintiffs also point to anecdotes presented at trial about isolated deficiencies in certain facilities.  But even if plaintiffs have identified specific problems at particular schools that should be remedied, this evidence cannot meet their burden of demonstrating system-wide deficiencies serious enough to interfere with learning.

Finally, as to class size, plaintiffs essentially contend that class sizes of 20 students or less are generally required for effective teaching and learning, that even smaller classes are required to address the needs of the City’s at-risk students, and, consequently, that average City class sizes between 26 and 29 students are inadequate to provide a sound basic education.   See Pl. Br. at 44-51.  However, as the State previously showed, Def. Br. at 72-74-- and plaintiffs do not refute -- the City’s class sizes were consistent with prevailing class sizes nationwide and permitted effective learning of basic skills, as evidenced by satisfactory City student test scores, see Point II.B, infra, as well as by the performance of similarly situated students enrolled in the City’s Catholic schools, who achieve superior State test results despite having even larger average class sizes.  As with facilities generally, plaintiffs’ lengthy discussion of why smaller class sizes might be desirable fails to meet their burden of showing that smaller sizes are essential to a minimally adequate educational program.

**3.**        **Instrumentalities of Learning**

Finally, as the State has previously shown, Def. Br. at 74-76, plaintiffs’ assertion that the City school system was so deficient in essential instrumentalities of learning as to deprive students of the opportunity for a sound basic education was again refuted by the record.  Indeed, the trial court found little non-anecdotal evidence of the City’s alleged lack of classroom supplies and equipment, and acknowledged that there was sufficient funding for textbooks during the relevant time period.  In addition, BOE itself rated the City school system’s classroom supplies and materials (including desks, chairs, pencils, and textbooks) to be near or at “exemplary” levels, and had documented its purchase of enough specialized equipment to bring the computer / student ratio to a level that equaled or exceeded the ratio prevailing nationally.  Finally, Chancellor Crew referred to the City school system as “one of the most technologically advanced in the nation.”

Plaintiffs’ response, see Pl. Br. at 68-75, relying largely on anecdotal evidence, fails to show that the City’s school system is lacking in “minimally adequate” instrumentalities of learning.  Thus, plaintiffs’ isolated examples of outdated library books and insufficient classroom supplies fail to establish system-wide deficiencies that deprive students of the possibility of a sound basic education.  Moreover, plaintiffs contend that recent increases in spending on textbooks and technology may not continue, but speculation of this sort cannot suffice to establish an Education Article violation.

**4.**        **Special Programs**

Plaintiffs also criticize the City school system for purportedly failing to provide “special” programs to enhance learning by the City’s predominantly at-risk student population.  See Pl. Br. at 26-33.  Such programs are not specifically mentioned in the Court of Appeals’ template.  Moreover, the evidence at trial raised a doubt as to whether the special programs identified by plaintiffs would actually make a difference in student learning.  See, e.g., PX2172, pp. 31-34; PX2176; DX19301; DX19302; T.0018-26 Casey; T.17097-104 Walberg.  But, assuming the value of such programs, the State demonstrated that BOE has had the funding necessary to provide a number of such programs, including: (1) universal pre-kindergarten classes; (2) class size reductions in grades K-3; (3) summer school; and (4) special reading programs.  See DTEV Tab 11, ¶¶ 527-37.  In addition, the evidence revealed that there was enough money available to provide Success for All for every child found to be in need of that program.  DX10021-51, pp. BOE22082-89.

In sum, plaintiffs have failed to conclusively demonstrate that the City’s public school system has a gross and glaring inadequacy in one or more of the resources recognized as essential for a sound basic education.

**B.     City Student Performance at the National and Statewide Averages on Math and Reading Tests Administered by the State and City During the Relevant Time Period Rebuts Plaintiffs’ Claim That the City School System Denied Students the Resources They Needed for a Sound Basic Education.**

As demonstrated in the State’s opening brief (see Def. Br. at 81-84), the overall performance of City students on standardized tests demonstrates that the City school system is providing City students with the opportunity for a sound basic education.

Through 1998, the preeminent accountability measure in New York City schools were the standardized, nationally-normed tests that were administered to children in grades 3‑8. DTEV Tab 11, ¶  254.  City students consistently performed near, at, or above the national average on these tests – performance that far exceeded that of students in other large urban school systems or systems with demographics similar to New York City’s.  DTEV Tab 11, ¶¶ 261‑263. While plaintiffs complain about the norming process used for these tests, the norms were selected using a rigorous and accurate sampling, and by employing state‑of‑the‑art procedures to obtain the best estimate of how the average student nationwide performs.  T.10453‑54, T.10489 Tobias; T.18466, T.18473 Mehrens.  Moreover, BOE selected these tests because they were aligned with BOE’s curriculum, as well as with then‑existing State standards, and BOE officials described them as “more valid indicators” of teaching and learning than State-administered tests.  T.10460‑61, T.10465-71, T.10473, T.10487 Tobias; T.10043-46 Casey.

New York City’s students also performed adequately on statewide tests that measured graduation competency.  As plaintiffs themselves concede, the overwhelming majority (90 percent) of the 39,741 eleventh-graders attending the City’s public schools demonstrated competency in reading and math on the RCTs (on even more rigorous graduation tests) in 1997-98.  This figure is close to the statewide averages of 92 percent for reading and 94 percent for math, and exceeds the average of 86 percent in both reading and math in the State’s other large urban school districts.  This fact alone should preclude any finding that the cumulative educational program provided by the City school system is incapable of giving students a sound basic education.

Plaintiffs do not appear to dispute that obtaining a diploma demonstrates a sound basic education, but they contend (and the trial court found) that the RCTs are insufficiently demanding as a measure of basic reading and calculating skills.   Plaintiffs also note that those tests are being phased out by the Regents in favor of the Regents exams (which are gauged to the RLS).  Pl. Br. at 130.  However, in 1999, the State permitted students to graduate who had demonstrated only the level of skills required to pass the RCTs or their equivalent.[5](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn6%22%20%5Co%20%22)  While plaintiffs quote the testimony of former Commissioner Thomas Sobol that the RCTs “were never intended to be a measure of what a sound basic education ought to be,” Pl. Br. at 131, Sobol also indicated that he viewed such a measure as requiring something more than the “minimum competency” needed to graduate.  PX9, p. 140; T.1844-49 Sobol.  In short, because the RCTs reflected the Regents’ judgment up until recently about the minimum level and kind of basic skills that students needed to graduate and begin to exercise the rights of adult citizens, those tests are entitled to substantial deference in this case.

Plaintiffs also challenge the significance of the 90 percent passage rate on the RCTs reading and math tests, contending that those students enrolled in the City school system through the eleventh grade were simply the toughest survivors of a terrible system and that a large number of students dropped out prior to reaching that grade.  But the Court of Appeals has observed that there are a “myriad of factors, beyond the control of the schools” that may affect student performance.  CFE I, 86 N.Y.2d at 317; see also Donohue, 47 N.Y.2d at 446 (Wachtler, J., concurring).  Indeed, if anything, the 90 percent passage rate is made even more impressive in view of plaintiffs’ assertions that “[o]ver 80 percent of the state’s limited English proficient students are in New York City, as are over 90 percent of the state’s recent immigrants,” and that “over 93 percent of the students in New York City’s schools are classified by the State as ‘extraordinary needs’ students.” Pl. Br. at 26.

Plaintiffs also suggest that, notwithstanding this high passage rate on the RCTs, test scores of City students in the third through sixth grades on the PEP and PET tests are more revealing with respect to the cumulative effect of a City public school education.  On the PEP tests, fully 90% of all students demonstrated competency at their grade level in math.  See Pl. Br. at 88. While only two‑thirds of 3rd and 6th graders demonstrated competency in reading, this result may be attributable to the fact that some of these students may be learning English as a second language, and may also be affected by other factors external to school.  Moreover, as the State previously noted, the City’s students performed at the same levels as the rest of the State when their scores were adjusted for the disproportionately disadvantaged backgrounds of City students.  T.20465-67 Armor; DX19601; DX19538.[6](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn7%22%20%5Co%20%22)  Plaintiffs also point to New York City students’ scores on the PET tests, which were presented only on a percentile basis in New York State.  If plaintiffs’ argument -- that the placement of New York City students in the lowest quartile demonstrates the lack of an opportunity for a “minimally adequate” education -- is correct, then by definition, one of every four school districts across the State would fail to provide students with the skills they need to competently vote and serve on a jury.

Finally, pointing to a “cohort analysis,” plaintiffs place heavy reliance on the fact that many high school students have difficulty achieving promotion to 10th grade, that many students drop out, and that many do not graduate with high level diplomas.  Pl. Br. at 1‑10,  79‑87.   Plaintiffs’ “cohort analysis,” however, failed to identify where the New York City high school students had received their elementary and middle school education.  Fully 80% of the 1997 New York City cohort of graduates were born outside the United States, see PX312, p.28, and a large proportion enter the New York City school system for the first time in 9th grade.  The 9th grade is the second largest grade of entry (after kindergarten) for students entering the NYC system, with a large number of those entering 9th graders coming from other countries.  See T.1612, T.19290‑91 Kadamus.  Nor does plaintiffs’ analysis take into account the external factors beyond the school system’s control that may affect student graduation rates.

In sum, this evidence of student performance on tests designed by the State and City to measure minimum competency in reading and math is completely consistent with the existence of  “minimally adequate” teaching, facilities, and instrumentalities of learning needed for a sound basic education.

**POINT III
PLAINTIFFS DID NOT MEET THEIR BURDEN TO SHOW THAT THE STATE’S EDUCATION FINANCE SYSTEM IS THE LEGAL CAUSE OF ANY PROVEN FAILURE TO PROVIDE A SOUND BASIC EDUCATION**

In attempting to show that the State’s education finance system is the legal cause of any proven failure of New York City’s schools to provide the opportunity for a sound basic education, plaintiffs advance three main arguments.  First, they argue that it is impossible to provide an education that meets the constitutional floor with the money available to the City system.  Second, they claim to have established that more money would cure any existing constitutional deficiency in education in the City.   Finally, they contend that the State is solely liable for any and all constitutional inadequacies in local education.  Each of these arguments fails, and accordingly, this Court should reverse the trial court’s judgment, and find for the State.

**A.     Plaintiffs Failed to Prove That New York City Lacks Sufficient
Funds to Provide a Sound Basic Education.**

Plaintiffs attempt to rebut the State’s substantial showing that New York City, one of the highest-spending large school districts in the nation, could provide a sound basic education at current funding levels.  According to plaintiffs, the City’s education funding is revealed as inadequate after it is “(a) adjusted to account for the city’s high cost of living, (b) adjusted to reflect the additional educational resources required by New York City’s at-risk students, and (c) compared to surrounding suburban districts . . . .”  Pl. Br. at 161.  The first of these proposed considerations -- cost of living -- does not help plaintiffs meet their burden, both because it skirts the salient question of whether close to $10,000 per student is sufficient to provide a sound basic education in New York City, and because plaintiffs failed to establish with any clarity the degree and impact of any higher costs in the City.   The other two considerations rest on assumptions that are contrary to established law: the Court of Appeals has indicated both that the Education Article does not require the State’s schools to fully compensate for external factors that affect student achievement, and that evidence of spending disparities among school districts has no place in an Education Article claim.

First, if indeed, as plaintiffs assert, an education dollar buys far less in New York City than it does elsewhere in the State, this fact still would not establish that the education funding available in New York City is insufficient to purchase a constitutionally adequate education for its public school students. Plaintiffs presented little or no evidence that current funding could not produce a sound basic education, but rather concentrated on supporting the proposition that current funding was not producing a sound basic education -- a proposition that was not only soundly refuted at trial, see Point II, supra, but more importantly in this context, goes to an issue distinct from that of financial sufficiency.  The trial evidence that did not remotely show current finding levels are insufficient to support a  that, consistent with common sense, a minimally adequate education can be had in New York City for $10,000.  See Def. Br. at 89-91.

Ultimately, plaintiffs’ claim that “our dollars are worth less than their dollars” is an argument about disparity of funding, not insufficiency of funding. Of course, as Levittown made clear, funding disparities do not make out a violation of the Education Article.  57 N.Y.2d at 39.  The nub of plaintiffs’ argument is reflected in the 1999 SED report, “Moving Towards [sic] Adequacy,” on which they relied at trial.  PFF[7](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn8%22%20%5Co%20%22) ¶ 294 (citing PX469A).  In recommending that school aid be made to correspond to variations in the cost of purchasing a “market basket of educational goods” in different markets, the report subscribed to the “fairness principle,” the notion that “all students are equal and should be treated equally.” PX469A at 7.  But the Court of Appeals has held that the Education Article does not require that distribution of education funds be equal.  It requires that what each district receives is at least “minimally adequate.” Neither plaintiffs’ regional costs argument, nor any evidence at trial, showed that funding to New York City schools is less than adequate.

In any event, plaintiffs failed to sufficiently demonstrate that New York City faces higher costs than other school districts in order to provide various educational inputs.  The only two witnesses to testify about cost of living stated that cross-City cost of living adjusters are difficult to construct for a number of reasons.  See DTEV Tab 10, ¶ 298A; T.16518-20, T.17908-12 Podgursky; T.16086-88 Hanushek.  In any event, even when adjusted for any higher cost of living -- using cost differences estimated by the American Federation of Teachers -- New York City’s per-pupil spending in 1995-96 ranked in the top ten percent (45th) of 463 cities with 15,000 students or more.  T.15639-15641 Hanushek.

While the trial court found that New York City must pay a higher price for educational inputs, see CFE Trial, 187 Misc.2d at 85-86, this conclusion rests solely on the previously-mentioned 1999 SED study.   The only witness to testify regarding the study’s reliability stated that it was not a “good cost-of-living index.”  T.17793 Podgursky.   Indeed, the study was premised on a faulty method that used one kind of educational input cost -- wage compensation differentials -- which measured median salaries of certain professional occupations by region, but actually excluded any measure of the salaries of teachers and other educational occupations, see PX469A at 15.  By measuring the wage differentials of non-education occupations, the SED study not only failed to account for the effects of features unique to an education labor market, see id., but also inflated wage differentials by not controlling for the high wages associated with New York City’s unique role as a world commercial center.

Plaintiffs’ next claim, that a sound basic education is not possible on the sum available to BOE because that sum must be “adjusted” for the extra costs of educating at-risk children, is also unpersuasive.  Like the regional costs argument, it avoids the burden of actually proving that the available sum is inadequate.  It also rests on another premise that has been rejected by the Court of Appeals.   As the Court has recognized (and common sense confirms), there a “myriad of factors” which affect student performance, CFE I, 86 N.Y. 2d at 317, many of which are outside the control of the classroom.  See also Donohue, 47 N.Y.2d at 446 (Wachtler, J., concurring) (agreeing with majority that students claiming to be functionally illiterate could not bring claim against school district because “[f]actors such as the student’s attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning”).  Schools and other community resources may help compensate for some of these factors that compromise student success. The Court’s delineation of them as extrinsic means that the State is not constitutionally required -- and may be well unable  -- to fully compensate for them through its schools.  Compare Levittown, 57 N.Y.2d at 41 (“[I]nequalities existing in cities are the product of demographic, economic, and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction.”).

Finally, plaintiffs’ argument that evaluation of whether the City has available sufficient funds to provide a sound basic education requires a comparison with the resources available to surrounding districts makes directly the sort of disparity-based claim that plaintiffs make more obliquely with regard to regional costs and extra funding for at-risk children.  For the reasons stated above, such a claim cannot succeed.

In sum, plaintiffs failed to show at all, let alone beyond a reasonable doubt, that current funding is inadequate to support a sound basic education in the City’s public schools.

**B.     Plaintiffs Failed to Prove That Additional Money Would Eliminate Any
Claimed Constitutional Deficiency in the City’s Public Education.**

Plaintiffs have referred to the notion that improving education is not about pumping more money into the schools as “counter-intuitive.”   But reason often disproves intuition, and that is the case here.  As demonstrated in the State’s opening brief, Def. Br. at 102-12, the State presented compelling expert testimony to show that there is no significant correlation between increased funding and better student performance, either in New York City or across the country.  The trial court’s opinion contained nothing to discredit this expert statistical evidence, and neither do plaintiffs’ arguments on appeal.  Further, plaintiffs’ affirmative arguments that the resources on which they would spend court-ordered funding increases are associated with better education and student outcomes fail as well.

Plaintiffs’ arguments fail to vitiate the compelling testimony of the State’s experts, which demonstrated that there is no significant connection between higher spending and higher achievement in the City’s public schools.  Plaintiffs’ curious first response to the absence of such a correlation is to assert that “[i]t is not surprising that, in a system that has been starved of funds for years, it is difficult to find systemwide effects of increased funding.”  Pl. Br. at 170.  This premise -- that seriously underfunded schools cannot be expected to improve because of increased funding -- is, to say the least, in tension with plaintiffs’ first principle, that more money is the surefire and only antidote to sub-par education.  It also ignores Dr. Hanushek’s studies based on national data, which showed that, across the country, student performance does not correspond with increased spending or with other resources claimed to be linked to educational quality, such as teacher salary and test scores, or condition of facilities.  See Def. Br. at 104.

For the most part, plaintiffs’ criticisms of the experts’ testimony track those made by the trial court and refuted in the State’s main brief.  See Def. Br. at 105-09.  Plaintiffs criticize the experts’ use of single-year data points, arguing in particular that funding of City schools varies from year to year.  Pl. Br. at 171. But the State has never claimed that school funding does not fluctuate in absolute terms, only that there is no reason to believe that relative funding among City schools varies greatly.  As they do with virtually every aspect of this case, plaintiffs neglect the fact that it is their burden to show that the defense experts’ methodology is flawed, and that under the purportedly correct method causation has been proven beyond a reasonable doubt.  The same applies to plaintiffs’ scarcely supported claim that the contribution of “parent resources” and other private contributions to individual schools, Pl. Br. at 168-69, 173, and year-to-year changes in budgeting between schools, Pl. Br. at 171, would skew the experts’ results and render them illegitimate.  Plaintiffs did not quantify these supposedly important factors to any analytically useful degree and did not perform the analysis they assume would alter the defense experts’ results.  Again, plaintiffs failed to even take up their burden to prove causal connection beyond a reasonable doubt.

Particularly empty is plaintiffs’ attack on the experts’ method of “leveling the playing field” for socioeconomic background characteristics.  “There is a name for what Dr. Armor did,” plaintiffs assert, and it is “cheating.”  Pl. Br. at 172-73.  Plaintiffs do not attempt to address the State’s demonstration, see Def. Br. at 106-07, that controlling for socioeconomic background is essential to isolating the effect of resource measures on student performance, in harmony with the pronouncements of the Court of Appeals, and consistent with BOE’s own method of analyzing the relative performance of schools.  Indeed, plaintiffs’ own expert, Dr. Grissmer, controlled for socioeconomic factors in his achievement analyses (none of which examined New York City test results), and acknowledged that factors such as parental education and family income play the “predominant” role in how students perform on academic tests.  T.9487, 9515-16 Grissmer.

Finally, plaintiffs’ argument that Dr. Armor purposely chose variables he knew had little impact on the quality of education, Pl. Br. at 174, makes no sense.  As argued in the State’s main brief, see Def. Br. at 109, if, as plaintiffs insist, two years of teaching experience is highly correlated with poor teacher quality, Dr. Armor’s study focusing on teachers with five years’ or less experience (which includes the allegedly woeful two-year teachers) would have been expected to show at least some significant correspondence between teacher experience and student outcomes.  Instead, it showed none at all**.**  Plaintiffs’ argument that the study masked the outcome-diminishing effect of teachers with two years’ experience is simply illogical.

Plaintiffs presented no concrete evidence of their own to show that infusing more money into the City’s public schools would materially improve student performance. In this regard, it is important to note that the test of causality in this context is not whether some particular resources that are purchased with money can enhance performance.  The questionis whether spending increases will have, overall, a significant impact on achievement.  The credible evidence indicated that they will not.  Plaintiffs’ assumption that additional resources will be “properly directed,” Pl. Br. at 163 (i.e., spent on resources that will in fact raise achievement), begs the question.

A primary explanation for plaintiffs’ failure to establish a correlation between spending and achievement is that they failed to prove that most of the wide-ranging and expensive initiatives they would have the State fund would bring better student performance.  For example, the trial court concluded, based on the Tennessee STAR study, that reducing class size would improve student performance.  CFE Trial, 187 Misc.2d at 51-54.  Putting to one side the fact that plaintiffs did not show that current class sizes in the City are incompatible with a constitutionally adequate education, neither the STAR study, nor other studies of the effect of class size, substantiate the trial court’s conclusion.  The STAR study, based on classroom experience in Tennessee, not New York, purported to show only a one-time, statistically “small or modest” improvement in outcomes.  See Def. Br. at 74.  As important, the study’s results were based on reductions to class sizes of 12 to 17 students, a size never suggested for New York City classes, and lower than the class size of 18 to 20 to which Justice DeGrasse unjustifiably found the results applicable.Thus, even without considering its methodological flaws, see DTEV Tab 10, ¶ 357, the STAR study had very little probative value on the question of whether reductions in class size in the City would yield significant gains in achievement.  Yet, the study was the centerpiece of the testimony of  Dr. Grissmer, the only witness through whom plaintiffs presented scientific evidence of the effect of school resources on achievement.

Plaintiffs rely heavily on Dr. Grissmer’s testimony that the performance of disadvantaged students -- as opposed to middle class and wealthy students -- rose dramatically during the period 1970 to 1996, a time of increased school spending.  See Pl. Br. at 165-67.  But Grissmer conceded on cross-examination that a host of other influences during the period could have been responsible for the observed performance gains.  These include disproportionate gains in parental education levels among minorities (e.g.,  a 336% increase, from 1970 to 1990,  in black mothers with “some college,” as opposed to 81% for non-blacks), T.9530-31 Grissmer, and unmeasured family characteristics, such as child rearing practices, which Dr. Grissmer testified he could not rule out as “an explanation of the residual gains,” T.9533 Grissmer.  There is no more powerful indictment of the value of Dr. Grissmer’s testimony for plaintiffs than his conclusion that the performance gains by disadvantaged children could have no other “reason outside of family, social programs and schools.”  T.9540 Grissmer.  His testimony provided scant evidence that the academic progress he observed among disadvantaged children was meaningfully linked to increases in education spending.

**C.     Plaintiffs Erroneously Assert That the State Bears All Responsibility
for Any Lack of a Sound Basic Education, and the City Bears None.**

Plaintiffs’ contention that all failures in local education are the responsibility of the State cannot bear even casual inspection.  It is contradicted, most immediately, by CFE I’s clear instruction that to prevail, plaintiffs must show a causal link between “the present funding system” and any constitutional inadequacy in education.  Thus, if the absence of a sound basic education in a locality is the result of waste, ineptitude, or malfeasance by local actors (i.e., if the locality fails to provide a sound basic education despite adequate funding to do so) the State could not be legally responsible because these causes have no connection to the adequacy of the funding system.

The limits on legislative responsibility under the Education Article apply with equal force when the cause of the educational deficiency is the locality’s failure to adequately fund its schools.  The Legislature’s funding responsibility is to provide for a rational system of state and local funding, and to contribute funds that are sufficient -- when combined with a reasonable local contribution -- to support a sound basic education.  Once it has done so, it cannot be held liable for the locality’s underfunding.

Plaintiffs reason that the State must bear all responsibility because, if a locality fails to provide its appropriate share of funding, the State can require the local government to raise and allocate funds for education.  But the State has already done just that.  The Legislature has imposed upon the City’s BOE the duty to maintain and support a public school system capable of providing all City children with a sound basic education.  See Educ. Law §2554.  Clearly, the City cannot frustrate BOE’s statutory compliance by refusing or failing to take whatever steps it reasonably can to provide the amount of funding that, together with whatever State and Federal aid it receives, is necessary for such compliance.  Accordingly, if plaintiffs believed that the budget approved by the City was inadequate to enable BOE to provide the services, facilities and programs required by the Education Law, they could seek redress against the City.[8](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn9%22%20%5Co%20%22)

In sum, the Legislature has provided for city as well as state funding of the city school system, and has also provided a judicial remedy for failures of the City to meet its funding (as well as administrative) obligations.  This scheme would adequately address the needs of the City’s children.  No more is required under the Education Article.

Finally, plaintiffs’ assertion that City of New York v. State of New York, 86 N.Y. 2d 286 (1995), precludes assigning direct responsibility to the City for any constitutional deficiency it caused, misreads that decision.  A companion case to the instant case, City of New York held only that the city lacked the capacity to sue the State under the Education Article.  This rule, which applies across the board to constitutional challenges, in no way prevents the City from being sued, or held liable, for violations of the Education Law, including those that cause education quality to fall below constitutional standards.

**POINT IV
PLAINTIFFS MAY NOT ASSERT THEIR CLAIM OF DISPARATE IMPACT UNDER TITLE VI’S IMPLEMENTING REGULATIONS BY MEANS OF A SUIT UNDER 42 U.S.C. § 1983**

Foreclosed by the Supreme Court’s decision in Alexander v. Sandoval, 121 S. Ct. 1511 (2001), from pursuing a private right of action under the Title VI implementing regulations, plaintiffs contend that the regulations’ disparate impact standard is enforceable under 42 U.S.C. §  1983.  This argument should be rejected.  There are two recognized exceptions to the general availability of § 1983 actions to redress violations of federal statutes by state actors.  Section 1983 is not available to remedy a violation of a federal statute (1) where the statute does not provide private parties with “enforceable rights” within the meaning of § 1983, or (2) where Congress has foreclosed such enforcement of the statute in the enactment itself (either expressly or by establishing a remedial scheme so comprehensive as to preclude the existence of private remedies for violations).  See Wilder v. Virginia Hosp. Ass’n, 496 U.S. 498, 521 (1990);  Wright v. Roanoke Redev. and Housing Auth., 479 U.S. 418, 423 (1987).  Application of each of these exceptions independently bars a § 1983 action here.

**A.     The Title VI Disparate Impact Regulations Do Not Create a Right Enforceable Under § 1983, Because Regulations Cannot Give Rise to Rights Independently of a Statute, and Title VI Does Not Create a Right to be Free From Disparate Impact.**

Plaintiffs’ argument that Title VI’s disparate impact regulations are enforceable via § 1983 wholly ignores the most fundamental prerequisite for an action under that section: in order for a provision to create a statutory “federal right” cognizable under § 1983, it must have its source in a statute.  See Blessing v. Freestone, 520 U.S. 329, 340 (1997) (§ 1983 “safeguards certain rights conferred by federal statutes”; inquiry is whether “a particular statutory provision” gives rise to federal right) (citing Maine v. Thiboutot, 448 U.S. 1 (1980)) (emphasis added).  Nevertheless, plaintiffs contend that the Title VI implementing regulations prohibiting disparate impact, by themselves, give rise to a § 1983 action.  They advance this claim even though the Supreme Court has explicitly held that Title VI does not reach beyond intentional discrimination and therefore that “the private right of action to enforce § 601 does not include a private right of action to enforce these regulations.”  Sandoval, 121 S. Ct. at 1519 (citation omitted).

Plaintiffs’ claim is flatly inconsistent with the plain meaning of § 1983 and with the precedent interpreting it.  As important, it cannot be reconciled with the Supreme Court’s decision in Sandoval.  While Sandoval addressed the question of the existence of a private right of action to enforce the disparate impact regulations under Title VI, rather than the enforceability of the regulations in a § 1983 action, it also squarely confronted the broader question of what relationship must exist between a regulation and a statute in order for the content of the regulation to constitute a federal statutory right -- an analysis that applies with equal force in this context.

More specifically, the Supreme Court held that no implied right of action for disparate impact discrimination exists under Title VI’s implementing regulations because: (a) in order for there to be such an implied right of action, there must be some basis in Title VI itself for inferring a right against disparate impact discrimination; (b) such a right could not be inferred from the anti-discrimination prohibition in § 601 of Title VI, because that prohibition does not extend beyond intentional discrimination; and (c) such a right also could not be inferred from § 602, because that statutory provision merely directs federal funding agencies to promulgate regulations enforcing § 601, and does not  contain “rights-creating” language.  See Sandoval, 121 S. Ct.  at 1516-23.

**1.**  **Statutes, Not Regulations, Can Create Rights Enforceable Under § 1983.**

  The principle that only a statute, and not merely a regulation, can generate a right enforceable under § 1983 is explicit in the text of § 1983, which offers redress for violation of “rights, privileges, or immunities secured by the Constitution and laws.”  42 U.S.C. § 1983 (emphasis added).  See Mungiovi v. Chicago Housing Authority, 98 F.3d 982, 984 (7th Cir. 1996) (“reference to ‘laws’ cannot readily be understood to imply a reference to regulations of all kinds--for the introductory clause [‘Every person who, under color of any statute, ordinance, regulation, custom, or usage ...’] shows that Congress distinguished statutes from regulations”).

The requirement of a statutory basis for a federal right is equally clear in the analytical framework used by courts to determine whether a federal right exists for purposes of § 1983.  In Blessing, the Supreme Court articulated a three-part test for determining whether a statutory provision creates a “federal right” enforceable under § 1983:

First, Congress must have intended that the provision in question benefit the plaintiff.  Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence.  Third, the statutemust unambiguously impose a binding obligation on the States.  In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory terms.

Blessing, 520 U.S. at 340-41 (citations omitted; emphasis added).  As this language clearly conveys, only statutory language, which directly reflects congressional intent, may serve as the foundation of a federal right.

To be sure, courts have sometimes looked to regulations to help define the nature of a statutory federal right.  But, with few -- and erroneous -- exceptions these courts have found a federal right to exist only when the regulation at issue fleshes out, or articulates more specifically, a right clearly provided in the text of the statute to which the regulation relates.  When a regulation functions in this way, courts have found that the regulation, together with the statute, defines the contours of the federal statutory right.  See Suter v. Artist M., 503 U.S. 347, 362 n.13 (1992) (regulation enforceable under § 1983 only if “statute . . ., in conjunction with regulations” created a right).

For example, in Harris v. James, 127 F.3d 993 (11th Cir. 1997), Medicaid recipients brought a class action against Alabama state officials under 42 U.S.C. § 1983, claiming that the State’s Medicaid plan failed to provide non-emergency transportation, which plaintiffs contended was required by federal law. However, the transportation requirement plaintiffs sought to enforce did not appear explicitly in the Medicaid statute, but rather in a federal regulation.  See id. at 996 (citing 42 C.F.R. § 431.53).

The court found that the regulation itself did not give rise to a right enforceable under § 1983:

[W]e do not think that transportation to and from providers is reasonably understood to be part of the content of a right to prompt provision of assistance, comparable assistance, or choice among providers . . . .  Such links [of the regulation] to Congressional intent may be sufficient to support the validity of a regulation; however, we think they are too tenuous to support a conclusion that Congress has unambiguously conferred upon Medicaid recipients a federal right to transportation enforceable under § 1983.

Id. at 1012.  In short, “so long as the statute itself confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right, then the statute -- ‘in conjunction with the regulation’ -- may create a federal right as further defined by the regulation.”  Id. at 1009.

Numerous other courts have employed the same persuasive logic as Harris to conclude that a regulation by itself cannot give rise to a federal right enforceable under § 1983.  See, e.g., Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987) (regulation under Social Security Act did not support contention that the Act creates right for handicapped individuals to receive special equipment without application of an economic needs test, because “[a]n administrative regulation . . . cannot create an enforceable § 1983 interest not already implicit in the enforcing statute”); Mungiovi, 98 F.3d at 984 (“[A] plaintiff cannot use § 1983 to enforce regulations in the abstract; enforcement depends on the role regulations play in making statutory obligations more concrete[.]”).

Plaintiffs’ claim that an administrative regulation, on its own, creates rights enforceable under § 1983 so long as the regulation -- rather than the underlying statutory provision -- meets the three-prong Blessing test finds little support in case law.  The cases plaintiffs cite for this proposition either did not face the issue at all, see West Virginia University Hospitals, Inc. v. Casey, 885 F.2d 11 (3d Cir. 1989) (no claim of regulation-based federal right raised);DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 725 n.19 (10th Cir. 1988) (deciding case on an other ground and avoiding question of whether regulation at issue supported § 1983 action),   or --  despite containing language suggesting that regulations can independently generate rights enforceable under § 1983 -- did not premise their findings of enforceable rights on regulations alone.  Rather, examination of these decisions reveals that the courts found federal rights to exist based on rights-creating statutory provisions in conjunction with a regulation that fleshed out those rights.

Thus, in Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir. 1985), the court held that plaintiffs had a right to a grievance procedure under the U.S. Housing Act of 1937, which was enforceable under § 1983.  But the court did not, as plaintiffs suggest, Pl. Br. at 186, find a right to exist based solely on regulations requiring a grievance procedure.  Rather, the court repeatedly stressed that the grievance procedure was “codified in the operative body of the Act, and its language is unequivocally specific and mandatory.” Samuels, 770 F.2d at 197; see also id. (“Congress . . . concluded . . . that administrative grievance procedures were sufficiently worthwhile to be required under the Act itself . . . .”).

Loschiavo v. City of Dearborn, 33 F.3d 548 (6th Cir. 1994), is to similar effect.  There, plaintiffs sued under § 1983, claiming that a federal regulation preempted city regulations that restricted plaintiffs’ right to receive programming via satellite antenna.  While the court asserted, without providing any supporting analysis, that “[a]s federal regulations have the force of law, they likewise may create enforceable rights,” id. at 551, the case actually turned on the conjunction of statute and regulation to create an enforceable right.  After setting forth the statutory language that created “the right recognized by the 1984 Act to receive satellite signals for home viewing,” the court explained that the regulation preempting certain local regulations was designed specifically to reduce interference with the statutory entitlement, and fell squarely within its scope.  Loschiavo simply does not stand for the proposition that regulations, untethered to any statutory right, can themselves create federal rights for § 1983 purposes.

To the extent that court decisions have suggested, or on occasion held, that regulations can give rise to federal rights, they have reached this erroneous conclusion based on a misreading of the Supreme Court’s decision in Wright.[9](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn10%22%20%5Co%20%22)   In Wright, housing project tenants alleged in a § 1983 suit that the local housing authority over-billed them for utilities, in violation of both rent ceilings imposed by the Brooke Amendment to the Housing Act of 1937, which capped rent at 30 percent of adjusted income, and the implementing regulations of the Department of Housing and Urban Development (“HUD”), which defined “rent” to include a “reasonable amount for utilities.”  While the Court, in permitting the action to go forward, stated at one point that “the regulations gave low-income tenants an enforceable right to a reasonable utility allowance,” 479 U.S. at 420 n.3, the opinion makes plain that the viability of the action depended on the statute and regulation taken together.  According to the Court, HUD’s view that defining rent to include “reasonable amount for utilities” was a “valid interpretation” of the statute, id. at 430, and reflected an understanding of the meaning of  “rent” that had been in force even before the adoption of the Brooke Amendment, id. at 420 n.3.  Nothing in Wright supports the view that the “reasonable utilities” regulation, torn loose from the statute, would independently create a federal right.  Indeed, in describing its own decision in Wright, the Supreme Court characterized it as holding that the “statute . . ., in conjunction with regulations providing that ‘reasonable utilities’ costs were included in the rental figure, created [a] right under § 1983.”  Suter, 503 U.S. at 361 n.13.

**2.**        **Sandoval Held That Title VI Does Not Create a Federal Right to Freedom From Disparate Impact.**

If the door was at all open to plaintiffs’ claim that Title VI’s disparate impact regulation creates a federal right at the time the Supreme Court heard arguments in Alexander v. Sandoval, it was emphatically shut by the Supreme Court’s decision in that case.   Sandoval held that freestanding regulations do not give rise to federal rights, and it drew that conclusion with regard to the very regulation at issue here.  It found that Congress had not provided the very purported right asserted here -- i.e., not to be subjected to disparate impact -- in the body of Title VI, and thus it could not support an action under the statute.

Plaintiffs strain to portray Sandoval as having nothing whatsoever to do with the instant case.  However, a review of the Court’s opinion in Sandovaldemonstrates otherwise.  To be sure, there are well-recognized distinctions between an analysis of whether a statute, in conjunction with its regulations, gives rise to a private right of action under the statute -- the analysis undertaken in Sandoval -- and determination of whether that same statutory/regulatory scheme creates a federal right enforceable under § 1983.  With respect to a private right of action, it must be clear that Congress intended to provide such a remedy under the statute.  121 S. Ct. at 1519-20, 1522 .    By contrast, there is a presumption that the same right may be vindicated under § 1983 because § 1983 provides a separate vehicle through which Congress sought to provide a remedy for federal rights violations.  Smith v. Robinson, 468 U.S. 992, 1012 (1984).  But the distinction between a private right of action and an action under § 1983 is a distinction with regard to the availability of a remedy -- with plaintiffs bearing a heavy burden to establish an available remedy in the first scenario and enjoying a presumption that a remedy exists in the second.  This distinction does not touch the determination of whether a statute creates a potentially enforceable right in the first instance.

As  Sandoval recognized, assessing whether a private right of action exists under a statute involves two separate questions: “The judicial task is to . . . determine whether [the statute] displays an intent to create not just a private right but also a private remedy.”  Sandoval, 121 S. Ct. at 1519.  Unlike the “private remedy” inquiry, the “private right” inquiry is just the same in the § 1983 context as when examining whether a private right of action exists under a statute.  The two inquiries also have an important common element:  specifically the bedrock principle that only Congress can create a federal statutory right.  SeeSandoval, 121 S. Ct. at 1519-20, 1522; Blessing, 520 U.S. at 340-41.   Because § 1983 is not itself a source of substantive rights, but rather a means of redressing a deprivation of rights secured by the Constitution or laws, see City of Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985), courts must look to the substantive statute at issue to determine whether it creates the claimed right.  “Congressional intent is the ‘key to the inquiry’ of whether a statute creates enforceable rights.”  Smith, 821 F.2d at 982 (quoting Middlesex County Sewer Authority v. National Sea Clammers Association, 453 U.S. 1, 13 (1981)).

The Sandoval court concluded that the Title VI regulations did not give rise to a federal right to be free from disparate impact because it found that nothing in the statutory language of Title VI conferred such a right.  The Court acknowledged that an administrative regulation that is an extension or amplification of a right established by Congress is enforceable, but held that the disparate impact regulations lie outside the scope of the rights-creating language Title VI and therefore are not enforceable.  Sandoval, 121 S. Ct. at 1518, 1523.  The Court explained:

It is clear now that the disparate-impact regulations do not simply apply §601 – since they indeed forbid conduct that §601 permits – and therefore clear that the private right of action to enforce §601 [the statute] does not include a private right to enforce these regulations.

Id. at 1519 (citing Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (1994)).

Having excluded § 601 of Title VI as the potential source of a right fleshed out by the disparate impact regulations, the Court turned to § 602.  The Court noted that § 602 of Title VI merely authorizes the agencies to “effectuate” rights already created by § 601, but does not contain “rights-creating” language of its own.  Id.  at 1521-22.   Because the only right created by Title VI is the right to be free of intentional race discrimination by an institution receiving federal funds, see id. at 1516 ; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), there is no private right of action to sue for conduct which causes a disparate impact.1[0](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn11%22%20%5Co%20%22)  This holding in Sandoval mandates the conclusion that a Title VI disparate impact suit is also foreclosed under § 1983.

**B.     Title VI’s Comprehensive Enforcement Scheme Forecloses Plaintiffs’
Ability to Seek a Remedy Through a § 1983 Claim**.

Even if this Court were to find a congressional intent to confer an “enforceable right” to be free of disparate impact in § 602, plaintiffs’ § 1983 claim still should be dismissed because Congress has foreclosed the enforcement of that right through § 1983 by creating a comprehensive remedial scheme in Title VI and its implementing regulations that is incompatible with individual enforcement.  See Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n, 453 U.S. 1, 20 (1981); Smith v. Robinson, 468 U.S. 992 (1984).  Although courts should not “lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy” for deprivations of federally secured rights, Smith, 468 U.S. at 1012, “when a state official is alleged to have violated a federal statute that provides its own comprehensive enforcement scheme, the requirements of that enforcement scheme may not be bypassed by bringing suit directly under § 1983.”  Sea Clammers, 453 U.S. at 20 (citations omitted).

In holding that there is no private right of action under the Title VI disparate impact regulations, the Supreme Court in Sandoval acknowledged the statute’s elaborate regulatory scheme and highlighted the agency’s primary role in enforcing the regulations. Sandoval, 121 S. Ct. at 1521.

While the Court in Sandoval did not directly address the question of whether Title VI’s enforcement scheme is sufficiently comprehensive to supplant a § 1983 claim, the Court found it unnecessary to reach that analysis because there was simply no evidence that Congress intended to create a right to be free of disparate impact or to allow plaintiffs to enforce any such right.  After detailing the provisions for agency enforcement, the Court concluded that these provisions do not show an intent to create privately enforceable rights. Id.

The Supreme Court has never ruled on the question of whether an alleged violation of either Title VI or Title IX gives rise to a  § 1983 claim under this analysis, and the circuit courts are split on that issue.  Applying the analyses of Blessing and Sea Clammers, the circuit courts have issued conflicting decisions over whether or not Titles VI and IX have a sufficiently comprehensive remedial scheme to supplant § 1983.1[1](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn12%22%20%5Co%20%22)  In Bruneau v.  South Kortright Cent. Sch. Dist., 163 F.3d 749 (2d Cir. 1998), cert. denied, 526 U.S. 1145 (1999), the Second Circuit held that Title IX,  Title VI’s gender-based twin,  has a sufficiently comprehensive scheme to foreclose a  § 1983 action.  Applying the Sea Clammers doctrine to Title IX, the Second Circuit found that Title IX’s enforcement scheme is sufficiently comprehensive to foreclose the use of § 1983 to implement its provisions.  First, the court reasoned, Title IX establishes a “complex administrative enforcement scheme” to ensure compliance with its provisions.  Bruneau, 163 F.3d at 756.  Pursuant to this scheme, an individual may file a complaint with the Department of Education, see 34 C.F.R .§ 100.7(b), which must then promptly investigate the allegations. See id. § 100.7(c).  Absent a complaint, the agency is authorized to conduct its own periodic compliance reviews, 34 C.F.R.§ 100.7(a).  If the Department deems the allegations in the complaint meritorious, or discovers violations independently, it will inform the violating institution and attempt to resolve the matter informally.  34 C.F.R. § 100.7(d).  When these measures fail, the Department may effect compliance by terminating funding following an administrative hearing.  34 C.F.R .§ 100.8. Additionally, although the original complainant is not a party to the hearing, the complainant has the right to petition to become an amicus curiae at a hearing held to decide whether to terminate federal financial assistance.  See 34 C.F.R. § 101.23.  The Court also noted that in addition to these administrative remedies, Title IX (like Title VI) implicitly permits an individual to bring a private right of action for intentional discrimination.  Bruneau, 163 F.3d at 756.

 This reasoning is persuasive and should also apply to preclude a § 1983 claim brought under Title VI.  Title IX was patterned after Title VI of the Civil Rights Act of 1964, Cannon v. University of Chicago, 441 U.S. 677, 694-95 (1979), and “except for the substitution of the word “sex”  in Title IX to replace the words “race, color, or national origin” in Title VI, the two statutes use identical language to describe the benefitted class.” Id.  Moreover, both statutes provide the same administrative mechanism for terminating  federal financial support for institutions engaged in prohibited discrimination. Id.   The procedural regulations cited by the Second Circuit in Bruneau to describe Title IX’s comprehensive remedial scheme are Title VI regulations which were incorporated into Title IX’s enforcement scheme.  See 34 C.F.R. § 106.71 (adopting and incorporating the procedural provisions applicable to Title VI found at 34 C.F.R. § 100.6-100.11 and 34 C.F.R., part 101 into Title IX regulations).  Thus, the remedial scheme found by the Second Circuit to be sufficiently comprehensive to preclude a §1983 claim under Title IX should operate equally to preclude a § 1983 claim to enforce Title VI.

While Bruneau, unlike the present case, involved a claim of intentional discrimination for which an implied private right of action existed under the statute itself, a § 1983 claim is likewise unavailable to enforce the Title VI disparate impact regulations.  In arguing the contrary, plaintiffs rely on Blessing v. Freestone, 520 U.S. 329 (1997), Wilder v. Virginia Hospital Ass’n, 496 U.S. 498  (1990), and Wright v. City of Roanoke Redevelopment and Housing Auth., 479 U.S. 418 (1987).  In each of these cases, the Supreme Court held that a remedial scheme was insufficiently comprehensive to demonstrate a congressional intent to preclude private actions under § 1983.  These remedial schemes in those cases, however, are distinguishable in material respects from those set forth in Title VI and its implementing regulations, because those schemes did not include any means by which an aggrieved individual could seek redress for the violation of his or her rights.1[2](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn13%22%20%5Co%20%22)           The Education Department’s Title VI  implementing regulations, by contrast, give individuals complaining of disparate impact the right to initiate agency review by filing a complaint, and to petition to become an amicus curiae at a hearing held to decide whether to terminate federal financial assistance.  See 34 C.F.R. § 101.23.  While perhaps not as elaborate as the “citizen suit provisions” contained in the statute in Sea Clammers, or the administrative and judicial review procedures in Smith v. Robinson, Title VI’s scheme affords individuals complaining of a disparate impact violation the opportunity to notify the agency and participate in the investigation of the claim.  However, as the Supreme Court has stated, Title VI delegates to the “agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that  had produced those impacts.” Alexander v. Choate, 469 U.S. 287, 293 (discussing holding in Guardians Ass’n v. Civil Service Comm’n of New York  City, 463 U.S. 582 (1983)).  Permitting an aggrieved individual to circumvent these procedures for enforcing Title VI’s implementing regulations by maintaining a § 1983 action would thus be inconsistent with Congress’s carefully tailored scheme.

**POINT V**  **PLAINTIFFS FAILED TO SHOW THAT THE STATE’S SCHOOL FUNDING MECHANISM HAS A DISPARATE IMPACT ON MINORITY STUDENTS IN THE STATE IN VIOLATION OF TITLE VI’S IMPLEMENTING REGULATIONS**

Even assuming plaintiffs are entitled to bring a § 1983 claim to enforce the Title VI implementing regulations, plaintiffs’ argument that the state education funding mechanism has a disparate impact on the state’s minority students fails on the merits.1[3](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn14%22%20%5Co%20%22)   First, plaintiffs failed to make a prima facie showing of disparate impact.  To establish a prima facie case under the Title VI implementing regulations, plaintiffs were required to show that the challenged program has an adverse impact overall on minorities throughout the state.  The trial court, in reaching its conclusion of disparate impact, improperly allowed plaintiffs to use New York City as a proxy for minorities statewide to show disparate impact, rather than requiring plaintiffs to show directly that the actual amount of funding provided to minority students statewide was less than that given to non-minority students throughout the state.   The State’s direct evidence showed that there was no statistically significant difference between the amount of aid distributed to minority and non-minority students throughout the State.

Rather than showing an actual disparity, plaintiffs relied on the per capita funding comparison between New York City and other districts; on other non-statistical evidence presented by their expert Dr. Robert Berne, which the court properly found to be unpersuasive, CFE Trial, 187 Misc. 2d at 104; and on regression analyses conducted by Dr. Berne, which purported to show a statistically significant negative relationship between a district’s percentage of minority students and student aid.  However, contrary to the trial court’s findings, the State demonstrated that these regression analyses were based on a flawed methodology, omitting significant aid amounts and erroneously assuming a linear relationship between district wealth and aid.

Finally, even if plaintiffs presented a prima facie showing of disparate impact, which they did not, the State set forth substantial legitimate justifications for the State’s funding formulas including the state’s policies of wealth-equalization and attendance-based funding.

Plaintiffs Failed to Present a Prima Facie Case of Disparate Impact Discrimination

**1.**                The trial court erred in allowing plaintiffs to rely on New York City as a proxy for minorities statewide to show disparate impact.

The trial court improperly permitted plaintiffs to rely on an analysis that used New York City as a proxy for all minorities throughout the State, and the rest of the State as a proxy for all non-minorities statewide.  Even if such a proxy could give rise to an inference of discrimination, the State’s direct evidence refuted this inference by showing that any difference between funding received by minorities and non-minorities statewide was statistically insignificant.

The trial court concluded that because “New York City receives less funding, per capita, on average than the rest of the State,” and “since 73% of the State’s minority students are concentrated into a single district, then comparisons of that district’s funding with average district funding in the rest of the State can be an accurate indicator of the presence (or absence) of a disparate impact based on race.”  CFE Trial, 187 Misc. 2d at 102.  The court found, “[t]his is particularly true here where approximately 84% of the City’s public school children are members of minority groups.”  Id.  Therefore, the court reasoned,  “the huge size of this percentage obviates the need to break the New York City school district into its constituent community school districts in order to investigate disparate funding of minorities and non-minorities within New York City.”  Id.1[4](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn15%22%20%5Co%20%22)

The court’s reliance on this proxy was flawed, especially in light of the State’s direct evidence refuting the disparate impact claim.  As the trial court acknowledge, a plaintiff in a Title VI regulation disparate impact case bears the initial burden of establishing that a facially neutral practice has had an adverse impact upon a protected class of people.  New York City Environmental Justice Alliance v. Giuliani, 214 F.3d 65, 69 (2000).  A disparate impact claim requires a “reliable indicator of disparate impact” and an “appropriate statistical measure.”  New York Urban League, Inc. v. State of New York, 71 F.3d 1031, 1038 (2d Cir. 1995).  Here, the trial court used an inappropriate measure of comparison.  The proper measure was to compare funding to the protected class, specifically minority students in New York State,  to funding to the non-protected class, i.e., non-minority students in New York State.  This comparison, which the State’s expert Dr. Wolkoff undertook, properly isolated and compared the treatment of the protected and the non-protected classes. The trial court erroneously rejected this evidence and relied instead on a proxy which compared two groups, each containing minority and non-minority students.

In choosing to accept plaintiffs’ proxy, the trial court relied primarily on Powell v. Ridge, 189 F.3d 387 (3d Cir.), cert. denied, 528 U.S. 1046 (1999), for the proposition that comparing funding to districts, rather than comparing funding to minority and non-minority individuals, was sufficient to show disparate impact.  The court’s reliance on Powell was misplaced.

In that case, plaintiffs alleged that Pennsylvania’s school funding mechanism resulted in a disparate impact on Pennsylvania’s minority students by providing more funds to school districts with a high proportion of white students than those with a high proportion of non-white students.  Defendants countered that the complaint failed to state a claim because it compared the effect of funding on districts, rather than individuals, as required by Title VI.  Id. at 396.

Although the Third Circuit held that plaintiffs’ Title VI allegations were sufficient to state a claim, the court declined to evaluate the merits of plaintiffs’ disparate impact claim, noting that “whether they will ultimately prevail is a question on which we express no opinion.” Id. at 395.  In fact, the Court cautioned that while plaintiffs should have the opportunity to prove the effect alleged at trial, “it may ultimately be more difficult to prove the impact, and consequently the disparate impact, on the school children because the funding is directed to the school districts.” Id. at 396.   Thus, Powell merely suggested that plaintiffs’ pleading was sufficient to survive a motion to dismiss.

 However, as Powell acknowledges, at trial, a Title VI disparate impact plaintiff is not entitled to rely on lenient pleading standards.  Rather, the plaintiff is required to prove “that the defendants’ racially neutral practice detrimentally affects persons of a particular race to a greater extent than other races.”  Powell, 189 F.3d at 394 (citation omitted).   The Third Circuit noted, “It is not enough for plaintiffs ‘merely [to] prove circumstances raising an inference of discriminatory impact at issue; [the plaintiff] must prove the discriminatory impact at issue.’”  Id. (quoting Johnson v. Uncle Ben’s Inc., 657 F.2d 750, 753 (5th Cir. 1981)).Similarly here, plaintiffs were required to show more than an inference of disparate impact at trial.   To prevail on their Title VI claim,  they were required to prove that in fact, minority students received less funding than non-minority students throughout the state, which they failed to do.  As part of a prima facie case, a plaintiff is required to defend statistical proof against challenges brought by the defendant. See, e.g., Dickerson v. United States Steel Corp., 472 F. Supp. 1304, 1308 (E.D. Pa. 1978)(rejecting plaintiffs’ prima facie case of disparate impact under Title VII where plaintiffs statistics shown to be unreliable), vacated on other grounds sub nom., Worth v. United States Steel Corp., 616 F.2d 698 (3d Cir. 1980).  Plaintiffs’ evidence does not become invulnerable after “they complete their case in chief and survive a motion to dismiss.  The Court must reexamine it at the close of all the evidence to ascertain if it still meets the prima facie test.” Id. (citations omitted).  Here, as discussed below,  the State presented direct evidence  showing no disparate impact, which refuted the statistical evidence presented by plaintiffs.1[5](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn16%22%20%5Co%20%22)

**2.**        **Direct evidence presented by the State’s expert showed no disparate impact**.

The State’s expert Dr. Wolkoff presented financial and demographic data from 1995-1996 and 1996-1997, comparing funding amounts to minorities to funding amounts to non-minorities statewide.  This evidence revealed that there was no disparate impact.  DTEV Tab 13, ¶¶ 627-628; 631-632; T.18151-53 Wolkoff.

Using the data, calculations were made based both on the number of students in average daily attendance and on the number of students enrolled in school.  On an attendance basis, the 1995-1996 data showed that average aid per minority pupil statewide was $4,097, as compared to average aid per non-minority student statewide of $4,019. DTEV Tab 13, ¶ 632; T. 18158-60 Wolkoff.  Likewise, the 1996-1997 data showed that the average aid to attending minority pupils was $4,154, compared to $3,999 for non-minority pupils.  Id.  Thus, the data revealed that average state aid per student was slightly greater for minority students than for non-minority students on an attendance basis.

On an enrollment basis, the data for 1995-1996 showed that  minority pupils received average aid of $3,615, as compared to $3,767 for non-minority students.  The 1996-1997 comparison showed that minority students received average aid of $3,699 as compared to $3,757 for non-minority students.  DTEV Tab 13, ¶ 632; T.18158-60 Wolkoff.  Thus, on an enrollment basis, the average state aid per student was slightly less for minority students than for non-minority students.

The attendance data, which are the basis on which the State distributes student-based aid to school districts,  DTEV Tab 13, ¶ 579, 582-84, did not show a disparity.1[6](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn17%22%20%5Co%20%22)   In African American Legal Defense Fund, Inc. v. New York State Dep’t of Educ., 8 F. Supp. 2d 330, 338 (S.D.N.Y. 1998), the district court dismissed a similar Title VI regulations claim when defendants presented similar evidence showing that there was no disparity in the attendance data. Concluding that plaintiffs had not put forth a prima facie case, the court noted that while the amended complaint asserted an alleged financial disparity between City and non-City students, plaintiffs’ statistical allegations based on per capita funding numbers, “are not only questionable, but they also tell only a part of the story of school funding.” Id.  They did not offer any comparison of the amount of State aid received per attending student. Id.  Also, with respect to plaintiffs’ claim that the attendance-based funding mechanism had a disparate impact on minority students, the court observed that school districts could not be held liable under Title VI for the various societal factors which contribute to low minority school attendance.  Id. at 338‑39.  The court concluded, “if each attending student receives the same amount of aid ‑‑ and it is the students, not the schools, who are the members of minority groups with cognizable interests under Title VI ‑‑ then there is no disparate impact on minority students.”   Id. at 338.  Here, the trial court should have applied the same reasoning to dismiss plaintiffs’ case, as the attendance data clearly showed no disparate impact.

Moreover, even analyzing the data on an enrollment basis, which showed a slightly greater amount of funding provided to non-minority than minority students, there is still no evidence of a disparate impact.  “Not all disparities . . . are probative of discrimination.  Before a deviation from a predicted outcome can be considered probative, the deviation must be ‘statistically significant.’” Ottaviani v. State Univ. of New York, 875 F.2d 365, 371 (2d Cir. 1989); see alsoCity of Chicago v. Lindley, 66 F.3d 819, 830 (7th Cir. 1995) (showing of statistical significance required to support disparate impact claim under Title VI regulations). Before concluding that a difference is statistically significant, courts generally require that there be less than a 5% probability that a disparity of equal or greater magnitude would occur simply by chance in a hypothetically neutral system.  Ottaviani, 875 F.2d at 372.  Here, Dr. Wolkoff showed that the small disparity shown in the enrollment numbers was about one-tenth of a standard deviation, in other words, the disparity would occur, under random conditions, about 90% of the time.  T.18167 Wolkoff.  Thus, the facts clearly showed that there was no significant disparity in the enrollment, or attendance numbers, and therefore plaintiffs’ prima facie claim should have failed.

The trial court rejected Dr. Wolkoff’s per capita evidence on the grounds that it failed to account for regional cost differences, which according to the court are highest in New York City, CFE Trial, 187 Misc. 2d at 107, and made no effort to account for the relative advantages that districts outside of New York City enjoy because of STAR tax relief.  Id.  These criticisms are unpersuasive.  Title VI’s disparate impact regulations require that funding provided through a covered state program be made available without an adverse racial impact.  Those regulations have never been interpreted to require that a state ensure that every resident receive an equal benefit from that funding. To do so would be an impossible task given the enormous variation in the circumstances of the state’s population.

**3.             Plaintiffs’ expert’s regression analysis did not constitute a
prima facie showing of disparate impact**

The trial court also improperly relied on Dr. Berne’s regression analyses as “probative evidence” and “independent proof of a disparate impact.”  CFE Trial, 187 Misc. 2d at 107.  Dr. Berne performed statistical regression analyses for the 1995-1996 school years to determine whether minority and non-minority students attending similar districts receive the same level of aid.  He conducted a total of 90 separate regression analyses comparing independent variables with 10 dependent variables, and these analyses purported to show a significant negative relationship between a district’s percentage of minority students and its per-student aid.  T.11971-1.12000 Berne.

As Dr. Wolkoff explained at trial, however, Dr. Berne’s analyses contained several methodological flaws. T. 18175-76 Wolkoff.  Among Dr. Wolkoff’s critiques were that half of the regression analyses conducted by Dr. Berne dealt only with operating aid, which accounted only for slightly more than half of general state support for public schools in the school years examined.  DTEV Tab 13, ¶ 639; PX2704.  The total aid variable used in the other half of the analyses did not include all state aid distributed to school districts but instead, left out a number of significant support categories, including $320 million in categories directed exclusively or mainly to high minority districts or the benefit of minority students. See DTEV Tab 13, ¶¶ 639-40; T.18181, T.18179-80 Wolkoff.

Moreover, Dr. Berne’s regression equations estimated a linear relationship between wealth and aid.  That is, they estimated that as school district wealth increases, state aid decreases.  However, the relationship between wealth and aid is not linear because the aid formulas call for even the wealthiest districts to receive a flat grant of $400 per district.  T.13143   Wolkoff.  Properly specifying the functional relationship between independent and dependent variables requires accounting for non-linearity, and plaintiffs’ failure to do so produced unreliable regression analyses.  DTEV Tab 13, ¶ 642; T.18183-84 Wolkoff.

Finally, Dr. Berne’s use of pupil units,1[7](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn18%22%20%5Co%20%22) as opposed to actual students in attendance was inappropriate because Title VI applies to pupils, not pupil units, which lack racial or ethnic characteristics.  DTEV Tab 13, ¶ 643, 644; T.13132-34 Berne; T.22689-96 Berne.

Dr. Wolkoff reworked several of Dr. Berne’s regression analyses to correct for these errors and found no disparate impact.  Dr. Wolkoff showed that the correction of fundamental errors in Dr. Berne’s analysis produced results establishing the absence of significant relationship between aid per student and race. DTEV Tab 13, ¶ 646; T. 18193-210 Wolkoff.  Despite the flaws in Dr. Berne’s analysis, and despite the existence of direct evidence showing no disparate impact, the trial court still found Dr. Berne’s regression analyses to be persuasive.  Id. at 223.  This conclusion was without foundation.

2.                  Any Disparate Impact is Justified by Substantial Legitimate State Policies

Under Title VI jurisprudence, if a plaintiff shows a prima facie case of disparate impact, the burden shifts to the defendant to prove a substantial legitimate justification for its practice.  See CFE I, 86 N.Y. 2d at 324 (citing Larry P. v. Riles, 793 F.2d 969, 982-83 (9th Cir. 1994)).  Then, plaintiffs still have an opportunity to show that “less discriminatory alternatives” were available to further the legitimate interest.  Id.

Here, even assuming plaintiffs have shown a prima facie case of disparate impact, the State has shown “legitimate nondiscriminatory reason[s]” CFE I, 86 N.Y.2d at 323, including wealth equalization and attendance based funding, for the State aid system it has created.

1.                  Because of New York City’s high relative wealth compared to most school districts in the state, wealth-equalization fully justifies New York City’s receipt of a percentage of aid lower than its percentage of students.

New York City is a wealthier-than-average district and therefore receives a smaller proportion of operating aid than other poorer districts.  DTEV Tab 13, ¶¶ 659-660.  The State’s wealth-equalization mechanism justifies New York City’s receipt of a percentage of total state aid that is lower than its percentage of total students.

The trial court improperly rejected the State’s wealth-equalization justification on the grounds that the State’s wealth-equalization mechanism does not adequately account for student need.  CFE Trial, 187 Misc. 2d at 111.   The court found that though New York City is treated as a relatively wealthy district by the funding formulas, it actually has a high concentration of at risk students who are not adequately accounted for by the state’s funding system.  Moreover, the trial court found that the wealth equalization mechanism does not adequately account for New York City’s high regional costs.  Id.  Therefore, the court found that while wealth equalization in the abstract is related to legitimate educational objectives, the plaintiffs demonstrated that this objective is not served by the State’s current school funding mechanism.

However, contrary to the court’s conclusion, New York State’s wealth equalization mechanism does account for student need and regional costs. Moreover, the State’s decision to base its funding mechanism on wealth-equalization was a rational choice designed to promote legitimate goals.  In rejecting this alternative, the trial court applied a higher level of scrutiny to the State’s legitimate decisions than was warranted.

**2.     The State Has A Legitimate Interest in Basing Distribution of Aid on Student Attendance**

The trial court rejected the State’s reliance on basing funding on districts’ average attendance rather than enrollment.  CFE Trial, 187 Misc. 2d at 111. However, the goal of using attendance as a measure of student need is intended to encourage districts to improve and maintain attendance.  T.20196-97 Guthrie.  Seven states, accounting for about 36 percent of the nation’s school children, count pupils this way.  T.20195-96 Guthrie.  In rejecting the State’s rational policy, the court improperly substituted its own policy judgment for that of the Legislature.

  In rejecting a similar challenge to New York’s State’s attendance based aid-formula, the district court in African American Legal Defense Fundexplained:

[T]he State . . .in spending its resources, has an interest in paying only for those students who actually attend.  At the outset, I do not see the alleged discrimination in the State funding fully each – but only each - student that actually attends.  Moreover, the State has a legitimate interest in providing an incentive for schools to improve attendance rates.  Whether the incentive succeeds is irrelevant: the scheme “may not be condemned simply because it imperfectly effectuates the State’s goals.”

African American Legal Defense Fund, 8 F. Supp. 2d at 336 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 51 (1973)). Echoing the Supreme Court’s decision in Rodriguez, the district court aptly observed that the policy cannot be condemned simply because it does not work perfectly.  The trial court lost sight of the fact that the issue is whether the provision exhibits a rational relationship to the State’s legitimate interest, and not whether the provision is the most desirable option.

**3.     This Court Should Not Consider Plaintiffs’ Proposed Alternatives to the Present System Because Relying on These Options Would Necessarily Require the Court to Substitute its Policy Judgments for that of the Legislature.**

Plaintiffs argue that even if the State put forth a substantial legitimate justification, plaintiffs should still prevail because their proposed alternatives would achieve the same results without the disparate impact they claim is caused by the State’s method.  This argument is without merit.

None of plaintiffs’ proposed alternatives would lessen the alleged disparate impact while still allowing the state to further its legitimate interests driving its funding mechanism.  The Second Circuit has held, however, in a similar Title VI disparate impact challenge that when the State has substantial legitimate justifications for its funding mechanism, the Court should not even consider these alternatives because doing so would necessarily require the Court to substitute its policy evaluation for the State’s.

In Bryan v. Koch, 627 F.2d 612, 619 (2d Cir. 1980), the Second Circuit rejected a disparate impact challenge brought under the Title VI implementing regulations challenging the City’s decision to close a hospital, on the grounds that it would have a disparate impact on minorities who were served by the hospital.  Concluding that Title VII analysis, which requires consideration of the alternatives, should not be applied in the context of this Title VI disparate impact claim, the Court stated:

With Title VI, however, the inquiry could frequently become too open‑ended. If, for example, a court were to assess alternative ways of saving funds throughout the administration of a city or even throughout the administration of the health care function, it would seriously risk substituting its own judgment for that of the city’s elected officials and appointed specialists. We are skeptical of the capacity and appropriateness of courts to conduct such broad inquiries concerning alternative ways to carry out municipal functions. Once a court is drawn into such a complex inquiry, it will inevitably be assessing the wisdom of competing political and economic alternatives. Moreover, such policy choices would be made without broad public participation and without sufficient assurance that the alternative selected will ultimately provide more of a benefit to the minority population.

Id. at 619.

The Second Circuit’s reasoning applies equally in this case.  Here, because the State has identified substantial, legitimate justifications for its policies, any inquiry by the Court into alternatives would necessarily encroach upon the Legislature’s domain.

For the foregoing reasons, the trial court improperly found that the State’s funding mechanism has a disparate impact on minorities in violation of Title VI’s implementing regulations, and this Court should reverse that finding.

**POINT VI**

**BECAUSE THE TRIAL COURT’S REMEDIAL ORDER IS OVERBROAD, ENCROACHES ON LEGISLATIVE PREROGATIVES, AND THREATENS TO UNDERMINE NEW YORK’S TRADITION OF LOCAL CONTROL OVER PUBLIC EDUCATION, IT SHOULD BE SET ASIDE**

In the event that this Court were to uphold Supreme Court’s finding that the State has violated the Education Article, it should set aside that court’s remedial order which is overbroad, encroaches on the fundamental prerogatives of the Legislature to set educational policy and decide how the State’s limited resources are to be deployed, and threatens to undermine the system of joint State and local control over education that has long existed in New York.  Many of the remedial measures ordered by the trial court go far beyond requiring that a sound basic education, as defined by the Court of Appeals, be provided to the children of New York City, and instead seek to implement the trial court’s own view of desirable education policy both in New York City and statewide. Moreover, even where the court’s remedial decrees do ostensibly relate to the provision of a sound basic education, the court’s approach will impose staggering costs on the State of New York, drastically impair the Legislature’s authority to order priorities and set educational policy, and undermine the joint responsibility that the State and localities have historically shared for primary and secondary education.   Therefore, if this Court were to find that the Education Article has been violated, the Court should vacate the trial court’s remedy with instructions to permit the Legislature to define the appropriate means of providing New York City’s public school students with a constitutionally sufficient education.

The Trial Court’s Remedial Order is Overbroad

The Court of Appeals made clear in CFE I that the Legislature’s obligation under the Education Article is specific and limited.  A sound basic education “should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.  If the physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation.”  CFE I, 86 N.Y.2d at 316.

Many of the remedial provisions ordered by the trial court relate not to fulfilling this constitutional standard, but rather to imposing the court’s own view of sound educational policy.  For example, the court’s order requires the State to ensure “appropriate class sizes,” and “an expanded platform for programs to help at risk students by giving them ‘more time on task.’” CFE Trial, 187 Misc.2d at 114-15.  While smaller class sizes and “more time on task” arguably may help improve educational performance, they have not been shown to be essential to enable schools to impart the “basic literacy, calculating, and verbal skills” that the Constitution requires.  The same is true of the court’s demand that the State “examine the effects of racial isolation on many of the City’s school children.”  Id. at 115.  Whether or not increased “racial and socioeconomic integration” may be “cost effective in raising student achievement,” the call for further study demonstrates that the trial court did not determine whether it was necessary to give students the opportunity for a sound basic education.

Furthermore, the court’s requirement that the State “[e]nsure that every school district has the resources necessary for providing the opportunity for a sound basic education,” id. (emphasis added), improperly ranges far beyond the scope of this lawsuit which was limited to purported deficiencies in New York City alone.

This disconnect between the scope of the lawsuit and the extremely broad nature of the trial court’s remedial order distinguishes the present case fromMatter of Lavette M., 35 N.Y.2d 136 (1974), Heard v. Cuomo, 80 N.Y.2d 684 (1993), and McCain v. Koch, 70 N.Y.2d 109 (1987), upon which plaintiffs rely. In each of those cases the Court of Appeals avoided the danger of judicial overreaching by carefully tailoring the remedy to the identified constitutional or statutory violation.  See Lavette M., 35 N.Y.2d at 142 (“It should not be our province to determine what is the best possible treatment or to espouse an ideal but perhaps unattainable standard.  Rather, our role should be to assure the presence of a bona fide treatment program.”); Heard, 80 N.Y.2d at 691 (“Courts, after all, must be mindful not to arrogate to themselves a larger authority or remedy than that which lies within judicial and juridical competence.”); McCain, 70 N.Y.2d at 119 (“Supreme Court decided that defendants, having undertaken to provide the homeless with emergency shelter, were obliged to furnish shelter meeting minimum standards.”).

Indeed, the trial court’s failure to properly tailor its remedial order is illustrated by the decisions from other states that plaintiffs rely on to justify the trial court’s remedy.  Those decisions implemented state constitutional provisions vastly different from New York’s Education Article as it has been construed by the Court of Appeals, and their remedial provisions are therefore not appropriate models for the present case.  For example, Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989), makes clear that in Kentucky providing a public education is strictly a state, and not a local, responsibility, and that the quality of education must be substantially uniform statewide:

The system of common schools must be substantially uniform throughout the state.  Each child, every child, in this Commonwealth must be provided with an equal opportunity to have an adequate education.  Equality is the key word here.  The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education.  This obligation cannot be shifted to local counties and local school districts.

Id. at 211.  The Kentucky Supreme Court therefore undertook to specify in some detail the essential characteristics of the uniform system that the state legislature was required to implement statewide.  Id. at 212-13.  The court made clear that the role, if any, to be played by “local school entities” is strictly supplementary.1[8](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn19%22%20%5Co%20%22)

Similarly, in Campbell County School District v. Wyoming, 907 P.2d 1238, 1279 (Wyo. 1995), the Wyoming Supreme Court concluded that Wyoming constitution required the state legislature to “design the best educational system,” ensure that the same “‘proper’ educational package” be available to each student regardless of locality, and fully fund the system regardless of competing priorities.  Accordingly, in its remedial order the court set forth various elements that it believed a “proper education” would include.

In New York, by contrast, the Court of Appeals has made clear that education is in large part a matter for local control, and that the Legislature’s obligation is to ensure that “minimally adequate” educational opportunities are made available statewide.  See CFE I, 86 N.Y.2d at 317; Levittown, 57 N.Y.2d at 46-48.  The Kentucky and Wyoming approaches are manifestly incompatible with that outlined by the Court of Appeals, and plaintiffs’ reliance on the Roseand Campbell remedial schemes is therefore unwarranted.1[9](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn20%22%20%5Co%20%22)

The Trial Court’s Remedy Improperly Intrudes on the
State Legislature’s Prerogatives

The trial court’s remedial order inappropriately encroaches on the Legislature’s power to conduct its business, and to decide how the State’s limited resources should be allocated to address its many priorities.  The court’s demands for “sustained and stable funding” and “as much transparency as possible” in the school financing system, see 187 Misc.2d at 115, represent an inappropriate interference in the legislative process that has in no way been shown to be necessary to ensure that constitutional requirements are met.  See Levittown, 57 N.Y.2d at 48 n.7 (“once it is concluded that there is an educational system in New York State which comports with the constitutional requirement, it is immaterial that the Legislature in its wisdom has seen fit to provide financial support under complex formulas with a variety of components, even were it to be concluded that the maze of financial support measures was not entitled itself to be characterized as a ‘system’”); New York Public Interest Research Group, Inc. v. Steingut, 40 N.Y.2d 250, 257 (1976) (“it is not the province of the courts to direct the legislature how to do its work”) (citations omitted).

Moreover, while the trial court purports to defer to the other branches of State government in framing a remedy, its decision makes amply clear that it will regard any plan that does not result in massive spending increases as insufficient.  See, e.g, CFE Trial, 187 Misc.2d at 78 (“If the average raise were $5,000 ‑‑ which would be a good deal less than the average wage differential between the City and its suburbs ‑‑ the annual increase in teacher pay (not including benefits) would amount to $390 million. . . .  Remedying the disrepair and overcrowding that plagues New York City’s public schools may require billions of additional dollars.”).   The Court of Appeals cautioned, however, that its CFE I decision “does not extend the State’s funding obligations.”  86 N.Y. 2d at 316. n.4.

While education is clearly a paramount priority for New York, the State’s resources are not unlimited.  Other priorities, such as making assistance available to the needy, simply cannot be ignored by the Legislature, particularly in difficult economic times when revenues are reduced and needs for governmental assistance increased.  The Court of Appeals in Levittown made clear that “decisions as to how public funds will be allocated among the several services for which by constitutional imperative the Legislature is required to make provision are matters peculiarly appropriate for formulation by the legislative body (reflective of and responsive as it is to the public will).” Levittown, 57 N.Y.2d at 48.  The trial court’s effort to arrogate from the Legislature to itself the power to set priorities and allocate limited resources should be rejected.

Finally, the trial court’s own call for further study as to what resources are necessary for providing a sound basic education illustrates the bankruptcy of its approach to reallocation.  While on one hand the order “declares that [the State’s] method for funding education” violates the Education Article of the State Education by making available insufficient funds to the schools, 187 Misc.2d at 115, on the other hand it directs the State to perform the “threshold task” of “ascertaining, to the extent possible, the actual costs of providing a sound basic education in districts around the State,” id. at 115.  That the court, after a seven-month trial, felt compelled to direct the State to calculate the cost of providing a sound basic education demonstrates that its conclusion that the current levels of spending are insufficient lacks any basis, particularly where the evidence showed that New York City school system spends more money per pupil than almost any other large urban school district, and significantly more than the national average.

The Trial Court’s Remedy Threatens to Undermine Local Control Over Education

The trial court’s demand that the State ensure “a system of accountability to measure whether the reforms implemented by the legislature actually provide the opportunity for a sound basic education” threatens to fundamentally alter New York State’s longstanding system whereby responsibility for education has been divided between the State and localities.  The Court of Appeals has expressly held “the preservation and promotion of local control over education” to be “a legitimate State interest.”  Levittown, 57 N.Y.2d at 44.  Disregarding the principle of local control, the trial court found that while significant deficiencies exist in BOE’s use of the resources made available to it, see CFE Trial, 187 Misc.2d at 92-97, the State should be held solelyresponsible for these deficiencies because “the State Constitution reposes responsibility to provide a sound basic education with the State,” see id. at 80.  The court’s analysis would thus seem give the State, rather than BOE, responsibility for overseeing the day-to-day operations of all the New York City schools. The Education Article has never been interpreted in this manner.  See Levittown, 57 N.Y.2d at 45-46 (“Any legislative attempt to make uniform and undeviating the educational opportunities offered by the several hundred local school districts . . . would inevitably work the demise of the local control of education available to students in individual districts.”).2[0](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftn21%22%20%5Co%20%22)  Such a fundamental change in the governance structure of public education in New York should not be imposed by judicial declaration.

**CONCLUSION**

For the foregoing reasons, the trial court’s decision should be reversed and judgment entered for defendants.

Dated:            New York, New York

October 15, 2001

Respectfully Submitted,

ELIOT SPITZER

Attorney General of the

  State of New York

Attorney for Defendants-Appellants

       By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

MARK GIMPEL

Deputy Solicitor General

120 Broadway

New York, New York 10271

 (212) 416-8027

CAITLIN J. HALLIGAN

Solicitor General

MARK GIMPEL

Deputy Solicitor General

MELANIE L. OXHORN

ALLISON PENN

DEON J. NOSSEL

SACHIN PANDYA

DAVID LAWRENCE III

Assistant Solicitors General

Of Counsel

[[1]](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref1%22%20%5Co%20%22)These predicted expenses include a “modest” increase in teacher salaries ($390 million),  Campaign for Fiscal Equity v. State of New York, 187 Misc.2d 1, 78 (Sup. Ct. N.Y. Co. 2001)(“CFE Trial”); “other initiatives to attract teachers and administrators” (“additional funds”), id.; professional development funds (figure described as understating need)($34 million), id.; maintenance (“conservative estimate” of $327 million), id.; capital funds from 2000 to 2004 (“credible evidence at trial demonstrated that this amount was insufficient”) ($11.2 billion), id.; other costs including libraries, supplies, technology (hard to quantify based on trial evidence), id. at 78-79; cost of additional teachers resulting from capping class size at 20 for grades K-3 and 24 for grades 4-6 ($209 million to $377 million).   Pl. Br. at 47.

[[2]](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref2%22%20%5Co%20%22)Citations to “Pl. Br.” are to Plaintiffs-Respondents’ Brief.

[3](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref4%22%20%5Co%20%22)Brief for Defendants-Appellants in Levittown, at 113 (citing 40th Annual Report of the State Superintendent of Public Instruction, 6 N.Y. Assembly Documents of 1894, Doc. No. 42, p.15).

[4](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref5%22%20%5Co%20%22)Citations to “Def. Br.” are to Defendants-Appellants’ Brief.

[5](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref6%22%20%5Co%20%22)Contrary to what plaintiffs assert, see Pl. Br. at 132-33, the Court of Appeals in CFE I did at least implicitly find even the RCTs to be in some respects aspirational, inasmuch as the RCTs were aligned with the Regents’ standards regarding curriculum, teaching, and other elements of educational programs (which, according to plaintiffs, was precisely what the Court was referring to when it stated that “many of the Regents’ and Commissioner’s standards exceed notions of a minimally adequate or sound basic education,” CFE I, 86 N.Y.2d at 317), and the Commissioner’s standards for evaluating schools.

[6](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref7%22%20%5Co%20%22)Plaintiffs’ attempt to portray the state PEP tests as testing at so low a level that anyone could reach it, see Pl. Br. at 89, is without foundation.   This was not the conclusion reached by plaintiffs’ testing expert, Richard Jaeger, who offered no such opinions regarding the State test.  Moreover, others familiar with the tests testified that a successful outcome demonstrated that the student did not require remediation, and had achieved basic competency.  T.1580 Kadamus; T.924, T.1000 Sobol.

[7](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref8%22%20%5Co%20%22)Citations to “PFF” refer to Plaintiffs’ Proposed Findings of Fact and Conclusions of Law.

[8](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref9%22%20%5Co%20%22)Actions have been brought in other states by local boards of education and parties seeking to challenge municipal funding decisions as they relate to a public school system.  See, e.g., Board of Educ. v. City of New Haven, 676 A.2d 375, 380 (Conn. 1996) (collecting cases involving suits against municipalities); Laconia Bd. of Educ. v. Laconia, 285 A.2d 793, 795-96 (N.H. 1971) (referring to cases establishing city council’s obligation to appropriate funds necessary to meet minimum statewide requirements); cf. Arthur v. Nyquist, 712 F.2d 809, 811-12 (2d Cir. 1983) (upholding order requiring City of Buffalo to appropriate additional money to its board of education found necessary to support the board’s efforts to achieve desegregation in the Buffalo schools in compliance with state and federal law).

[9](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref10%22%20%5Co%20%22)Virtually all of these cases relied on Wright, but it does not support their conclusions.  See, e.g., Loshavio, 33 F.3d at 551 (citing only Wright to support proposition that “federal regulations . . . may create enforceable rights”); Casey, 885 F.2d at 18 (3d Cir. 1989) (citing Wright to support proposition that “with respect tothe existence of the private rights requirement, valid federal regulations as well as federal statutes may create rights enforceable under section 1983”); DeVargas, 844 F.2d at 725 n.19 (citing Wright as one of “some instances” when “violations of rights provided under federal regulations provide a basis for § 1983 suits”); South Camden Citizens in Action v. New Jersey Dep’t of Envir. Protection, 145 F. Supp. 2d 505, 526-27 (D.N.J. 2001) (citing Wright for the proposition that agency regulations may create “rights within the meaning of § 1983”).

[10](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref11%22%20%5Co%20%22)Plaintiffs’ reliance on Powell v. Ridge, 189 F.3d 387, 402 (3d Cir.), cert. denied, 528 U.S. 1046 (1999), is misplaced.  In Powell, the Third Circuit concluded that because the Title VI disparate impact regulations had been held by the Supreme Court to be valid, they created an enforceable right to be free from disparate impact upon which a private right of action under Title VI could be based.  Id. at 399-400.  The court further held that this enforceable right could also be asserted in a § 1983 action.  Id. at 400-03.  As has been discussed, Sandoval now makes clear that the disparate impact regulations do not give rise to an enforceable right not to be free from disparate impact.  Therefore, the premise upon which Powell held a § 1983 action to be permissible is no longer valid.

[11](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref12%22%20%5Co%20%22)Compare Bruneau; Waid v. Merrill Area Public Sch., 91 F.3d 857, 862 (7th Cir. 1996)  (Title IX “subsumed”  constitutional § 1983 claims); Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 789 (3d. Cir. 1990) (same); Alexander v. Chicago Park District, 773 F.2d 850, 856 (7th Cir. 1985 (Title VI claim for intentional discrimination may not be asserted through § 1983)  with Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1997) (holding that Title IX does not preclude a separate action under § 1983);Seamons v. Snow, 84 F.3d 1226, 1233-34 (10th Cir. 1996) (same); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 723 (6th Cir. 1996) (same); Powell, 189 F.3d at 399-400) (Title VI implementing regulations claim may be asserted via § 1983).

[12](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref13%22%20%5Co%20%22)See Blessing, 520 U.S. at 348 (“Title IV‑D contains no private remedy‑‑ either judicial or administrative‑‑through which aggrieved persons can seek redress. The only way that Title IV‑D assures that States live up to their child  support plans is through the Secretary’s oversight. The Secretary can audit only for ‘substantial compliance’ on a programmatic basis. Furthermore, up to 25 percent of eligible children and custodial parents can go without most of the services enumerated in Title IV‑D before the Secretary can trim a State’s AFDC grant.”); Wilder, 496 U.S. at 521 (“The Medicaid Act contains no comparable provision for private judicial or administrative enforcement.”); Wright, 479 U.S. at 428 (“The statute does not require and HUD has not provided any formal procedure for tenants to bring to HUD’s attention alleged PHA failures to abide by the Brooke Amendment and HUD regulations.”).

[13](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref14%22%20%5Co%20%22)Plaintiffs’ contention that the State has waived its arguments about the merits of plaintiffs’ Title VI disparate impact claim is without foundation.  SeePl. Br. at 179, n.45. Contrary to plaintiffs’ assertions, the State in its opening brief referred the Court to the State’s lengthy discussion of the merits contained in their post-trial brief.  See Def. Br. at 113, n. 29.  Aside from a cursory reference to § 1983 in a paragraph of plaintiffs’ Amended Complaint, see Pl. Amended Complaint, Joint Appendix, Volume I at 224, ¶ 84, plaintiffs never at any point briefed their § 1983 claim or explained how it was an alternative for bringing their disparate impact claim in the event that their private right of action claim failed.  Given the clarity with which the Supreme Court rejected a private right of action under the Title VI implementing regulations and the tenuousness of plaintiffs’ § 1983 claim, the State’s decision not to engage in a lengthy discussion of the merits of plaintiffs’ disparate impact claim in their opening brief was entirely justified.

[14](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref15%22%20%5Co%20%22) The court’s analysis reveals its basic misunderstanding of the Title VI inquiry in this case. Neither of the parties argued that the court was required to investigate whether there was disparate funding between minorities and non-minorities within New York City school districts.  Rather, the appropriate inquiry was whether the State’s funding mechanism resulted in a disparate impact on minority students statewide.

[15](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref16%22%20%5Co%20%22) Meek v. Martinez, 724 F. Supp. 888 (S.D. Fla. 1987), also relied on by the trial court, does not support its decision to rely on a proxy in disregarding the direct evidence showing that there was no disparate impact.  In Meek, plaintiffs claimed that Florida’s formula for allocating funds to senior citizens pursuant to the Older Americans Act of 1964 discriminated against minority seniors.  The court observed in Meek that defendants presented “no credible evidence to rebut Plaintiffs’ prima facie case as to any or all of the factors in the intrastate funding formula.” Id. at 906.  The State in this case, by contrast, presented direct evidence that there was no disparity in funding amounts.

[16](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref17%22%20%5Co%20%22) Much of the aid distributed in New York State is allocated using Total Attending Pupil Units (“TAPU”) for payment, a pupil count based, in part, on average daily attendance.  DTEV Tab 13, at ¶ 584; T.17949 Wolkoff.

[17](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref18%22%20%5Co%20%22) Total Aidable Pupil Units (“TAPU”) is a pupil count based on average daily attendance that also contains weightings for secondary status, special educational needs, and other pupil characteristics thought to affect a district’s need for resources.  T.17949-17950 Wolkoff.

[18](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref19%22%20%5Co%20%22)Plaintiffs’ characterization of McDuffy v. Secretary of the Executive Office of Education, 615 N.E.2d 516 (Mass. 1993), is erroneous.  Although quoting the Kentucky Supreme Court’s guidelines as to the goals of an education, the Massachusetts Supreme Judicial Court made clear that it was following the approaches of Texas and Washington in leaving it to the state legislature to formulate the remedy for the constitutional violations that it found in the existing Massachusetts system.  Id. at 554-55 & n.92.

[19](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref20%22%20%5Co%20%22)Plaintiffs wrongly suggest that the New York State educational system has long been found to be in violation of the constitution.  Rather, inLevittown, the Court of Appeals rejected the plaintiffs’ constitutional claims, and rejected the contention that the flaws that the plaintiffs identified merited a judicial remedy.  Levittown further makes clear that plaintiffs’ reliance on recommendations of various task forces on excellence in education that they contend have not been implemented is inappropriate.  See Levittown, 57 N.Y.2d at 47 n.6 (“What . . . has been urged on the Legislature as sound educational policy is to be clearly distinguished from the command laid on the Legislature by the Constitution.”)

[20](https://www.escr-net.org/sites/default/files/ReplyBriefFinal_10_15_2001.html%22%20%5Cl%20%22_ftnref21%22%20%5Co%20%22)The Levittown court quoted with approval an amicus brief filed by 85 school districts that emphasized the importance of New York’s tradition of local control:

For all of the nearly two centuries that New York has had public schools, it has utilized a statutory system whereby citizens at the local level, acting as part of school district units containing people with a community of interest and a tradition of acting together to govern themselves, have made the basic decisions on funding and operating their own schools.  Through the years, the people of the State have remained true to the concept that the maximum support of the public schools and the most informed, intelligent and responsive decision-making as to the financing and operation of those schools is generated by giving citizens direct and meaningful control over the schools that their children attend.

57 N.Y.2d at 46.