SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

INTEGRATENYC, INC.; A.C.; H.D. ex rel. W.D.; M.G. ex rel. M.G.; L.S. ex rel. S.G.; C.H. ex rel. C.H.; Y.C. ex rel. Y.J.; A.M.; V.M. ex rel. J.M.; M.A. ex rel. F.P.; S.S. ex rel. M.S.; S.D. ex rel. S.S.; K.T. ex rel. F.T.; and S.W. ex rel. B.W.,

Plaintiffs,

vs.

THE STATE OF NEW YORK; ANDREW M. CUOMO, as Governor of the State of New York; NEW YORK STATE BOARD OF REGENTS; NEW YORK STATE EDUCATION DEPARTMENT; BETTY A. ROSA, as New York State Commissioner of Education; BILL DE BLASIO, as Chief Executive Officer of New York City; NEW YORK CITY DEPARTMENT OF EDUCATION; and MEISHA PORTER, as Chancellor of the New York City Department of Education,

Defendants,

and

PARENTS DEFENDING EDUCATION,

Intervenor-Defendant.

Index No. 152743/2021

Assigned to Hon. Frank P. Nervo

MEMORANDUM OF LAW
BY INTERVENOR-DEFENDANT PARENTS DEFENDING EDUCATION
IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs tell this Court that there is a "racist caste system" in New York City public education and an "apartheid state" in the City's high schools.[1] Why? Because of Defendants' audacity to use race-neutral, merit-based admissions processes for gifted programs, specialized high schools, and other academically screened schools. As Plaintiffs' own complaint reveals, there is no state-sponsored "caste system" or "apartheid." The race-based assumptions throughout Plaintiffs' complaint are pernicious. *See Missouri v. Jenkins*, 515 U.S. 70, 119 (1995) (Thomas, J., concurring) (condemning "idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites"). And the unabashed request for race-based relief is no better. There is no legal basis for substituting the schools' race-neutral policies with "race-conscious" ones. Compl. ¶19. Treating students "solely as members of a racial group is fundamentally at cross-purposes" with the aim "that students see fellow students as individuals rather than solely as members of a racial group." *Parents Involved in Comm. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 733 (2007) (plurality). Such race-based classifications are "forbidden" because they "demea[n] the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). Every count of Plaintiffs' complaint should be dismissed.

BACKGROUND

1. New York City began providing free public schooling nearly 200 years ago, well before its counterparts across the State. *See Paynter v. State*, 100 N.Y.2d 434, 457-58 (2003) (Smith, J., dissenting). Today, the City's public school system comprises more than 1,000 schools divided into more than 30 districts, serving more than 1 million schoolchildren and employing more than 100,000 teachers and staff. *See Campaign for Fiscal Equity, Inc. v. State* ("*CFE II*"), 100 N.Y.2d 893, 903-04 (2003).

[1] Dkt. 81, Plaintiffs' First-Amended Compl. ("Compl.") at ¶¶19, 79.

The City offers gifted and talented programs beginning in elementary school. Compl. ¶¶8, 10. Beginning in middle school, students can test into academically "screened" schools. *Id.* ¶¶10, 88-90. These programs admit students based upon merit, without regard to race. *Id.* ¶¶8, 10, 84.

For high schoolers, the City offers more than 700 programs at 400 high schools. *Id.* ¶¶11, 93. Nine of those 400 high schools are so-called "specialized high schools." *Id.* ¶¶12, 94. Admission to eight of the nine specialized high schools is based on merit. *Id.*[2] Any eighth grader may take the Specialized High School Admissions Test (or SHSAT) to gain admission. *Id.* The City offers scholarships for SHSAT test preparation (called the "DREAM program") and an admissions track for low-income students whose SHSAT scores are sufficiently high to earn admission to a specialized high school (called the "Discovery program"). *Id.* ¶¶96-97.

A substantial percentage of the City's schoolchildren are students of color. *See CFE II*, 100 N.Y.2d at 903-04. So too are the schoolchildren admitted to the City's gifted programs and specialized high schools. *See, e.g.*, Compl. ¶99 (alleging more than 60 percent of the offers to specialized high schools went to students of color).

2. In March 2021, Plaintiffs filed this lawsuit. Plaintiffs are 14 students at New York City public schools (including some at the City's specialized high schools) and three organizational plaintiffs. *Id.* ¶¶28-41. They sued the State, the Governor, the Mayor, the State Board of Regents, the State Education Department, the Commissioner of Education, the New York City Department of Education, and the Department's Chancellor. *Id.* ¶¶20-27. Parents Defending Education successfully moved to intervene as a Defendant. Like Plaintiffs, PDE is a membership organization whose

[2] Admissions to eight of the nine specialized high schools is based on SHSAT performance. Admission to the ninth, LaGuardia High School of Music & Art, is based on an audition. Compl. ¶94.

members include parents of students enrolled in the City's schools, including in gifted programs and specialized high schools. Dkt. 6, Memo. of Law in Support of Mot. to Intervene at 4-5.

Plaintiffs' complaint alleges violations of the New York Constitution as well as the New York State Human Rights Law. Compl. ¶¶147-67. The complaint denigrates—eight different times—the race-neutral gifted programs and specialized high schools as a racial "caste system." *Id.* ¶¶7-8, 15, 18-19, 151, 159. It describes high schools as resembling "an apartheid state." *Id.* ¶79. It critiques the City's curriculum as "Eurocentric" and perpetuating "Antidarkness" and "antiblack racism." *Id.* ¶¶104, 109 n.145, 110. It attacks the City's teachers as too white. *Id.* ¶¶118-35. And it alleges racially disproportionate disciplinary rates. *Id.* ¶¶82-102.

Plaintiffs seek declaratory and prospective injunctive relief. Plaintiffs ask this Court to invoke its "remedial authority to impose measures," "whether race-neutral or race-conscious," to eliminate not only intentional discrimination but also "unlawful disparate impacts." *Id.* ¶19. They ask for a judicial decree that eliminates the current admissions process for gifted programs, specialized high schools, and other screened schools; mandates the adoption of "evidence-based programs" for recruiting teachers and staff of color; prescribes "monitoring and enforcement" to ensure compliance with the State's "Culturally Responsive-Sustaining Education Framework" curriculum guidelines; and demands the "[e]stablishment of a system of accountability" with more monitoring and intervention. *Id.*, pp. 83-84. On top of that, Plaintiffs seek "issuance of an order requiring the preparation of a plan, with Court approval and consideration of any objections by Plaintiffs, designed to cure Defendants' violations of law, and bring them into compliance with the law." *Id.*, p. 84.

STANDARD OF REVIEW

"Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mex. Grill, Inc.*, 29 N.Y.3d 137, 142 (2017);

see Weinbaum v. Cuomo, 219 A.D.2d 554, 556 (1st Dep't 1995). When reviewing a motion to dismiss for failure to state a cause of action, CPLR 3211(a)(7), a court assumes the factual allegations to be true and construes the complaint in the light most favorable to the plaintiff. *See Myers v. Schneiderman*, 30 N.Y.3d 1, 11 (2017). Even so, a court is "not required to accept as true, factual allegations that [are] conclusory, inherently incredible, or speculative." *Sonkin v. Sonkin*, 157 A.D.3d 414, 415 (1st Dep't 2018); *see M&E 73-75, LLC v. 57 Fusion LLC*, 189 A.D.3d 1, 5 (1st Dep't 2020) ("bare legal conclusions and inherently incredible facts are not entitled to preferential consideration"). Nor must a court accept contradictory contentions. *See Schuit v. Tree Line Mgmt. Corp.*, 46 A.D.3d 405, 406 (1st Dep't 2007).

ARGUMENT

I. Plaintiffs Fail to State a Claim for Violation of the Education Article.

The Education Article of the New York Constitution states, "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. CONST. art. XI, §1. The Education Article was added to the New York Constitution at the Constitutional Convention of 1894. *See Paynter*, 100 N.Y.2d at 449 (Smith, J., dissenting). It was born of the free school movement—an effort to relieve parents from paying "rate bills" for schooling and to establish free public schools across the State. *See id.* at 459-65. New York City was ahead of the curve. The City's Free School Society had been operating schools for decades. *See id.* at 457-58.

The Education Article ensures a "sound basic education" for students. *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 48 (1982). But the constitutional obligation it imposes is specific to the Legislature's provision of "maintenance and support" to schools—meaning its "funding system." *Paynter*, 100 N.Y.2d at 441; *Campaign for Fiscal Equity, Inc. v. State* ("*CFE I*"), 86 N.Y.2d 307, 318-19 (1995). It does not further require Defendants to guarantee "equal educational

opportunities in every school district." *Paynter*, 100 N.Y.2d at 439; *see also Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo*, 86 N.Y.2d 279, 284-85 (1995). It establishes only "a constitutional floor." *Aristy-Farer v. State*, 29 N.Y.3d 501, 505 (2017) (quotation marks omitted). In short, the Education Article guarantees sufficient funding for schools with "minimal acceptable facilities and services," not equality of outcomes in every New York school. *Levittown*, 57 N.Y.2d at 47 (text "makes no reference to any requirement that the education to be made available be equal or substantially equivalent in every district"); *see, e.g.*, *Paynter*, 100 N.Y.2d at 439, 443.

To state a claim for a violation of the Education Article, Plaintiffs must first "demonstrat[e] 'gross and glaring inadequacy' in their schools." *Paynter*, 100 N.Y.2d at 439 (quoting *Levittown*, 57 N.Y. 2d at 48). Plaintiffs must then plead that any such inadequacy "is causally connected to the funding system." *Id.* at 440. Count I fails in both regards and should be dismissed.

A. Plaintiffs fail to allege "gross and glaring inadequacy."

1. New York courts will not intervene in the Legislature's school funding decisions (or local control over schools) absent "gross and glaring inadequacy." *Levittown*, 57 N.Y.2d at 48-49. Schools must be missing certain essential features on a scale "large enough to represent a systemic failure"—allegations absent from Plaintiffs' complaint here. *CFE II*, 100 N.Y.2d at 914. These essential features are "minimally adequate" physical facilities, school supplies, "basic curricula," and teaching personnel:

> Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.

CFE I, 86 N.Y.2d at 317.

A plaintiff cannot plead "gross and glaring inadequacy" based on allegations about poor educational *outcomes* alone. Allegations about poor examination results or failed state educational

standards are not enough. *See Paynter*, 100 N.Y.2d at 440; *CFE I*, 86 N.Y.2d at 317, 319. While such facts might be probative of the adequacy of school funding, they are not themselves sufficient to allege a violation of the Education Article. *See*, *e.g.*, *CFE I*, 86 N.Y.2d at 317 (noting "there are a myriad of factors which have a causal bearing on test results," beyond constitutionally inadequate school funding); *cf. CFE II*, 100 N.Y.2d at 914 ("A showing of good test results and graduation rates among these students—the 'outputs'—might indicate that they somehow still receive the opportunity for a sound basic education.").

2. Here, Plaintiffs have not adequately alleged that Defendants failed to provide New York City schoolchildren with essential features of a sound basic education. Only a *single* paragraph of Plaintiffs' 167-paragraph complaint alleges that physical facilities and supplies are lacking. Compl. ¶100. Not even that paragraph alleges there are system-wide inadequacies. Asserting that some high schools are relegated to "poorly maintained buildings," Plaintiffs describe a single high school in the Bronx allegedly built too close to the Hutchinson River Parkway with a windowless cafeteria. *Id.* They describe run-ins with urban vermin and assert that there are insufficient textbooks, lacking classroom and bathroom supplies, overcrowded hallways and classrooms, and leaky hallways in other unnamed and unquantified high schools. *Id.*; *see also id.* ¶6 (repeating allegations in introduction). That's it—in a complaint otherwise replete with detail and 215 footnotes. *Cf. CFE I*, 86 N.Y.2d at 319 (allegations included "fact-based claims of inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books, etc."); *Aristy-Farer*, 29 N.Y.3d at 514-15 (alleging similar deficiencies "with some degree of specificity").

That lone paragraph is insufficient to plead an Education Article violation. It does not allege a "district-wide failure" or "systemic failure." *New York Civ. Liberties Union v. State of New York*, 4 N.Y.3d 175, 182 (2005) ("because school districts, not individual schools, are the local units responsible for receiving and using state funding, and the State is responsible for providing sufficient

funding to school districts, a claim under the Education Article requires that a district-wide failure be pleaded"); *CFE II*, 100 N.Y.2d at 914. It does not allege that these deficiencies are correlated with lower educational outcomes. *See CFE II*, 100 N.Y.2d at 911. And it does not allege that they are causally connected to state funding decisions. Part I.B, *infra*.

2. Plaintiffs' overarching theory is little different than those rejected by the Court of Appeals in *Paynter* and *Levittown*. Plaintiffs contend that a "caste system" persists, claim staffing too "infrequently exposes students to adults of color in positions of power and stature," and complain of "curriculum steeped in Eurocentrism." Compl. ¶151. But no amount of rhetoric (not even likening schools to "an apartheid state," *id.* ¶79) can distinguish their theory from *Paynter* and *Levittown*. In *Paynter*, the Court of Appeals affirmed the dismissal of plaintiffs' complaint, which alleged a "novel theory" that segregated school districts violated the Education Article. 100 N.Y.2d at 438-39. Plaintiffs asserted defendants' "practices and policies resulted in high concentrations of racial minorities and poverty in the school district, leading to abysmal student performance." *Id.* at 438-39. The crux of the complaint, rejected by the Court of Appeals, was the State's "failure to mitigate" those demographics. *Id.* Likewise in *Levittown*, Plaintiffs alleged "property-rich districts" could "provide enriched educational programs" while "property-poor districts" could not. 57 N.Y.2d at 36. Those allegations were insufficient, even though the resulting "significant inequalities" were undisputed. *Id.* at 36, 38 & n.3. The Court of Appeals concluded that Plaintiffs' attack on such "educational unevenness above [the] minimum standard" was not actionable. *Id.* at 38.

So too here. Plaintiffs allege Defendants violate the Education Article by failing to diversify classrooms and schools; not mandating more "culturally responsive curriculum" for those insufficiently diverse classrooms and schools; and not achieving racial parity in staffing or discipline. Compl. ¶¶79, 82-84, 104, 118-19, 151. Plaintiffs' focus is entirely on demographic outcomes, making one race-based comparison after another regarding admissions, graduation rates, diplomas received,

staff hired, and discipline. *E.g.*, *id.* ¶¶6, 8-11, 13, 16, 77-79, 80, 82-83, 86, 98-99, 102-103, 118-22, 125-26, 135. These allegations of "unevenness" are insufficient. *Levittown*, 57 N.Y.2d at 36; *see also R.E.F.I.T.*, 86 N.Y.2d at 284-85 (dismissing claim predicated on funding disparities). As the Court of Appeals explained in *Paynter*, even accepting as true the race-based assumption that "concentrated poverty and racial isolation" correlates with "poor educational performance," more must be alleged to state a claim for violation of the Education Article. 100 N.Y.2d at 441. Plaintiffs must allege "a lack of education funding" or "education resources" depriving schools of the essential "educational facilities or services." *Id.* at 438-39, 441 n.3; *Levittown*, 57 N.Y.2d at 38, 47. They have not.

Plaintiffs' allegations of insufficiently diverse classrooms do not correspond with the "minimally adequate" essentials under the Education Act, which are specific to "school facilities and classrooms," "instrumentalities of learning" such as textbooks, and "basic curricula" and "teaching." *CFE I*, 86 N.Y.2d at 317. Plaintiffs' novel theory, including their request for "race-conscious" relief, have "no relation to the discernible objectives of the Education Article" and must be dismissed. *Paynter*, 100 N.Y.2d at 442; Compl. ¶ 19.

3. Nor can Plaintiffs' disagreements with Defendants' staffing decisions save their claim. Plaintiffs allege that Defendants have failed to create a more racially diverse teaching corps. *See* Compl. ¶¶3, 80, 112. The Education Article guarantees something different—sufficient funds for "personnel adequately trained to teach" basic academic subjects such as reading and mathematics. *CFE I*, 86 N.Y.2d at 317. "Untrained teachers" is not synonymous with "insufficiently diverse teachers."

4. Plaintiffs' curriculum arguments fare no better. Plaintiffs complain that schools haven't followed "Culturally Responsive-Sustaining Education Framework" curriculum recommendations. Compl. ¶¶104-17. The Court of Appeals rejected similar allegations in *CFE I*, where plaintiffs alleged noncompliance with state-wide educational standards. 86 N.Y.2d at 317. If noncompliance with general education standards was insufficient in *CFE I*, it necessarily follows that noncompliance with

recommendations for "inclusive curriculum" (Compl. ¶107) is insufficient too. To "enshrine" state guidelines as constitutionally mandated "would be to cede to a state agency the power to define a constitutional right." *CFE II*, 100 N.Y.2d at 907.

Plaintiffs' curriculum claims are policy claims, not constitutional claims. The Education Article requires sufficient funding for "minimally adequate teaching of reasonably up-to-date basic curricula" so students can learn the basics of "reading, writing, mathematics, science, and social studies." *CFE I*, 86 N.Y.2d at 317. It does not mandate Plaintiffs' preferred curriculum in every New York school.[3]

* * *

At bottom, Plaintiffs have alleged various substantive disagreements with Defendants' school policies—be it Plaintiffs' disagreement with race-neutral admissions processes or curriculum that is too "Eurocentric" and not sufficiently "culturally responsive." Such pedagogical disagreements are not "gross and glaring" system-wide inadequacies warranting judicial intervention. *Levittown*, 57 N.Y. 2d at 48. Plaintiffs' Education Article claim fails at step one.

B. Plaintiffs do not bother to connect the alleged deficiencies to inadequate legislative funding.

1. Even if Plaintiffs had alleged "gross and glaring inadequacies," such "inadequacies are not, standing alone, enough to state a claim under the Education Article." *New York Civ. Liberties Union*, 4 N.Y.3d at 179. A plaintiff must also allege a "causal connection" between these inadequacies and the Legislature's school funding decisions. *Paynter*, 100 N.Y.2d at 440; *see, e.g.*, *New York Civ. Liberties Union*, 4 N.Y.3d at 180 (dismissing complaint for "fail[ure] to clearly allege even one" cause for "failure of their schools"). That is because "[t]he causes of academic failure may be manifold, including such

[3] Indicative of the divisive nature of such curriculum, Plaintiffs praise a school where students "successfully advocated for the removal of the European history course" and fault those assigning too many books by white authors. Compl. ¶¶109, 116-17.

factors as the lack of family supports and health care." *Paynter*, 100 N.Y.2d at 440. And the Education Article does not shield students from any and all such causes. *Id.* at 441. So long as "the State truly puts adequate resources into the classroom, it satisfies its constitutional promise under the Education Article." *Id.*

2. Here, Plaintiffs state in conclusory fashion that Defendants' policies and practices "cause the denial of a sound basic education to New York City schoolchildren." Compl. ¶¶5, 152. That "bare legal conclusio[n]" need not be accepted as true. *Myers*, 30 N.Y.3d at 11. Even if it were accepted as true, Plaintiffs' allegations about the effect of race-neutral admissions policies are not allegations of constitutionally inadequate "maintenance and support" from the Legislature. N.Y. CONST. art. XI, §1. Plaintiffs' claim fails because it is "not premised on any alleged failure of the State to provide 'resources'—financial or otherwise." *New York Civ. Liberties Union*, 4 N.Y.3d at 180; *Paynter*, 100 N.Y.2d at 438-39 (rejecting complaint that "rest[ed] not on a lack of education funding but on [the State's] failure to mitigate demographic factors that may affect student performance"). Even the complaint's lone paragraph about "poorly maintained buildings" and lacking "basic classroom materials" contains no allegations that such deficiencies resulted from constitutionally adequate funding. Compl. ¶100. Having failed to tie these allegations (no matter how alarming) to school funding decisions resulting in a "district-wide" failure, Plaintiffs' claim must be dismissed. *New York Civ. Liberties Union*, 4 N.Y.3d at 182; *e.g.*, *Aristy-Farer*, 29 N.Y.3d at 515 ("The NYSER allegations do not allege a causal relationship between the unspecified educational deficiencies and a lack of state funding, or identify any specific districts, such that the State might be put on notice as to the relief sought.").

3. Indeed, Plaintiffs' complaint reveals myriad alternative causes for the alleged disparities. Even Plaintiffs admit that "the demographics of the City's G&T programs reflect disparate *familial* resources." Compl. ¶8 (emphasis added). Plaintiffs bemoan "affluent families" that "pay handsomely for fourth grade State standardized test preparation" or "pay admissions consultants" or those who

"choose to prep their children directly, using sample interview questions posted in online parent networks." *Id.* ¶10; *see also id.* ¶89 (similar), ¶96 (alleging students "have been tutored in preparation for the G&T test as toddlers"). Even assuming that these allegations are true, the disparities Plaintiffs complain of are not disparities caused by school funding decisions. They are therefore beyond the Education Article's reach. *See Paynter*, 100 N.Y.2d at 441 (rejecting "lack of family supports" cause).

In conclusion, Plaintiffs' allegations are missing the necessary "causal link" tying alleged deficiencies to legislative funding of the City's schools. *See CFE II*, 100 N.Y.2d at 919. As in *Paynter*, Plaintiffs here do not ask for additional resources. 100 N.Y.2d at 441 n.3. They have not even alleged that increased funding could improve the alleged disparities. That failure to allege a "causal connection" is a separate and independent basis for dismissing Count I.

II. Plaintiffs Fail to State an Equal Protection Claim.

Count II of Plaintiffs' complaint alleges that the City has violated the Equal Protection Clause of the New York Constitution. Compl. ¶¶153-59. Plaintiffs fault Defendants for choosing "test-based" sorting instead of equalizing "outcomes" among students of different racial backgrounds. *Id.* ¶¶156-57. In simplest terms, Plaintiffs claim that it is unconstitutional to apply the same admissions standards to every student (regardless of race) if those admissions standards do not produce parity of outcome (with regard to race). This claim fails as a matter of law.

The New York Constitution states, "No person shall be denied the equal protection of the laws of this state . . . ." N.Y. CONST. art. 1, §11. That Equal Protection guarantee is "coextensive with the rights protected under the Federal Equal Protection Clause." *Myers*, 30 N.Y.3d at 13; *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 531 (1949). Only "purposeful discrimination" violates the New York Equal Protection Clause and its federal equivalent. *People v. New York City Transit Auth.*, 59 N.Y.2d 343, 350 (1983); *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66

(1977).[4] Disparate impact alone is not enough. In *CFE I*, for example, allegations that "the State's educational funding methodology ha[d] a disparate impact upon African-American and other minority students," without more, was not enough to state an Equal Protection Clause claim. 86 N.Y.2d at 321. For disparate outcomes to be unconstitutional, those outcomes must be traced to a government "purpose to discriminate on the basis of race." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 260 (1979). Plaintiffs must show that "invidious discriminatory purpose was a motivating factor" for the government action. *Arlington Heights*, 429 U.S. at 266; *see, e.g.*, *People v. Aviles*, 28 N.Y.3d 497, 502-03 (2016).

Applied here, Plaintiffs concede that discrimination must be intentional for their Equal Protection claim to proceed. *See* Compl. ¶¶18 n.45, 81. But Plaintiffs' allegations of intent, even when accepted as true and given all favorable inferences, are at most allegations of disparate impact. Accordingly, Count II must be dismissed.

A. By Plaintiffs' own admission, Defendants' admissions policies are facially neutral.

Plaintiffs do not dispute that the allegedly unconstitutional admissions policies are facially neutral. The same admissions process, including the same merit-based testing, is available to students of every race. Compl. ¶¶8, 10, 84. Likewise, gifted programs and specialized high schools are open to students of all races. *Id.* ¶¶8, 10-11, 88-90, 93. There is no test or gifted program for white students and another for non-white students. Even Plaintiffs admit that testing was intended to replace more "subjective" metrics for admission. *Id.* ¶84. And they concede that "[t]he sole criterion for admission"

[4] "[A] statute which causes disparate treatment but does not target a suspect class nor implicate a fundamental right is subject to rational basis scrutiny," "the least rigorous standard of judicial review" requiring only a "rational relationship" to "any legitimate government purpose." *D'Amico v. Crosson*, 93 N.Y.2d 29, 31-32 (1999). Here, Plaintiffs do not allege that Defendants' chosen admissions programs would fail rational basis review and concede that if there is no intentional discrimination, their Equal Protection claim fails. Compl. ¶¶18 n.45, 81.

for specialized high schools "is a student's rank-order score on the SHSAT, a two-and-a-half-hour, 114-question exam consisting of English language arts and math items"—not a student's race. *Id.* ¶94.

Plaintiffs' claim is based instead on the *outcomes* of these facially neutral policies. *Id.* ¶156. They describe the school system as one that—by virtue of these race-neutral policies—"segregates large swaths of students of color" and "marks students of color with badges of inferiority." *Id.* ¶151. They allege "superior treatment is assured" only for "students who are disproportionately white and from certain Asian backgrounds." *Id.*[5] They attack the gifted programs as perpetuating a "caste system" and "segregation" within a school because "predominately white and certain Asian students" test into gifted programs while "predominately Black and Latinx" students are enrolled in "general education." *Id.* ¶¶8-10.[6] And they describe the "specialized high schools' admissions outcomes" as part of "a sorting process that systemically advantages members of groups with the greatest social and economic resources." *Id.* ¶13; *see also id.* ¶¶11, 99.[7]

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[5] Curiously, Plaintiffs also allege that Asian teachers are unconstitutionally underrepresented. *Compare* Compl. ¶¶86, 156-57, *with id.* ¶119. It cannot be that the Constitution simultaneously requires *exclusion* of Asian students from gifted programs, lest they be overrepresented, while *favoring* Asian teacher applicants based on race alone, lest they be underrepresented.

[6] As pled, the complaint itself exemplifies the perniciousness of race-based sorting. For example, Plaintiffs equate "economically privileged" and "[i]n-the-know parents" and parents helping kids prepare for the admissions process with the families of "predominantly white and Asian students" (and not, by implication, the parents of "predominantly Black and Latinx" students). Compl. ¶¶10, 89-90, 155. In fact, students of every race test into the City's specialized programs, including some individual Plaintiffs. *Id.* ¶¶29, 30, 34-35, 38, 40, 79, 99, 114, 139. A majority of students at specialized high schools are students of color. *Id.* ¶99. Plaintiffs' sweeping assertions about who does and does not test into these programs (and ham-handed descriptions of their families) perpetuate the very "badges of inferiority" that Plaintiffs want eradicated. *Id.* ¶84. That monolithic treatment of students by race alone contravenes the Equal Protection Clause's "command that the Government must treat citizens as individuals, not as simply components of a racial…class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quotation marks omitted).

[7] Plaintiffs' chosen statistics to allege disparities in academically screened schools do not even cover specialized high schools. Worse, they exclude students of "other" races, students not reporting their race, and presumably some multi-racial students. *See* Compl. ¶79 (citing Varner & Lecher, *Show Your Work*, The Markup (May 26, 2021), https://bit.ly/3jkAcx7).

Plaintiffs' outcome-based allegations run headlong into "the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results." *Feeney*, 442 U.S. at 273; *see also, e.g.*, *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 330 (4th Cir. 2001) ("the Fourteenth Amendment guarantees equal protection, but not equal outcomes"). Realizing this, Plaintiffs concede that their Equal Protection claim fails absent allegations of intentional discrimination. *See* Compl. ¶¶18 n.45, 81. Plaintiffs have no such allegations here.

B. Plaintiffs have not alleged that Defendants intentionally discriminated against students.

1. Plaintiffs assert throughout their complaint that Defendants acted intentionally or knowingly. *See* Compl. ¶¶18, 81, 98, 155, 157. Adverbs alone cannot transform a disparate impact claim into a claim for intentional and invidious discrimination. *See Weinbaum*, 219 A.D.2d at 556.

Read more closely, Plaintiffs' intent case rests on Defendants' acting "intentionally" to run the school system (as one must). Those are not allegations that Defendants acted intentionally to discriminate. For example, Plaintiffs claim that Defendants "intentionally maintain and sanction this system." Compl. ¶18. They say that Defendants "have intentionally failed to take sufficient action—or often any action—to address the egregious inequities." *Id.* ¶81. They say that Defendants have "intentionally refus[ed] to dismantle, root and branch" schools' "racialized channeling system." *Id.* ¶98; *see also id.* ¶¶155, 157. But there are no allegations that Defendants themselves "acted with a discriminatory purpose or were motivated by the race or ethnic background of the student bodies." *Weinbaum*, 219 A.D.2d at 556.

At most, Plaintiffs have alleged that Defendants are *aware* of racial disparities in the City's schools. They allege that Defendants "intentionally retained" the admissions processes even "know[ing]" they "exclud[e] students of color." Compl. ¶157. But this and other allegations of Defendants' mere "awareness of consequences," even if true, are not tantamount to allegations of the "[d]iscriminatory purpose" required to state an Equal Protection violation. *Feeney*, 442 U.S. at 279.

Plaintiffs have failed to allege that Defendants acted "because of" and "not merely in spite of" any "adverse effects upon an identifiable group." *Id.* Having failed to identify even a single act of intentional discrimination by Defendants, Plaintiffs' Equal Protection claim should be dismissed. *See New York City Transit Auth.*, 59 N.Y.2d at 350 (rejecting claim for failing to plead "necessary element" of "present intent to discriminate").

C. Plaintiffs' remaining allegations about the Hecht-Calandra Act are not allegations of intentional and invidious discriminatory purpose.

Plaintiffs' remaining intent allegations are limited to eight of the City's specialized high schools. According to Plaintiffs, the admissions test used by these schools "is the product of discriminatory intent" because "the state law that codified the testing requirement[] was enacted to thwart the City's investigation of the test's potential bias against Black and Puerto Rican students." Compl. ¶158. The constitutionally suspect law according to Plaintiffs is the Hecht-Calandra Act, enacted in 1971. *Id.* It required specialized high school admissions to be based "solely and exclusively by taking a competitive, objective and scholastic achievement examination, which shall be open to each and every child in the city of New York…without regard to any school district wherein the child may reside." *Id.* ¶94 & n.95 (quoting N.Y. Educ. Law §2590-g(12)(b) (1997)). Plaintiffs allege that the Act was intended "to stymie the efforts of a commission" appointed "to study whether admissions testing for the specialized schools was discriminatory." *Id.* ¶94. Even assuming the truth of Plaintiffs' allegations, Plaintiffs have at most alleged that legislators—50 years ago—intended to "stymie" efforts to study "potential bias." *Id.* ¶¶94, 158. That threadbare theory is insufficient to state a claim for intentional discrimination today for at least three reasons.

First, Plaintiffs cannot impute the allegedly discriminatory intent of legislators 50 years ago to Defendants today. Even if Defendants were aware of any animus allegedly harbored decades ago, alleging "discriminatory purpose" requires more than allegations of "awareness" alone. *Feeney*, 442 U.S. at 279.

Second, even Plaintiffs admit that the high school admissions process has changed in the intervening 50 years. Plaintiffs admit that the "current iteration of the SHSAT" is different from that of seven years ago, let alone 50 years ago. Compl. ¶95. Plaintiffs admit that Defendants have "hired a private consulting firm to assess the validity of the SHSAT in 2013." *Id.* And Plaintiffs admit that Defendants have since created SHSAT preparation programs, scholarships, and a program for the admission of low-income students with "sufficiently close" SHSAT scores. *Id.* ¶¶96-97. These intervening events belie Plaintiffs' contradictory allegations of invidious intent born out of a statute passed 50 years ago.

Third, even if intent could be imputed decades later, Plaintiffs have not alleged "that the legislature as a whole was imbued with racial motives." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021). The Act itself plainly states that admissions tests shall be "objective" and "open to each and every child…, without regard to any school district wherein the child may reside." Compl. ¶94 n.95 (quoting N.Y. Educ. Law §2590-g(12)(b) (1997)).

* * *

Plaintiffs have failed to state a claim for violation of the Equal Protection Clause, just as other plaintiffs failed when alleging similar facts. *See CFE I*, 86 N.Y.2d at 321. Plaintiffs' theory predicated on disparate outcomes alone is insufficient. To embrace Plaintiffs' theory as an Equal Protection violation would be to embrace race-based balancing, race-based quotas, and other race-based decisionmaking to achieve race-based outcomes in New York City schools. Such race-conscious meddling is constitutionally impermissible. *See Parents Involved*, 551 U.S. at 747; *cf. Jenkins*, 515 U.S. at 138 (Thomas, J., concurring) ("We must forever put aside the notion that simply because a school district today is black, it must be educationally inferior.").

III. Plaintiffs Fail to State a Claim Under the New York State Human Rights Law.

Count III of Plaintiffs' complaint claims that Defendants' policies and practices violate the New York State Human Rights Law (NYHRL). Compl. ¶¶163-66. The NYHRL defines "[t]he opportunity to obtain education…without discrimination because of age, race, creed, color" as a civil right. N.Y. Exec. Law §291(2) (McKinney 2019). Section 296(4), in turn, makes it "an unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race."[8] For the following reasons, Plaintiffs have failed to state a claim for violation of the NYHRL.

A. Defendants are not "educational institutions."

The NYHRL specifically forbids discriminatory practices by an "educational institution." N.Y. Exec. Law §296(4). It was recently amended to clarify that an "educational institution" includes "any public school, including any school district." *Id.* §292(37)(b). Applied here, Count III faults the "State and City Defendants" for "unlawful discriminatory practices under the NYSHRL." Compl. ¶165. But the named Defendants are State- and City-level government agencies, not "educational institution[s]." They are not the "public school[s]" themselves, and they are not equivalent to one of the many community districts in the City's boroughs. N.Y. Exec. Law §292(37)(b); *see* N.Y. Educ. Law §2590-b; *CFE II*, 100 N.Y.2d at 903-04. Because Plaintiffs have not named as defendants any of the particular

[8] Elsewhere in Plaintiffs' complaint, Plaintiffs claim Defendants denied "schoolchildren the opportunity to obtain an education free from racial discrimination," attempting to parrot NYHRL §291(2). *Compare* Compl. ¶18 n.45, *with* N.Y. Exec. Law §291(2) ("opportunity to obtain education…without discrimination"). But section 296(4), proscribing "discriminatory practice[s]," provides Plaintiffs' cause of action. Section 291(2) does not separately confer another. *See, e.g.*, *Forkin v. United Parcel Serv.*, No. 18-CV-3397 (MKB), 2020 WL 9816001, *1 n.1 (E.D.N.Y. Nov. 10, 2020) ("section 291 merely recognizes and declares the right for which section 296(1)(a) creates the cause of action"). Even if it did, any such claim would be duplicative of Plaintiffs' constitutional claims and would fail for the reasons discussed in Parts I and II, *supra*. *See Campaign for Fiscal Equity, Inc. v. State*, 205 A.D.2d 272, 276-77 (1st Dep't 1994).

schools or any of the particular community districts at which the alleged denial of facilities or harassment occurred, Plaintiffs' NYHRL claim should be dismissed. *See, e.g.*, *Garcia v. City Univ. of New York*, 136 A.D.3d 577, 578 (1st Dep't 2016) (affirming dismissal against wrongly named defendants).

B. Plaintiffs have not sufficiently alleged that Defendants denied Plaintiffs access to facilities by reason of their race.

1. Even if the NYHRL reached the State or City Defendants, Plaintiffs' claim still fails. Citing an employment discrimination case, Plaintiffs assert that Defendants' admissions policies can violate the NYHRL merely because of their alleged disparate impact. *See* Compl. ¶162 & n.213 (citing *New York City Transit Auth.*, 59 N.Y.2d at 348-49). But the employment provision at issue in that case is not the education-related provision at issue here. *Compare* N.Y. Exec. Law §296(1)(a) ("unlawful discriminatory practice…[f]or an employer…because of an individual's…race…to refuse to hire or employ or to bar or to discharge from employment such individual"), *with* §296(4) ("unlawful discriminatory practice for an educational institution to *deny* the use of its facilities to any person otherwise qualified, or to *permit* the harassment of any student or applicant, *by reason of* his race" (emphases added)). And for education-related claims like Plaintiffs', no court has endorsed a disparate impact theory of liability. *Cf. Campaign for Fiscal Equity, Inc.*, 205 A.D.2d at 276-77 (describing §291(2) as "merely assur[ing] every student 'an opportunity to obtain education'" and rejecting claim regarding school funding with allegedly disparate impact). Nor would a theory of disparate impact liability follow from the plain text of section 296(4), forbidding educational institutions from "deny[ing]" the use of facilities or "permit[ting]…harassment" "by reason of" a student's race. Having failed to allege intentional discrimination "by reason of" race, Plaintiffs' claim fails. *See* Part II.B, *supra.*

2. Even if this Court were to recognize Plaintiffs' constitutionally dubious theory (pp. 20-21, *infra*), Plaintiffs' claim still fails. Plaintiffs' allegation is not that the school system has "den[ied] the use of…facilities to any person otherwise qualified…by reason of race." N.Y. Exec. Law §296(4). Plaintiffs' allegation is different—that race-neutral admissions policies deny students "access to

facilities to which they have equal right." Compl. ¶164. In support of that allegation, Plaintiffs rely on *New York Univ. v. New York State Div. of Human Rights*, 84 Misc.2d 702 (Sup. Ct. 1975), involving an applicant who was denied admission to NYU. *New York University* is distinguishable in at least two respects. First, the applicant was excluded from NYU altogether, *id.* at 703, whereas students here have not been categorically excluded from New York City public schools. Second, the applicant was excluded by reason of a race-based admissions policy, *id.*, whereas students here are granted or denied admission to programs without regard to race. If anything, *New York University* supports dismissal.

More fundamentally, there are no limits to Plaintiffs' argument that Defendants' race-neutral admissions policies deny students "access to facilities to which they have equal right." Compl. ¶164. By Plaintiffs' logic, every student could demand admission to Stuyvesant. The NYHRL requires no such thing. Defendants may offer gifted programs or specialized high schools without also offering unlimited enrollment to such programs and schools. *Cf. Levittown*, 57 N.Y.2d at 47 (nothing stops districts from "choosing to provide opportunities beyond those that other districts might elect or be able to offer").

C. Plaintiffs have not sufficiently alleged that Defendants authorized or acquiesced to race-based harassment.

Plaintiffs' complaint also alleges instances of discrimination at unnamed schools. *E.g.*, Compl. ¶¶6, 68. Plaintiffs incorporate these allegations only by reference into Count III, with the crux of Plaintiffs' claim being the race-neutral admissions processes. *Id.* ¶¶160-67. In any event, Plaintiffs have failed to state a claim against Defendants for these particular classroom incidents.

Plaintiffs must allege that Defendants "somehow authorized or acquiesced" to that conduct. *JG & PG ex rel. JG III v. Card*, No. 08 Civ. 5668, 2009 WL 2986640, *12 (S.D.N.Y. Sept. 17, 2009). For example, when parents of students diagnosed with Autism brought an NYHRL claim against a school district for alleged abuse by teachers, the court dismissed the claim against the school district. *Id.* at *8-9. Plaintiffs failed to allege that the district "authorized or acquiesced" to the teachers'

conduct. *Id.* at *12. Similarly in *Planck v. SUNY Bd. of Trustees*, it was not enough that the defendant was "statutorily obligated to oversee the adoption of certain policies which impact local community colleges." 18 A.D.3d 988, 991 (3d Dep't 2005). The plaintiffs' complaint was dismissed for failure "to allege any facts which would suggest a connection between that obligation and [a community college's] alleged violation." *Id.*

Here too, Plaintiffs have failed to allege facts showing that Defendants "authorized or acquiesced" to the alleged incidents of classroom harassment. *JG III*, 2009 WL 2986640, at *12; *see Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 103 (3d Dep't 1999) (affirming dismissal for failure to allege supervisor knew or should have known of alleged harassment). Plaintiffs offer only the conclusory assertion that Defendants "permitted" the harassment (Compl. ¶165), without alleging "specific action taken" by Defendants themselves. *Planck*, 18 A.D.3d at 991. That conclusory allegation is not enough. *E.g.*, *Dasrath v. Ross Univ. Sch. of Med.*, No. 07CV2433CBARER, 2008 WL 11438041, *9 (E.D.N.Y. Aug. 6, 2008) ("complaint merely parrots the statute"). And it is contradicted by Plaintiffs' allegations about Defendants' efforts to remove alleged discrimination and improve diversity. *See, e.g.*, Compl. ¶¶84, 96-98 (describing DREAM and Discovery programs), *id.* ¶107 (describing Culturally Responsive-Sustaining Education Framework). Although Plaintiffs allege instances of unacceptable cruelty by teachers or students, Plaintiffs cannot impute those acts to Defendants under the NYHRL. Plaintiffs' claim should be dismissed.

CONCLUSION

Plaintiffs invite this Court to dismantle race-neutral policies and usher in a new era of "race-conscious" schooling in New York City. Compl. ¶19. The race-balancing that Plaintiffs' disparate impact theories would entail could itself violate the Equal Protection Clause and other bans on intentional racial discrimination. Adopting race-conscious metrics because Plaintiffs want to see different racial outcomes among "white and Asian students" versus "Black and Latinx students" is

itself intentional racial discrimination. *E.g.*, *id.* ¶¶10, 79, 99; *see Ricci v. DeStefano*, 557 U.S. 557, 579-80 (2009); *id.* at 594-95 (Scalia, J., concurring). Placing students "on racial registers…demeans us all." *Fisher v. Univ. of Tex.*, 570 U.S. 297, 316 (2013) (Thomas, J., concurring). There is no constitutional "'authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.'" *Parents Involved*, 551 U.S. at 747.

For the foregoing reasons, this Court should dismiss Plaintiffs' amended complaint in its entirety.

Dated: August 23, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This memorandum complies with the word limit prescribed by §202.8-b of the Uniform Civil Rules because it has 6,839 words, excluding the parts that can be excluded by §202.8-b(b).

Dated: August 23, 2021

Dennis J. Saffran

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