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

INTERVENOR-DEFENDANT PARENTS DEFENDING EDUCATION'S REPLY IN SUPPORT OF MOTION TO DISMISS

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Plaintiffs ask this Court to step in to oversee the racial makeup of the New York City schools' teaching corps, the student bodies of the City's gifted programs and specialized high schools, and even the authors read by the City's schoolchildren. Compl. ¶¶84, 112, 118. They seek to replace race-neutral policies with race-conscious ones. *Id.* ¶19. Setting aside the rhetoric of "racist caste system[s]" and "apartheid state[s]," *id.* ¶¶19, 79, their complaint fails to state a claim for violation of New York's Education Article, Equal Protection Clause, or Human Rights Law.

I. Plaintiffs' Arguments Regarding the Education Article Are Unavailing.

Plaintiffs have not grappled with the text and meaning of New York's Education Article, requiring the legislature 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. "If what is made available by this system…may properly be said to constitute an education, the constitutional mandate is satisfied." *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 48 (1982). That "sound basic education" consists of "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants." *Campaign for Fiscal Equity, Inc. v. State* ("*CFE I*"), 86 N.Y.2d 307, 314, 316 (1995); *accord Paynter v. State*, 100 N.Y.2d 434, 440 (2003); *Campaign for Fiscal Equity, Inc. v. State* ("*CFE II*"), 100 N.Y.2d 893, 918 (2003); *Aristy-Farer v. State*, 29 N.Y.3d 501, 505 (2017). "[T]o provide children with the opportunity to obtain these essential skills," the State must sufficiently fund a school system with "adequate" "physical facilities and pedagogical services and resources." *CFE I*, 86 N.Y.2d at 316. Such a school system must have certain "instructional 'inputs,'" *CFE II*, 100 N.Y.2d at 903—minimally adequate "teaching," "physical facilities," and "instrumentalities of learning." *CFE I*, 86 N.Y.2d at 317; *accord Paynter*, 100 N.Y.2d at 438; *CFE II*, 100 N.Y.2d at 908; *New York Civ. Liberties Union v. State of New York*, 4 N.Y.3d 175, 181 (2005); *Aristy-Farer*, 29 N.Y.3d at 510. Plaintiffs have not stated a claim under these actual parameters

of the Education Article. They do not allege facts demonstrating "gross and glaring"[1] inadequacy of instructional inputs on a district-wide level, let alone that these inadequacies are caused by Defendants' failure to allocate sufficient resources, as New York law requires. *Paynter*, 100 N.Y.2d at 439 (quoting *Levittown*, 57 N.Y.2d at 48); *see also CFE II*, 100 N.Y.2d at 914.

A. Plaintiffs expand the Education Article to require something it does not.

Plaintiffs have no response to PDE's argument that they have failed to allege a *systemic* lack of teaching, physical facilities, and instrumentalities of learning in the City's schools. PDE Br. 5-9. Plaintiffs merely repeat the handful of school-specific allegations from their complaint (*e.g.*, ¶100)—allegations that PDE already explained were insufficient. Plaintiffs' Br. in Opp'n to Defs.' Mot. to Dismiss 29-32 ("Opp'n"); PDE Br. 6-7. These allegations are not the "gross and glaring" dearth of basic educational tools required to involve the courts in the supremely local affairs of a school system. *Levittown*, 57 N.Y.2d at 48.

Plaintiffs' remaining arguments are disagreements with Defendants' pedagogical *policies*, not constitutional claims. *See* Opp'n 29, 32-36. Plaintiffs contend that these policy disagreements are sufficient, even if they do not resemble the features of a sound basic education under the Education Article. *Id.* 32-35. By their own admission, Plaintiffs' claim rests on new notions of constitutional obligations, never before adopted by a New York court. They emphasize their allegations of "racialized

[1] Plaintiffs incorrectly contend that they need not allege "gross and glaring" inadequacies to survive a motion to dismiss. Opp'n 28 n.11. Citing the dissent in *CFE I*, they argue the New York Court of Appeals abandoned this pleading requirement. *Id.* In fact, the *CFE I* dissent criticized the majority for "ignor[ing]" *Levittown*'s "gross and glaring" requirement, not overruling or rejecting or changing it. 86 N.Y.2d at 340. And in *Reform Education Financial Inequities Today (R.E.F.I.T.) v. Cuomo*, decided the same day as *CFE I*, the Court reiterated that a plaintiff must allege "gross and glaring inadequacy" and that extreme disparities in funding alone fail to meet this standard. 86 N.Y.2d 279, 284 (1995); *see also New York Civ. Liberties Union*, 4 N.Y.3d at 179. Later, in *Paynter*, *CFE II*, and *Aristy-Farer*, the Court repeated this standard. *Paynter*, 100 N.Y.2d at 439; *CFE II*, 100 N.Y.2d at 914; *Aristy-Farer*, 29 N.Y.3d at 510, 510 n.5 ("[A]bsent allegations of 'gross and glaring inadequacy,' decisions regarding the allocation of public funds for education fall within the purview of the legislature, not the courts.").

tracking," "racially demeaning and hostile school environments," lack of "access to texts reflecting the perspective and experiences of persons of color," or "inadequate mental health supports." *Id.* 31, 33-35. They believe these and other alleged failings are sufficient because they leave schoolchildren "unfit to engage in meaningful civic and economic participation." Compl. ¶151; Opp'n 23, 35.

Plaintiffs' conception of the Education Article is limitless. *See* Opp'n 27-29. Plaintiffs would inject every New York court into the day-to-day decisions of every New York school. The particular obligations created by the Education Article do not sweep so broadly. The State's constitutional obligations are to fund schools to provide the "basic literacy, calculating and verbal skills necessary to enable [students] to function as civic participants." *CFE I*, 86 N.Y.2d at 318; N.Y. CONST. art. XI, §1. Plaintiffs' complaint is far afield from that "constitutional floor" of the Education Article. *Id.* at 315. Allegations that too many white and Asian students attend gifted programs, or that students do not receive support for the "trauma" of being a student of color at school, or that elementary students "read more books whose cover characters are animals than books whose cover characters are Latinx, Black, or Asian people," Compl. ¶84; Opp'n 1, 10, 34, 47, go well beyond the funding objectives of the Education Article. *See Paynter*, 100 N.Y.2d at 442.

B. Plaintiffs have not pleaded that the State caused the alleged inadequacies.

Plaintiffs also make no effort to allege that these alleged failings are tied to a failure by the State to "provide for the maintenance and support" of schools. N.Y. CONST. art. XI, §1; *see* PDE Br. 9-11. Plaintiffs respond that they "have clearly articulated the actions Defendants have taken—or have failed to take." Opp'n 36. But the causal link required is more precise: a plaintiff must allege, at a bare minimum, "a causal link between the present funding system and any…failure to provide a sound basic education." *Paynter*, 100 N.Y.2d at 440 (quoting *CFE I*, 86 N.Y.2d at 318). Plaintiffs do not

appear to dispute that there is no such causal link here; they instead contend that such a causal link is not required. Opp'n 25-27. Plaintiffs are incorrect. *See* PDE Br. 9-11.[2]

Plaintiffs cite *CFE I*, *Paynter*, and a Second Department appeal to support their position, but all are at odds with Plaintiffs' argument. In *CFE I*, the Court held that a plaintiff must connect "funding and educational opportunity." 86 N.Y.2d at 318. Even if, as Plaintiffs contend, *CFE I* is a rule unto itself, *Paynter* left no doubt that the Education Article requires that all plaintiffs plead a lack of resources to survive a motion to dismiss.[3] The Court rejected the plaintiffs' suit because plaintiffs' claims rested "*not on a lack of education funding* but on [the State's] failure to mitigate demographic factors that may affect student performance." *Paynter*, 100 N.Y.2d at 438-39 (emphasis added). The flaw in the plaintiffs' complaint—repeated by Plaintiffs here—was that it did "not allege a lack of state education resources" and did "not ask for more resources." *Id.* at 441 n.3. *Paynter* rejected that "it is the State's responsibility to change the school population" or improve results, "no matter how well the State funds their schools." *Id.* at 441; *accord id.* at 466 (Smith, J., dissenting) (emphasizing "resources made available under the State's financing system").[4]

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[2] Regarding causation, Plaintiffs add that "*PDE* argues that the racially disparate admissions rates are caused not by admissions screens but by differences in family resources" and that such an argument should be left for the factfinder. Opp'n 39 (emphasis added). That is not PDE's argument; these are Plaintiffs' own allegations. There is no factfinding to be done. Plaintiffs' complaint alleges that disparities "reflect disparate familial resources," "affluent families" paying for test preparation, and the like—not a lack of state resources. Compl. ¶¶8, 10, 89, 96.

[3] Puzzlingly, Plaintiffs argue that because *Paynter* discussed more than just the plaintiffs' failure to plead a causal link to education funding, *Paynter* does not require that causal link. Opp'n 26-27. To be sure, there were multiple flaws with the *Paynter* complaint. *Paynter*, 100 N.Y.2d at 438-39. But those other flaws do not negate the Court's discussion about causation.

[4] Plaintiffs overread *Paynter*'s statement that there was "no occasion" in *CFE I* "to delineate the contours of all possible Education Article claims." 100 N.Y.2d at 441; *see* Opp'n 27. *Paynter* states a bright-line rule, just three sentences later, that "if the State truly puts adequate resources into the classroom, it satisfies its constitutional promise under the Education Article." 100 N.Y.2d at 441. Thus, "all possible education article claims" must allege, at a minimum, that the State has placed inadequate "resources into the classroom." *Id.* Plaintiffs have not brought such a claim.

Finally, *Davids v. State of New York*, 159 A.D.3d 987 (2d Dep't 2018), is distinguishable in the following respects. The *Davids* plaintiffs alleged that system-wide inadequate teaching was caused by the failure to "deliver adequate resources into the classroom." Complaint ¶43, *Davids*, 159 A.D.3d 987. *Davids* thus does not relieve Plaintiffs from alleging a causal link between a deficient educational environment and inadequate resources. The *Davids* plaintiffs, moreover, alleged that failure was caused by the State, in particular state law: "The *Davids* plaintiffs allege that *the statutory scheme* which controls the dismissal of teachers in New York and a seniority-based layoff system make it nearly impossible for school administrators to dismiss ineffective teachers." 159 A.D.3d at 990 (emphasis added). Such allegations bear no resemblance to Plaintiffs' disagreements with a particular school system's admissions policies, teacher hiring, reading lists, or other curriculum choices.

* * *

Plaintiffs have lost sight of the "aim of the Article"—"to constitutionalize the established system of common schools rather than to alter its substance." *R.E.F.I.T.*, 86 N.Y.2d at 284. The Education Article guarantees free schools for New York families. PDE Br. 4. It is not a means of policing schools, telling local communities what books its children must read and what race their teachers must be. *Cf.* Compl. ¶104, p. 83. As with the remedies sought by the plaintiffs in *Paynter*, Plaintiffs' requested relief would work a wholesale upheaval of the New York City school system. *See Paynter*, 100 N.Y.2d at 442. It would "subvert the important role of local control and participation in education" "enshrined" in the Education Article. *Id.* The Constitution requires the State to give local communities sufficient resources to maintain a school system sufficient to equip students with basic skills. *See CFE I*, 86 N.Y.2d at 318. No allegation found in Plaintiffs' complaint suggests Defendants have failed to meet this requirement.

II. Plaintiffs Have Not Stated an Equal Protection Clause Violation.

Plaintiffs' equal protection arguments invite this Court to ignore binding United States Supreme Court precedent in multiple ways. They tell this Court that disparate outcomes are a sufficient proxy for discriminatory intent. Opp'n 40, 49-50. They are not. *See Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66, 270 (1977); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 260 (1979). They make the bizarre claim that test preparation programs for low-income students and other "remedial measures" are themselves evidence of discrimination. Opp'n 56. And they demand a race-conscious dismantling of race-neutral admissions processes, Opp'n 1; Compl. ¶19—contrary to equal protection's very promise that students will not be sorted by state actors on the basis of race. *See, e.g.*, *Parents Involved in Comm. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007). Plaintiffs do not seek equal application of the law regardless of race; they seek judicially enforced equal outcomes based on race. Compl. ¶¶156-57. None of Plaintiffs' arguments or evidence, including various new allegations absent from Plaintiffs' complaint, survives the motion to dismiss stage.

Plaintiffs point only to the decades-old Hecht-Calandra Act in their attempt to show actual discriminatory intent, while conceding that any other finding of intentional and invidious discrimination must be *inferred* from their allegations of disparate impact. Opp'n 43, 44, 48-56; *see* Compl. ¶¶99 n.107, 158 (alleging discriminatory intent or purpose *only* when referring to the Hecht-Calandra Act). Rather than offer any response to PDE's arguments about why the Hecht-Calandra Act cannot serve as the evidence of discriminatory intent, *see* PDE Br. 15-16, Plaintiffs abandon their allegations as pled and add new ones in their opposition brief. Opp'n 44-48.[5] These newfound facts do nothing to rebut PDE's uncontroverted arguments. Plaintiffs still have not alleged facts showing

[5] Plaintiffs add various allegations regarding intent, absent from their complaint, including statements by New York Assembly Members, a City Community School Board Member, a NYC School Chancellor, and several others. Opp'n 44-48.

that Defendants possess the "present intent to discriminate," *People v. New York City Transit Auth.*, 59 N.Y.2d 343, 350 (1983), or even that a legislature from decades past "as a whole was imbued with racial motives," *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021). *See* PDE Br. 15-16.

Without the Hecht-Calandra Act, Plaintiffs are left with allegations of disparate impact, which they hope this Court will equate with discriminatory intent. Opp'n 43, 44, 48-56. Plaintiffs make various arguments about the *Arlington Heights* factors—likewise inserting new allegations absent in their complaint[6]—but those arguments cannot save Plaintiffs' claim. In Plaintiffs' own words, "Defendants retain policies that 'maintain[] a racialized pipeline' despite being *well-aware of statistics* that the existing policies and procedures confirm and exacerbate segregation and unequal outcomes." Opp'n 50 (quoting Compl. ¶5) (emphasis added); *see also id.* at 54 ("Defendants remain 'on notice' and 'aware' of racial segregation and severely unequal outcomes by race."); *id.* at 55 ("Defendants are aware that there are serious issues."). That is precisely what the Supreme Court has said is not good enough. *See Feeney*, 442 U.S. at 278-79; *see also, e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-72 (1993); *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987); *Soberal-Perez v. Heckler*, 717 F.2d 36, 42 (2d Cir. 1983) ("While it is true, as plaintiffs argue, that the fact that a particular action has a foreseeable adverse impact may be relevant evidence in proving an equal protection claim, standing alone that fact is insufficient to establish discriminatory intent." (citations omitted)). Awareness of unequal *outcomes*, even if true, does not state a claim. *See* PDE Br. 14-15.

Arlington Heights is not an exception to this rule; it reinforces it. The Supreme Court merely confirmed that "[p]roof of racially *discriminatory intent* or purpose is required to show a violation of the Equal Protection Clause" and that *disparate impact*, while not irrelevant, is not alone sufficient. *Arlington*

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[6] *See* Opp'n 50-55 (citing several articles describing the City's G&T programs and specialized high schools, among other new allegations).

Heights, 429 U.S. at 265-66 (emphasis added). As in *Arlington Heights*, there is no mystery here. It has long been the City's policy to employ race-neutral admissions policies based on merit. *Cf. id.* at 270 (explaining that zoning decision was motivated by race-neutral considerations). Plaintiffs cannot distort that race-neutral policy into an unconstitutional one. Any "discriminatory 'ultimate effect' is without independent constitutional significance." *Id.* at 271.

Plaintiffs' claim fails just as others have. Again, a "discriminatory purpose" requires more than Plaintiffs' allegations of mere "awareness of consequences" or "foreseeab[ility]," *Feeney*, 442 U.S. at 278-79, as is illustrated by the dismissal of the equal protection claim in *CFE I*. The *CFE* plaintiffs alleged that "Defendants have *refused to act*, even though the detrimental impact of their failure to provide equitable levels of funding on minority students was well-recognized and reasonably foreseeable." Compl. ¶71, *Campaign for Fiscal Equity Inc. v. State*, 1993 WL 13159629 (Sup. Ct. 1994) (No. 93/111070) (emphasis added); *see also Campaign for Fiscal Equity, Inc. v. State*, 616 N.Y.S.2d 851, 856 (Sup. Ct. 1994) (acknowledging that plaintiffs alleged funding resulted in "reduced educational resources for minority children" but that allegations were insufficient for "claim of intentional discrimination"). Plaintiffs have alleged the same here. *See* Compl. ¶¶13, 93 (alleging "racialized inequality"). Their complaint is premised on the notion that disparities were "foreseeable," *e.g.*, *id.* ¶¶7, 8 n.21, 79, and that Defendants are aware of them, *e.g.*, *id.* ¶¶98, 157. This does not rise to the level of intentional and invidious discrimination. As the plaintiffs did in *CFE I*, Plaintiffs must concede that "no discriminatory intent has been charged in this case." *CFE I*, 86 N.Y.2d at 321.[7]

Plaintiffs' equal protection claim should be dismissed for failure to allege intentional and invidious discrimination, or anything approaching it. At bottom, Plaintiffs' allegations are that New

[7] Similarly, other past plaintiffs (with allegations resembling Plaintiffs' allegations) also abandoned their equal protection claims. *See Paynter*, 100 N.Y.2d at 439 n.2; *Aristy-Farer*, 29 N.Y.3d at 507 n.3, 509.

York made an intentional choice to use *race-neutral* admissions policies. There is no worse perversion of the equal protection clause than to declare that such race-neutral policies are unlawful and that race-conscious ones must be put in their place, picking winners and losers on the basis of race. *See, e.g.*, Opp'n 46 (asserting that gifted programs are unconstitutional because they admit too many "white and certain Asian students, while largely excluding students of color from them").

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

With respect to their NYSHRL claim, Plaintiffs simultaneously contend that Defendants are "educational institution[s]" and that Defendants must permit them access not just to a City school but to any and all particular schools and programs within the educational institution. According to Plaintiffs, Defendants have denied them "a particular *type* of education" by denying them "access to specific schools," such as Stuyvesant or Brooklyn Tech, and to "specific programs within those schools," namely gifted programs. Opp'n 62.[8] Plaintiffs cannot have it both ways. Either the Defendants are not themselves educational institutions, *see* PDE Br. 17, or they are, and Plaintiffs cannot possibly allege that they have been denied access to them. The NYSHRL does not empower Plaintiffs to demand admission to a particular school or a particular program, unless this Court is prepared to declare illegal all academic, athletic, arts, and other programs with merit- or talent-based selection. *See* PDE Br. 18-19.[9]

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[8] Plaintiffs continue to rely on *New York University v. N.Y. State Division of Human Rights*, 84 Misc.2d 702 (Sup. Ct. 1975), for this proposition. *NYU* is, at best, inapposite and, at worst, contrary to Plaintiffs' novel theory of liability here. The issue in *NYU* was whether an applicant denied admission to the university altogether could state a NYSHRL claim. *Id.* at 706. And the discussion about "a particular type of education" refers to admission to NYU—what today would be the "educational institution"—not access to some particular honors program within the university once admitted. *Id.*

[9] Plaintiffs are wrong that "the City could establish a system of schools for white students and a separate but equal system of schools for Black and Latinx students" if PDE's arguments prevail. Opp'n 62. Were that to transpire, PDE would be first in line to bring a claim for that *intentional* discrimination, be it as an equal protection claim or an NYSHRL claim.

A. Interpreting §296(4) to permit Plaintiffs' disparate impact claim would raise serious constitutional questions.

Plaintiffs have not stated a claim by alleging disparate impact alone. *See* PDE Br. 18-19. Plaintiffs' invocation of "longstanding Court of Appeals precedent" is inapposite. Opp'n 64. Every cited case involves other NYSHRL provisions, not the education provision at issue here.[10] Section 296(4)'s separately codified provision governs different relationships and protects different human rights. Should the Court interpret section 296(4) to require the City to employ a racial quota system for admissions to particular schools or programs, that would raise serious constitutional questions about section 296(4). *See Ricci v. DeStefano*, 557 U.S. 557, 594-96 (2009) (Scalia, 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.

Unsurprisingly, decisions addressing section 296(4) specifically do not permit race-conscious meddling to adjust the outcomes of a school's otherwise race-neutral practices. For example, in *Scaggs v. New York Department of Education*, students brought a NYSHRL claim, alleging that minority students were treated differently than non-minority students. 2007 WL 1456221, at *1, *12 (E.D.N.Y. May 16, 2007). The court dismissed the NYSHRL claim and sided with defendants' argument that plaintiffs failed to allege that "discriminatory animus" motivated the defendants' actions. *See id.* at *16, *21. As *Scaggs* shows, section 296(4)'s "by reason of" race proscribes *intentionally* discriminatory conduct, not race-neutral policies that may lead to disparate outcomes. Here too, Plaintiffs have failed to allege intentional discrimination, discriminatory animus, disparate treatment, or anything more than

[10] And even in the employment context, New York appellate courts do not fully agree on the full scope of disparate impact liability. *Compare Bohlke v. Gen. Elec. Co.*, 293 A.D.2d 198, 200 (3d Dep't 2002) (holding that an age discrimination "disparate impact claim is not cognizable under the Human Rights Law), *with Bennett v. Time Warner Cable, Inc.*, 138 A.D.3d 598, 599 (1st Dep't 2016) (holding the opposite).

disparate impact. *See* Compl. ¶¶18 n.45, 81 ("*Even if* not intentional…"); *id.* ¶162 ("disparate impacts constitute unlawful discrimination."); *id.* ¶163 ("discriminatory and inferior outcomes"); *id.* ¶164 ("profound disparate impact"); *see also* Opp'n 63-68 (arguing only disparate impact). These allegations cannot state a claim under the NYSHRL's education provision.

B. Plaintiffs also cannot impute liability for alleged harassment to Defendants.

With respect to their harassment claims, Plaintiffs acknowledge that Defendants must have "authorized or acquiesced" to reported incidents of classroom harassment. Opp'n 68. They argue they have adequately alleged "Defendants' awareness" of harassment and their "failure to act." *Id.* That is contrary to the complaint, alleging harassment was reported at two schools of the over 1000 City schools. *See* Compl. ¶¶68, 144.[11] Plaintiffs allege that the school leadership of P.S. 132 was made aware of two particular instances of harassment, *id.* ¶68, and that a teacher reported racist incidents occurring between 2012 and 2015 to Brooklyn Tech, *id.* ¶144. But the complaint contains no allegations that *Defendants* were or should have been aware of these incidents at these two schools, much less that Defendants acquiesced.

In light of these allegations, Plaintiffs' attempt to distinguish *Planck v. SUNY Board of Trustees*, 18 A.D.3d 988 (3d Dep't 2005), is unavailing. As in *Planck*, there is no connection between Defendants' policies and the alleged incidents of harassment at two specific schools. Similarly, in light of these allegations, Plaintiffs' attempt to liken this case to *Ithaca City School District v. New York State Division of Human Rights*, 926 N.Y.S.2d 686 (2011), *rev'd* 19 N.Y.3d 481 (2012), falls flat. In *Ithaca*, the plaintiff "repeatedly contacted school officials to complain" about specific and repeated instances of abuse and the school district "failed to meaningfully respond to the incidents, thereby permitting the

[11] A defendant, moreover, cannot "permit harassment" without being made aware that such harassment exists. For that reason, all of Plaintiffs' remaining allegations of unreported harassment cannot serve as a factual basis upon which to state a NYSHRL claim.

harassment to persist." *Id.* Plaintiffs here have not alleged that instances of harassment were ever reported to Defendants, nor that Defendants permitted such unknown harassment to persist.

Plaintiffs also have no response to PDE's discussion of *JG & PG ex rel. JG III v. Card*, 2009 WL 2986640, at *1-3 (S.D.N.Y. Sept. 17, 2009). Even though students' abuse was reported and the principal took no action, the court dismissed the parents' NYSHRL claim against the school district because they did not allege that the district itself "somehow authorized or acquiesced to Defendants' allegedly discriminatory conduct." *Id.* at *3, *12. It follows here that Plaintiffs' harassment claim should be dismissed. That particular school administrators were made aware of alleged harassment is insufficient to implicate the City or State Defendants in "permit[ting] the harassment of any student…by reason of his race." N.Y. Exec. Law §296(4).

CONCLUSION

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

Dated: January 24, 2022

Respectfully Submitted,

Dennis J. Saffran
Local Counsel of Record
38-18 West Drive
Douglaston, NY 11363
(718) 428-7156
djsaffranlaw@gmail.com

William S. Consovoy (*pro hac vice*)
Taylor A.R. Meehan (*pro hac vice*)
James F. Hasson (*pro hac vice*)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com
taylor@consovoymccarthy.com
james@consovoymccarthy.com

Counsel for Movant,
Intervenor-Defendant Parents Defending Education

CERTIFICATE OF COMPLIANCE

This reply brief complies with the word limit prescribed by §202.8-b(a) of the Uniform Civil Rules because it has 4,122 words, excluding the parts that can be excluded by §202.8-b(b).

Dated: January 24, 2022

Dennis J. Saffran

Local Counsel of Record for Defendant-Intervenor