To be argued by James Hasson, Esq.
(of the bar of the District of Columbia)
by permission of the Court.
Time Requested: 15 Minutes

A.D. No.: 2022-02719

NEW YORK SUPREME COURT APPELLATE DIVISION: FIRST DEPARTMENT

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

***Plaintiffs-Appellants*,**

-against-

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

***Defendants-Respondents*,**

-and-

PARENTS DEFENDING EDUCATION,

***Intervenor-Defendant-Respondent*.**

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1. Did the New York Supreme Court correctly dismiss Plaintiffs' complaint because courts cannot make education policy or otherwise direct Defendants to make changes to allegedly deficient race-neutral admissions policies, race-neutral staffing decisions, curriculum content, and other day-to-day decisions of the New York City schools? Yes.

2. Is Plaintiffs' failure to state a claim for relief under the Education Article, the Equal Protection Clause, or the New York State Human Rights Law an alternative ground to affirm the dismissal of Plaintiffs' complaint? Yes.

INTRODUCTION

Plaintiffs asked the New York courts to redress a "racist caste system" in New York City schools and an "apartheid state" alleged to exist in the City's high schools. R.29-30 ¶19; R.45-46 ¶79. They alleged that the State, the Governor, the New York City Mayor, the New York City schools, and others do not consider race *enough* and that the schools' race-neutral policies should be substituted with "race-conscious" ones. R.29-30 (Compl. ¶19). But treating students "solely as members of a racial group" conflicts with the aim, embodied in the U.S. Constitution's Equal Protection Clause, "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). The "race-conscious" treatment that Plaintiffs sought is "forbidden" because it "demeans 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). New York courts cannot become embroiled in making education policy, let alone unconstitutional education policy. The supreme court was correct to dismiss Plaintiffs' complaint. R.8.

COUNTERSTATEMENT OF THE CASE

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 encompasses more than 1,000 schools, serves more than 1,000,000 schoolchildren, and employs 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).

The City offers a variety of programs and specialized schools for gifted students on a race-neutral basis. The City offers gifted-and-talented courses beginning in elementary school. R.20-21 ¶8; R.22-23 ¶10. Once in middle school, students can test into academically "screened" schools. R.22-23 ¶10; R.52-54 ¶¶88-90. These programs admit students based on merit alone, and do not consider applicants' ethnicity or skin color. R.20-21 ¶8; R.22-23 ¶10; R.49-50 ¶84. At the high school level, the City offers more than 700 programs at 400 different schools. R.23-24 ¶11; R.55 ¶93. Nine of those 400 high schools are so-called "specialized high schools." R.24-25 ¶12; R.55-56 ¶94. Admission to eight of the nine specialized high schools is based on academic merit, and admission to the ninth, LaGuardia High School of Music & Art, is based

on an audition. R.55-56 ¶94. Any eighth grader may take the Specialized High School Admissions Test (or "SHSAT") to gain admission. *Id.* To ensure equal opportunities, the City offers scholarships for SHSAT test preparation if families cannot afford it (the "DREAM program") and has a dedicated admissions track for low-income students whose SHSAT scores are high enough to earn admission to a specialized high school (called the "Discovery program"). R.57-59 ¶¶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. As Plaintiffs' complaint shows, more than 60 percent of the offers to specialized high schools in past years went to students of color. *See, e.g.*, R.60 ¶99 (citing Reema Amin & Christina Veiga, *Once again, few Black, Latino students admitted to NYC's prestigious specialized high schools*, Chalkbeat (Apr. 29, 2021), perma.cc/RUJ3-35VD (reporting "[a]lmost 54% of offers went to Asian students" for 2021-2022)).

2. In March 2021, Plaintiffs 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. R.30-31 ¶¶20-27. Parents

Defending Education intervened as a Defendant. R.9-10. PDE is a membership organization with parent members whose children attend various New York City schools and take part in the City's gifted and talented programs and specialized high schools. *Id.*

Plaintiffs alleged violations of the New York Constitution's Education Article and Equal Protection Clause, as well as the New York State Human Rights Law. R.89-95 ¶¶147-67. The complaint described race-neutral gifted programs and specialized high schools as a racial "caste system" or "an apartheid state." *See, e.g.*, R.20-21 ¶¶7-8; R.27 ¶15; R.29-30 ¶¶18-19; R.45-46 ¶79; R.90 ¶151; R.93 ¶159. It alleged the City's "Eurocentric" curriculum was deficient and perpetuated "Antidarkness" and "antiblack racism." R.65-66 ¶¶104; R.69 ¶109 n.145; R.70 ¶110. It attacked the City's teachers as too white. R.75-84 ¶¶118-35. And it alleged disparate impact in disciplinary rates. R.48-64 ¶¶82-102.

Plaintiffs sought declaratory and injunctive relief. R.13; R.95-96. Specifically, Plaintiffs asked the supreme 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." R.29-30 ¶19. Among other requested relief, they asked for the elimination of the current race-neutral admissions

processes, including testing, for gifted programs, specialized high schools, and other screened schools; for better recruitment of teachers and staff of color; for compliance with curriculum guidelines. R.95-96. Plaintiffs also asked the court to order continued "monitor[ing]" and "[i]nterven[tion]" by Defendants to police "conditions that deny students a sound basic education, such as segregated schools and programs; disproportionately low numbers of school leaders, administrators, teachers, social workers, and guidance counselors of color; and failure to provide sufficient mental health supports to students, including failure to implement trauma-informed practices." R.95.

3. PDE, along with the State and City Defendants, moved to dismiss Plaintiffs' complaint on several grounds, including that Plaintiffs failed to state cognizable claims for violations of the Education Article, Equal Protection Clause, and New York State Human Rights Law.[1]

On May 25, 2022, the supreme court dismissed Plaintiffs' complaint. R.8. The court concluded that Plaintiffs' action "present[ed] a

[1] *See, e.g.*, PDE Mem. Law Supp. Mot. Dismiss Am. Compl. at 9, NYSCEF Doc. N. 121 (Sup. Ct. N.Y. Cnty. 2021) (hereinafter "PDE MTD"); PDE Reply Mem. Law Supp. Mot. Dismiss Am. Compl. at 2-3, NYSCEF Doc. No. 184 (Sup. Ct. N.Y. Cnty. 2022) (hereinafter "PDE MTD Reply").

nonjusticiable controversy." *Id.* "It is beyond cavil," according to the supreme court's order, "that the Court lacks jurisdiction to grant the relief sought." *Id.* That was because Plaintiffs "improperly" asked the court "to make educational policy by directing respondents take certain actions regarding curriculum content, testing content, employment diversity, employment policies, admission policies, and disciplinary policies, among others." *Id.* Concluding that Plaintiffs' lawsuit would require the court "to make education policy," the court dismissed it and stated "[t]he legislature, not the judiciary, is the proper branch of government to hear petitioners' prayers." *Id.* It further ordered that any "remaining relief is denied as academic in light of the dismissal of the action." *Id.*

Plaintiffs appealed, arguing only that the court erred in dismissing their claims as nonjusticiable. R.3-4.

ARGUMENT

This Court should affirm the dismissal of Plaintiffs' complaint. Plaintiffs' complaint did not present a justiciable controversy, and it failed to adequately plead any cognizable claim for relief on the merits. This Court can affirm on either basis. *See Matter of Am. Dental Co-op., Inc. v. Att'y Gen. of State of N.Y.*, 127 A.D.2d 274, 279 n.3 (1st Dep't 1987) ("An appellate court need not rely on the rationale articulated in the court of original jurisdiction to affirm a decision."); *see also, e.g.*, *Uribe v. Merchants Bank of New York*, 239 A.D.2d 128, 129 (1st Dep't 1997) (affirming dismissal on alternative grounds), *aff'd*, 91 N.Y.2d 336 (1998); *Nickerson v. Volt Delta Resources, Inc.*, 211 A.D.2d 512, 512 (1st Dep't 1995) (affirming summary judgment "on the alternative ground urged by defendants before the IAS court").

I. Plaintiffs' Claims Are Not Properly Suited for Judicial Resolution.

As the supreme court concluded below, Plaintiffs' case is not justiciable. *See* R.8-9. "Justiciability is an 'untidy' concept but it embraces the constitutional doctrine of separation of powers and refers, in the broad sense, to matters resolvable by the judicial branch of government as opposed to the executive or legislative branches or their extensions."

Jiggetts v. Grinker, 75 N.Y.2d 411, 415 (1990); *see also Matter of New York State Inspection, Sec. & L. Enf't Empls., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 238 (1984) ("Justiciability is the generic term of art which encompasses discrete, subsidiary concepts including, *inter alia*, political questions, ripeness and advisory opinions."). This Court will not "intrud[e] upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." *Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311, 324 (1st Dep't 2011) (cleaned up).

In short, the justiciability doctrines have "'one recurrent theme: the court … will abstain from venturing into areas if it is ill-equipped to undertake the responsibility and other branches are far more suited to the task.'" *Id.* at 323 (quoting *Jones v. Beame*, 45 N.Y.2d 402, 409 (1978)). "'[T]he manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government.'" *Campaign for Fiscal Equity, Inc. v. State* (*CFE III*), 8 N.Y.3d 14, 28 (2006) (ellipsis omitted); *see also Klostermann v. Cuomo*, 61 N.Y.2d 525, 535 (1984) ("The paramount concern is that the judiciary not undertake tasks that the other branches are better suited to perform.").

This case fits that theme. Plaintiffs demanded a judicially managed overhaul of the New York City schools, from their allegedly "Eurocentric" curriculum (R.65 ¶104) to the alleged "caste" system resulting from race-neutral admissions policies (R.90 ¶151). Adjudicating Plaintiffs' claims would erase any distinction between the distinct roles of the legislature, state and local education officials, and the judiciary. *See* R.8 ("The legislature, not the judiciary is the proper branch of government to hear petitioners' prayers."). Such "[b]road policy choices … are matters for the executive and legislative branches of government and the place to question their wisdom lies not in the courts but elsewhere." *Jiggetts*, 75 N.Y.2d at 415.

A. Plaintiffs' claims require the judiciary to make improper policy judgments and then enforce those judgments with indefinite prospective relief.

Plaintiffs' novel legal theories would require the New York courts to approve, monitor, and intervene in decisions about whom to hire, how to train, whom to admit, what to teach, how to allocate funds, and other day-to-day details about the administration of the City's school system serving more than one million students. For the reasons discussed in Part II, Plaintiffs' claims are claims of bad policy, not constitutional or statutory violations. And for the reasons discussed below, courts have

neither the delegated power nor the expertise to redress those claims.

Plaintiffs have never denied that their legal theories would require courts to make policy judgments and then enforce those judgments through a prospective injunction. *Compare, e.g.*, R.27 ¶14 (discussing City's "fail[ure] to take action to eliminate" use of SHSAT even though "policymakers … decry the [test's] outcomes"), *with* R.95 (listing "[e]limination" of "high school admissions screens currently in use" as first request in prayer for relief); *see also* R.66 ¶105 (City's failure to follow approach promoted by Plaintiffs' preferred "[e]ducation experts"); R.24-25 ¶12 (City's failure to follow "widespread consensus among psychometricians").

Plaintiffs not only demanded the "adoption" of programs they favored and the "elimination" of those they disfavored, but also "injunctive relief … including, but not limited to":

- "[m]onitoring and enforcement of schools' compliance with the New York State Culturally Responsive-Sustaining Education Framework";
- "[a]dopting of evidence-based programs to improve recruitment and retention of school leaders, administrators, teachers, social workers, and guidance counselors of color";
- "[e]stablishment of a system of accountability whereby Defendants[] [m]onitor conditions that deny students a sound basic education, such as segregated schools and programs;

disproportionately low numbers of school leaders, administrators, teachers, social workers, and guidance counselors of color; and failure to provide sufficient mental health supports to students, including failure to implement trauma-informed practices";

- "[e]stablishment of a system of accountability whereby Defendants[] [i]ntervene in a timely manner to address identified conditions that deny students a sound basic education"; and
- "issuance of an order requiring the preparation of a plan," subject to "Court approval," identifying the steps the City will take to achieve the specific relief requested above.

R.95-96.

In sum, Plaintiffs demanded nothing short of an overhaul of the State's largest school system, with judicially decreed policy. *See* Pls.Br.30 n.6 (conceding that they "broadly requested injunctive relief … [c]onsistent with other institutional reform litigation"); Pls.Br.31 ("other types of institutional reform litigation"); *see also, e.g.*, R.68 ¶107 ("implement a pedagogically necessary, inclusive curriculum"); R.18 ¶19 (urging trial court to "impose" any educational "measures" that it determines "the evidence may support"). That broad, perpetual relief would put the New York courts in the position of both super-legislature and super-superintendent for the City's public schools.

The supreme court correctly dismissed Plaintiffs' complaint in light of the relief their claims would entail. While other claims under the

Education Article, Equal Protection Clause, and New York State Human Rights Act might be justiciable, Plaintiffs' particular claims were not. The Court of Appeals has long recognized courts' "limited capabilities" in "fashioning and then enforcing particularized remedies." *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 39 (1982). And while those limitations will not "dictate judicial abstention in every case," they cannot "be ignored" here. *Id.* The Court of Appeals has admonished courts to "tread carefully" when wading into past education disputes. *CFE III*, 8 N.Y.3d at 28. Plaintiffs' claims are well beyond the lines drawn in those cases. *Infra*, Part I.C. Plaintiffs must take their claims about better curriculum, staff training, and other reforms to the political branches. *See* R.8.

B. Remedies are relevant to the justiciability analysis.

Plaintiffs now claim that their requested relief is irrelevant to the question of justiciability and that the supreme court should have never considered it. Pls.Br.10-26. But Plaintiffs' entire complaint was premised on the idea that courts—rather than the legislature, State or City officials, or schools themselves—must decide issues of student admissions to particular schools, R.37-48 ¶¶84-99; specific curricula for all grade levels and topics of instruction; "recruit[ment]" initiatives to

develop an "educator workforce" that is suitable to Plaintiffs, R.19 ¶6; teacher hiring and placement, R.63-84 ¶¶118-35; teacher "training" on "how to deliver a racially equitable and culturally responsive education," R.80 ¶127; school security procedures and "school discipline" policies, R.62-63 ¶¶101-02. All these issues, Plaintiffs said, needed to be addressed through the court's "*remedial authority*." R.30 ¶19.

As a fallback, Plaintiffs now argue that even if the Court cannot invoke that "remedial authority," *id.*, it could limit its decision to issues of "liability" and thereby avoid remedial issues. Pls.Br.29. That argument ignores that Plaintiffs' theories of liability were the reason that their requested relief swept so broadly. The two are necessarily intertwined. Plaintiffs' theories of liability turned on policy disagreements, rather than any constitutionally or statutorily prescribed obligation. *See, e.g.*, R.90-91 ¶¶151-52 (cause of action alleging violation of Education Article based on, *inter alia*, Plaintiffs' opinion that the City's "curriculum [is] steeped in Eurocentrism" and other criticisms of the "policies and practices of the City and State"); R.90-91 ¶¶155-56 (cause of action alleging violation of state Equal Protection Clause based in part on "a range of admissions, screening, and other policies" that have failed to

"equalize … outcomes"); R.94 ¶¶164-66 (cause of action alleging violation of New York Human Rights Law due to various "admissions policies and practices—including screened admissions, G&T testing and evaluation, and the SHSAT," that Plaintiffs believe unlawfully "privilege whiteness and Eurocentrism"). Any ruling about "liability" under Plaintiffs' theory of the law would require the courts to decide matters of policy instead of matters of law, no less than the remedies Plaintiffs sought for such a liability finding.

1. Courts look to the nature of a plaintiff's requested relief, together with a plaintiff's claims, to determine whether a claim is justiciable or whether it raises an issue that is properly reserved to the political branches. Actions are particularly nonjusticiable where "policy matters have demonstrably and textually been committed to a coordinate, political branch of government." *New York State Inspection*, 64 N.Y.2d at 240. That is the case here.

The Court of Appeals' decision in *New York State Inspection* is on point. There, employees of the Department of Correctional Services sought an injunction to prevent the Governor from closing a state prison. *Id.* at 237-38. They argued that the Governor's decision to close the

facility would lead to overcrowding at other facilities and subject them to increased threats when they interacted with the inmate population. *Id.*

The Court held the plaintiffs' requested remedy, if granted, would "embroil the judiciary in the management and operation of the State correction system" and agreed the complaint must be dismissed as nonjusticiable. *Id.* at 239. The Court acknowledged that "it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals," but authority is necessarily limited "[w]here … policy matters have demonstrably and textually been committed to a coordinate, political branch of government." *Id.* at 239-40. In *New York State Inspection*, such matters were left to the Commissioner of the Department of Corrections, and the Court of Appeals refused to dictate policies left to his discretion or to otherwise second-guess "the manner by which the State addresses complex societal and governmental issues." *Id.*

Plaintiffs' claims here required the same approach. Plaintiffs' requested relief—consistent with alleged curriculum, staffing, and admissions deficiencies throughout their complaint—would require the courts to oversee or overwrite the discretionary decisions of the City's

education officials and elected representatives, including "eliminat[ing]" current admissions tests and entire education tracks within the City school system; creating "evidence-based programs" to improve teacher hiring; "monitoring" outcomes; and "establish[ing] systems of accountability." R.95 (prayer for relief). The Court cannot direct "the manner by which the State addresses" such "complex societal and governmental issues," *New York State Inspection*, 64 N.Y.2d at 239-40, because they are within the legislature's control, as well as state and local school authorities.

In the words of the Court of Appeals, "public education is committed to the control of State and local school authorities," who are "vested with wide discretion in the management of school affairs." *Ware v. Valley Stream High Sch. Dist.*, 75 N.Y.2d 114, 122 (1989). "Ordinarily, judicial intervention is appropriate only when school conflicts 'directly and sharply implicate basic constitutional values,'" such as a religious group's request for a religious exemption from specific curriculum in *Ware*. *Id.* Courts generally cannot "usurp" the political branches' "power" to "determine funding needs" and "priorities for the allocation of the State's resources," absent some causal connection between deficient funding and constitutionally deficient educational opportunities. *CFE III*, 8 N.Y.3d at

29. The Constitution's Education Article embodies this commitment: "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 (emphasis added); *see Campaign for Fiscal Equity, Inc. v. State*, 29 A.D.3d 175, 187 (1st Dep't 2006) ("It is not for the courts to make education policy."), *aff'd as modified*, 8 N.Y.3d 14 (2006).

Because the education policies that Plaintiffs want reformed are committed to other branches of government, the Court should affirm the supreme court's decision to dismiss Plaintiffs' complaint. *See New York State Inspection*, 64 N.Y.2d at 240. Their claims, combined with their requested relief, *supra*, pp.13-15, would "compel [Defendants] to implement specific recommendations" that involve "'the exercise of reasoned judgment which could typically produce different acceptable results.'" *Curry v. N.Y. State Edu. Dep't*, 163 A.D.3d 1327, 1330 (3d Dep't 2018). The Court should affirm that such an action is nonjusticiable, lest "the education decisions of State and local officials—particularly in matters of curriculum"—be under this Court's indefinite supervision, in conflict with the "preservation of local democratic control over educational policy; protection of teachers' academic freedom;

maintenance of policies that comport with the views of educational experts; and formulation of curriculum so as to transmit community values and foster the free exchange of ideas." *Ware*, 75 N.Y.2d at 122.

2. Plaintiffs cannot avoid dismissal by hiding behind illusory distinctions between "liability" and "remedy." For purposes of Plaintiffs' claims, the two converge. As the supreme court recognized, Plaintiffs' liability theories rest on arguments about "curriculum content," "testing content," "employment diversity," "admission" practices, teacher training, and school discipline, among others. R.8; *accord* R.68 ¶107 (curriculum); R.12 ¶12 (testing); R.75-84 ¶¶118-35 (employment diversity); R.49-60 ¶¶84-99 (admissions); R.80 ¶127 (training); R.62-63 ¶¶101-02 (discipline). They fault Defendants' *failure* to sufficiently consider race in admissions, *e.g.*, R.45-46 ¶79 ("high schools are not remotely representative of the City's children"), disparate impact for discipline or graduation rates, R.48-49 ¶¶82-84 ("discipline is not fairly applied" and "[r]acial disparities are also reflected in the City's graduation rates"), "curriculum steeped in Eurocentrism" and "centering [on] white language, history, and culture," R.65 ¶104; R.90-91 ¶151, and the failure to "increase the recruitment and retention of qualified teachers of color," R.75-76 ¶¶118-19, among other allegations.

These alleged deficiencies, no different than the requested remedies to redress them, are for policymakers to address. To be sure, courts adjudicate particular cases or controversies, such as unlawful intentional discrimination in a particular hiring decision, *see* Pls.Br.17, but Plaintiffs' claims are not that, *see infra*, Part II.B. (explaining that Plaintiffs' Equal Protection claims are about disparate impact of race-neutral policies, not intentional race-based discrimination). Plaintiffs' claims are instead about day-to-day administration of schools writ large. And such issues of education policy are textually committed to another branch—both for questions of "liability" and "remedies," even assuming the two could be disaggregated. *See, e.g.*, *Jones,* 45 N.Y.2d at 409 (explaining that "courts are the wrong forum" when "resolution of the ultimate issues rests on policy, and reference to violations of applicable statutes is irrelevant except in recognized separately litigable matters brought to enforce them"); *see also, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 133 (1995) (Thomas, J., concurring) ("[S]taffing[] and educational decisions" along with "administrative oversight and monitoring" are "functions [that] involve a legislative or executive, rather than a judicial, power.").

3. Plaintiffs counter with this Court's decision in *Center for*

Independence of the Disabled v. Metropolitan Transportation Authority, 184 A.D.3d 197 (1st Dep't 2020), and contend it stands for the proposition that "a trial court's justiciability ruling" should be reversed "for having conflated potential remedy with the legal violation alleged," Pls.Br.15. The decision is not so broad. The decision faulted the government for "focusing only on *one* of the remedies that could be implicated by th[e] action" because it caused "defendants [to] miss the greater import of plaintiffs' complaint." 184 A.D.3d at 208 (emphasis added). That relief was "nothing more than having defendants implement a nondiscriminatory plan" to allow persons with disabilities to access the New York City subway system as anticipated by the New York City Human Rights Law, *id.*, as compared to Plaintiffs' relief sought here for new curriculum, new teachers, new teacher training, new discriminatory admissions policies, and the like. *Center for Independence* confirmed that courts can do the former but *cannot* do the latter, which would "go beyond any mandatory directives of the Constitution, statutes, or regulations" and "intrude upon the policy-making and discretionary decisions" of the political branches. *Id.* at 209. Particularly relevant here, this Court cautioned that courts cannot "dictate the specific manner in which such plans and programs operate." *Id.* That describes Plaintiffs' legal theories

and requested relief, *see supra*, pp.13-15, 18-19—precisely what *Center for Independence* acknowledged was not justiciable.

4. U.S. Supreme Court precedent reinforces the conclusion that remedies are relevant when deciding whether claims are nonjusticiable.[2]

In *Gilligan v. Morgan*, for example, the Supreme Court concluded the plaintiffs' requested remedy (restraining the Ohio governor from prematurely ordering National Guard troops to quell future campus protests) established that the claim was not justiciable. 413 U.S. 1, 5 (1973). The Supreme Court assumed, for purposes of justiciability, that the students' allegations were "true and could be established by evidence" and then asked "whether there is any relief a District Court could appropriately fashion" for those claims. *Id.* The Supreme Court concluded no, given the plaintiffs' requested relief was "a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard." *Id.* It would require courts to make "complex[,] subtle, and professional decisions" on areas in which they lacked

[2] New York state courts often find federal precedent instructive for justiciability. *See, e.g.*, *Roberts*, 87 A.D.3d at 322-23 (relying on *Baker v. Carr*, 369 U.S. 186, 211 (1962); *Flast v. Cohen*, 392 U.S. 83, 95 (1968)); *Jones*, 45 N.Y.2d at 408 (relying on *Flast* and *Baker*).

expertise and in which another branch had expertise. *Id.* at 10; *accord Nixon v. United States*, 506 U.S. 224, 236 (1993) (concluding claim was nonjusticiable in part because of "the difficulty of fashioning relief" for claims about Senate impeachment hearings, even if a constitutional violation were shown). There, as here, when plaintiffs seek prospective injunctive relief that would immerse the courts in the wisdom of National Guard deployments or curriculum policy, the claims themselves can be deemed nonjusticiable.

The U.S. Supreme Court's partisan gerrymandering decisions provide a more recent example. For decades, the Court considered whether (and how) it could adjudicate claims that voting districts were drawn to politically disfavor one political party over another. *See Gaffney v. Cummings*, 412 U.S. 735 (1973); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006); *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). In 2019, the Supreme Court conclusively decided partisan gerrymandering claims are not justiciable, distinguishing the "justiciability conundrums" of such claims from other redistricting claims, which remain justiciable

under the Equal Protection Clause. *See id.* at 2501-02; *see also, e.g.*, *Evenwel v. Abbott*, 578 U.S. 54, 58-61 (2016) (describing history of malapportionment claims); *Shaw v. Reno*, 509 U.S. 630 (1993) (racial gerrymandering claims). Relevant here, the Court has described the justiciability problem in partisan gerrymandering cases as a problem of remedies. In *Vieth*, for example, the plurality observed that "[t]he issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, *and to design a remedy*." 541 U.S. at 292 (emphasis added). Similarly in *Rucho*, the Court observed there was no justification "for judges to take the extraordinary step of reallocating power and influence between political parties" by ordering new districts. 139 S. Ct. at 2502. Here, as there, the difficulty in fashioning a remedy is necessarily entwined with adjudicating the elements of the claim. *Cf. Vieth*, 541 U.S. at 290 ("the easily administrable standard of population equality … enables judges to decide whether a violation has occurred *(and to remedy it)* essentially on the basis of three readily determined factors" (emphasis added)).

5. Applied here, it becomes clear that Plaintiffs' claims are nonjusticiable, as revealed by their sweeping requests for prospective

injunctions. *See In re Gee*, 941 F.3d 153, 167 (5th Cir. 2019) ("sweeping requests for 'intrusive and unworkable' injunctions are nonjusticiable" (quoting *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974))). After all, "the judicial process is not designed or intended to assume the management and operation of the executive enterprise." *Jones*, 45 N.Y.2d at 408; *see also id.* (New York courts are "'not so organized as to enable it conveniently to assume a general supervisory power over their acts; and indeed such an assumption by it would be contrary to the whole spirit and intent of our government.'"); *accord Levittown*, 57 N.Y.2d at 39 (acknowledging courts' "limited capabilities and competencies").

Here, "[i]t would be impossible for a court to oversee the performance of these acts." *James v. Bd. of Ed. of City of New York*, 42 N.Y.2d 357, 368 (1977). After all, Plaintiffs "seek to compel executive officials to engage in a general course of conduct and in a series of continuous acts, all for the purpose of providing what [Plaintiffs] would perceive to be an appropriate" education system. *Id.* This course would include a host of complex policy judgments, including developing and purchasing new curriculum content and testing content, making employment and admissions decisions that prioritize diversity, and

redesigning disciplinary procedures to ensure there is no racial disparity, *see supra*, pp.18-19. It is hard to imagine relief more intrusive of the political branches' role than Plaintiffs' requested perpetual monitoring over New York City's schools, including whether the curriculum is culturally responsive enough, whether classrooms and staff are diverse enough, whether discipline is fair enough, or whether testing is inclusive enough. *See* R.95-96; *accord, e.g.*, R.16-17 ¶5; R.29-30 ¶19; R.21-26 ¶¶9-13; R.28 ¶16; R.43-45 ¶¶77-79; R.46 ¶80; R.48 ¶82; R.51 ¶86; R.59-60 ¶¶98-99; R.63-64 ¶102; R.68-70 ¶¶109-10; R.75-77 ¶¶118-22; R.83-84 ¶135.

Nor do Plaintiffs' claims of unfairness lend themselves to any "judicially manageable standard." *Vieth*, 541 U.S. at 291; *see, e.g.*, R.16 ¶5 (saying "institutional racism" includes "unfair policies and practices"); R.48 ¶82 ("school discipline is not fairly applied across all racial groups in New York City school"); R.67 ¶107 (alleging that the City is not living up to its "recommendation[]" to "educate all students effectively and equitably"); *id.* ("'inclusive'"); R.39 ¶61 (discussing whether the City has "an equitable culture and culturally responsive curriculum"); R.69 ¶109 (similar). At bottom, unlike other education claims the New York courts

have adjudicated, *infra*, Part I.C., Plaintiffs' grievances "provide[] no basis whatever to guide the exercise of judicial discretion." *Rucho*, 139 S. Ct. at 2506.

C. Courts' adjudications of other education claims do not establish that Plaintiffs' particular claims are justiciable.

Plaintiffs respond that New York courts have addressed claims alleging violations of the constitutional and statutory provisions they invoke. Pls.Br.19-24. But that argument ignores that justiciability is "subtle," "has … moved … with the passage of time," *Jones*, 45 N.Y.2d at 408, and is generally determined on a "case-by-case" basis, *Roberts*, 87 A.D.3d at 323. That courts have previously adjudicated Education Article claims or Equal Protection claims does not mean that Plaintiffs' particular claims are justiciable. *See, e.g.*, *Rucho*, 139 S. Ct. at 2501-02 (illustrating that certain redistricting claims are justiciable but not others).

1. Plaintiffs conflate their claims here with those in past suits, including those in the *CFE* litigation. Pls.Br.12-15. But as PDE argued below, *CFE* and other Education Article suits were specific to school funding, not day-to-day decisions about how schools must be run. *See, e.g.*, *Levittown*, 57 N.Y.2d at 39; *Paynter*, 100 N.Y.2d at 438-41, 443;

Campaign for Fiscal Equity, Inc. v. State (CFE I), 86 N.Y.2d 307, 318-19 (1995); PDE MTD 4-11; PDE MTD Reply 1-5. Even then, the New York Court of Appeals has shown great restraint by not dictating the manner the funding should be used. *See, e.g.*, *CFE II*, 100 N.Y.2d at 925 ("We have neither the authority, nor the ability, nor the will, to micromanage education financing.").

With respect to *CFE* in particular, the Court of Appeals did not say any and all claims arising under the Education Article were justiciable as Plaintiffs suggest (at 13-14). Rather, the Court staked out a narrow path for a cognizable claim: The plaintiffs would "have to establish *a causal link* between the present *funding system* and any proven failure to provide a sound basic education to New York City school children." *CFE I*, 86 N.Y.2d at 318 (emphases added). *CFE* was thus always about "the current system of *public school financing*," *CFE III*, 8 N.Y.3d at 27 (emphasis added), not particular curriculum choices or teacher hiring without any alleged causal link to constitutionally deficient "maintenance and support," N.Y. Const. art. XI, §1. Even for that narrower set of claims, the Court of Appeals warned that courts must "tread carefully when asked to evaluate state financing plans." *CFE III*,

8 N.Y.3d at 28. The Court described the "deference" due "to the Legislature's education financing plans," given "'the separation of powers upon which our system of government is based.'" *Id.* (quoting *Matter of 89 Christopher v. Joy*, 35 N.Y.2d 213, 220 (1974)). Those budgetary questions were the "prerogative of the Legislature and Executive"—branches of government "in a far better position" to "determine funding needs" and "priorities for the allocation of the State's resources"—and "the Judiciary should not usurp this power." *CFE III*, 8 N.Y.3d at 29. Applying those principles in *CFE III*, the Court allowed only an inquiry about whether "the State's estimate of the *cost* of providing a sound basic education in New York City was a *reasonable* estimate." *Id.* (first emphasis added). The courts were not to go any further, and the Court of Appeals specifically rejected that continuing reporting to the judiciary "to ensure accountability" was constitutionally required. *Id.* at 32; *but see* R.95 (requesting "[e]stablishment of a system of accountability" with continued monitoring and intervention).

Plaintiffs' claims here cross the line already demarcated in *CFE* between the courts' judicial role and other branches' policymaking roles. Plaintiffs' claims ask for something much more than a reasonable cost

estimate from the State. *Cf. CFE III*, 8 N.Y.3d at 29. Plaintiffs did not allege that the legislature defaulted on its constitutional duty to provide sufficient funding. They instead pressed three theories of liability—none funding. Plaintiffs alleged that Defendants violated the Education Article by (a) failing to diversify classrooms and schools, (b) not mandating more "culturally responsive curriculum" for those insufficiently diverse classrooms and schools, and (c) not achieving racial parity in staffing or discipline. R.45-46 ¶79; R.48 ¶¶82-84; R.65 ¶104; R.75-76 ¶¶118-19; R.90-91 ¶151.[3] All three theories would entail policy judgments, not the lack of funding at issue in past suits.

a. Plaintiffs' allegations of insufficiently diverse classrooms did 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, had "no relation to the

[3] The complaint did have one lone paragraph about "poorly maintained buildings" and lacking "basic classroom materials," R.61-62 ¶100, but the complaint lacks allegations that such deficiencies have a causal connection to constitutionally inadequate funding, *see infra*, Part II.A.2.

discernible objectives of the Education Article." *Paynter*, 100 N.Y.2d at 442; R.29-30 ¶19.

b. Plaintiffs' disagreements with Defendants' staffing strategies were likewise far afield from cognizable Education Article claims. Plaintiffs alleged that Defendants failed to create a more racially diverse teaching corps. *See* R.14-15 ¶3; R.46-47 ¶80; R.71 ¶112. But how best to achieve such diversity is a policy decision, absent allegations of intentional discrimination in particular hiring decisions. That again is why New York courts have specifically focused on the adequacy of *funding* for "personnel adequately trained to teach" basic academic subjects, *CFE I*, 86 N.Y.2d at 317, not the wisdom of teacher hiring more generally, *see CFE III*, 8 N.Y.3d at 28 (cannot intrude on "policy-making and discretionary decisions").

c. Similarly, Plaintiffs complained that schools have not followed "Culturally Responsive-Sustaining Education Framework" curriculum recommendations and seeks for the court to order compliance. *See* R.65-75 ¶¶104-17. This curriculum theory was also about policy, not about funding. The judiciary would usurp the political branches' roles by mandating particular curriculum. *See, e.g.*, *CFE II*, 100 N.Y.2d at 907

(cautioning that court cannot "enshrine" state guidelines as constitutionally mandated); *compare Ware*, 75 N.Y.2d at 122 (adjudicating narrower question of whether religious exemption for certain curriculum was warranted).

Having failed to tie their allegations to school funding decisions Plaintiffs have not stated the sort of cognizable claim that *CFE* anticipates. They are different in kind than those previously adjudicated by New York courts, and they are not justiciable.

2. Plaintiffs next counter (at 15) that the Second District's decision in *Davids v. State*, 159 A.D.3d 987 (2d Dep't 2018), supports reversal here. But the claims in *Davids* were materially different than the diversity, staffing, and curriculum claims that Plaintiffs make here. The *Davids* plaintiffs asked for a declaration that particular statutes regarding teacher dismissals deprived students of a sound basic education. *Id.* at 990. The court's one-paragraph discussion of justiciability stands, at most, for the proposition that a case that "'*touches upon* a political issue'" can still be justiciable. *Id.* at 991-92 (emphasis added) (quoting *Matter of Boung Jae Jang v. Brown*, 161 A.D.2d 49, 55 (2d Dep't 1990)). *Davids* consideration of the constitutionality of state

statutes does not support Plaintiffs' arguments that courts may adjudicate their disagreement with myriad day-to-day decisions made regarding admissions policies, teacher hiring, reading lists, or other curriculum choices, nor does *Davids* anticipate continuous monitoring of such day-to-day decisions.

3. Finally, Plaintiffs contend that courts can at least consider their request for declaratory relief, even if not their request for injunctive relief. Pls.Br.29. The Courts should reject that fallback argument for three reasons.

a. First, Plaintiffs never argued that their request for declaratory relief should save their complaint in the supreme court. They merely argued that justiciability doctrine may consider only the elements of the claim, not the relief requested. The argument is forfeited. *See, e.g.*, *U.S. Bank Nat'l Association v. DLJ Mortg. Cap., Inc.*, 33 N.Y.3d 84, 89 (2019) ("To preserve an argument for review by this Court, a party must 'raise the specific argument[]' in [the] Supreme Court 'and ask the court to conduct that analysis' in the first instance.").

b. Even if not forfeited, the argument fails for the same reasons as those discussed above. Issuing declaratory relief about New York City

schools' curriculum, teacher training, or testing standards, among other features, would entail the same policy considerations that preclude the Court from deciding whether Plaintiffs are entitled to a prospective injunction. *Cf. Matter of Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 148 (1983) ("The jurisdictional impediments to obtaining declaratory judgment are virtually coextensive with those to any normal lawsuit.").

c. Finally, this Court can exercise its discretion to deny declaratory relief given the sensitive separation-of-powers concerns inherent in adjudicating Plaintiffs' complaint. *See Smyley v. Tejada*, 171 A.D.2d 660, 661 (2d Dep't 1991) ("It is firmly established that the decision of whether to grant declaratory relief is discretionary in character."); N.Y. CPLR §3001 ("The supreme court *may* render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds." (emphasis added)).

D. PDE's other suits differ from Plaintiffs' suit because PDE's suits seek injunctive relief precluding, not prescribing, unconstitutional intentional discrimination.

Plaintiffs suggest that PDE cannot seriously "challenge the

justiciability of Plaintiffs' claims" because "PDE has brought claims challenging all manner of school practices in other cases." Pls.Br.9 n.2 (collecting cases). Plaintiffs cannot conflate their claims with PDE's constitutional litigation. Unlike Plaintiffs, PDE does not seek injunctions for "institutional reform." PDE's suits ordinarily ask to enjoin the enforcement of intentionally discriminatory school policies that violate the First or Fourteenth Amendments of the U.S. Constitution, such as racially segregated school activities. *See, e.g.*, Compl., *PDE v. Wellesley Sch. Dist.*, No. 1:21-cv-11709 (D. Mass. Oct. 19, 2021); Compl., *PDE v. Linn-Mar Community Sch. Dist.*, No. 1:22-cv-00078 (N.D. Iowa Aug. 2, 2022); Compl., *PDE v. Olentangy Local Sch. Dist. Board of Edu.*, No. 2:23-cv-01595 (S.D. Ohio May 11, 2023).

PDE's requested relief in these cases thus does not "bind state and local officials to [certain] policy preferences," nor does PDE "improperly deprive future officials of their designated legislative and executive powers" or force courts to make judgments they are not suited to make. *Horne v. Flores*, 557 U.S. 433, 449 (2009) (internal quotation marks omitted). Rather, the purpose of PDE's claims is to protect its members and their children from the sort of race-conscious policies that Plaintiffs seek here. It is for this very reason that PDE argued extensively below—

and Plaintiffs now ignore—that Plaintiffs' claims are not judicially redressable. Their request that New York courts invoke their "remedial authority" to impose measures, even "race-conscious ones," to dismantle New York's otherwise race-neutral policies (R.30 ¶19) conflicts with the U.S. Constitution. *See* PDE MTD 16; PDE MTD Reply 10; *infra*, pp.59-61.

II. This Court Can Affirm on the Alternative Ground That Every Count of Plaintiffs' Complaint Fails to State a Claim Upon Which Relief Could Be Granted.

This Court could affirm the supreme court's dismissal of Plaintiffs' complaint for the alternative reasons PDE offered in the court below and offers here again. *See, e.g.*, *Uribe*, 239 A.D.2d at 129 (affirming dismissal on alternative grounds); *Nickerson*, 211 A.D.2d at 512 (affirming summary judgment "on the alternative ground urged by defendants before the IAS court"). Plaintiffs' complaint fails to state a claim for relief under New York's Education Article, Equal Protection Clause, or Human Rights Law.

A. Plaintiffs did not state a claim for violation of the Education Article.

Discussed above, the Constitution's Education Article requires "[t]he 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. 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.

Still today, the Education Article ensures a "sound basic education" for students. *Levittown*, 57 N.Y.2d at 48. But that constitutional obligation is specific to the Legislature's provision of "maintenance and support" to schools—meaning its "funding system." *Paynter*, 100 N.Y.2d at 239-40; *see also CFE I*, 86 N.Y.2d at 318-19. But directly contrary to Plaintiffs' allegations, the government is not further required 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). Rather, the Education Article establishes only "a constitutional floor," *Aristy-Farer v. State*, 29 N.Y.3d 501, 505 (2017) (internal quotation marks omitted), guaranteeing sufficient funding for schools with "minimal acceptable

facilities and services" but not necessarily equality of outcomes in every New York school, *Levittown*, 57 N.Y.2d at 47; *see id.* (text "makes no reference to any requirement that the education to be made available be equal or substantially equivalent in every district"); *Paynter*, 100 N.Y.2d at 439, 443.

To state a claim for a violation of the Education Article, Plaintiffs must first show "'gross and glaring inadequacy' in their schools." *Paynter*, 100 N.Y.2d at 439 (quoting *Levittown*, 57 N.Y. 2d at 48); *see R.E.F.I.T.*, 86 N.Y.2d at 284; *Aristy-Farer*, 29 N.Y.3d at 510, 510 ("[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."). Plaintiffs must next plead that any such inadequacy "is causally connected to the funding system." *Paynter*, 100 N.Y.2d at 440; *accord CFE I*, 86 N.Y.2d at 318 ("causal link"). Plaintiffs' Education Article claim failed in both regards.

1. Plaintiffs failed to allege "gross and glaring inadequacy."

a. New York courts will not intervene in 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. *CFE II*, 100 N.Y.2d at 914.

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.*, *id.* 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.").

b. Here, Plaintiffs did not adequately allege 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 discussed allegedly lacking physical facilities and supplies. R.61 ¶100. That paragraph did not allege "district-wide failure" or "systemic failure." *New York Civ. Liberties Union (NYCLU) v. State of*

New York, 4 N.Y.3d 175, 182 (2005) ("[B]ecause 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 instead asserted that some high schools were relegated to "poorly maintained buildings," naming only a single high school in the Bronx allegedly built too close to the Hutchinson River Parkway with a windowless cafeteria. *Id.* That was 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"). Nor did that paragraph allege that these deficiencies are correlated with lower educational outcomes or causally connected to state funding decisions. *See id.* at 911. Yet in the court below, Plaintiffs had no response to the absence of allegations about these deficiencies in their complaint. *See* PDE MTD Reply 2.

c. Plaintiffs' overarching Education Article claim was little different than the claims rejected by the Court of Appeals in *Paynter* and *Levittown*. Plaintiffs contended that a "caste system" persists, asserted that staffing too "infrequently exposes students to adults of color in positions of power and stature," and complained of "curriculum steeped in Eurocentrism." R.90-91 ¶151. But that rhetoric cannot distinguish their claims. In *Paynter*, the Court of Appeals affirmed the dismissal of the plaintiffs' complaint, which likewise relied on a "novel theory" that *de facto* segregation of school districts violated the Education Article. 100 N.Y.2d at 438-39. The plaintiffs asserted that the defendants' "practices and policies … resulted in high concentrations of racial minorities and poverty in the school district, leading to abysmal student performance." *Id.* The crux of the complaint was the State's "failure to mitigate" those demographics. *Id.* The Court of Appeals rejected that theory. *Id.* Similarly, in *Levittown*, the 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 the plaintiffs' attack on such "educational unevenness above th[e] minimum standard" was

not actionable. *Id.* at 38.

The same was true here. Plaintiffs alleged Defendants violated 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. R.45-46 ¶79; R.48-49 ¶¶82-84; R.65 ¶104; R.75-76 ¶¶118-19; R.90 ¶151. Plaintiffs' focus was entirely on demographic outcomes, making one race-based comparison after another regarding admissions, graduation rates, diplomas received, staff hired, and discipline. *See, e.g.*, R.20-23 ¶¶8-11; R.26 ¶13; R.28 ¶16; R.43-45 ¶¶77-79; R.46-47 ¶80; R.48-49 ¶¶82-83; R.51 ¶86; R.59-60 ¶¶98-99; R.63-64 ¶¶102-103; R.75-77 ¶¶118-22; R.78-79 ¶¶125-26; R.83-84 ¶135. These allegations of "unevenness" are insufficient. *Levittown*, 57 N.Y.2d at 38; *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" correlated with "poor educational performance," more must be alleged to state a claim for violation of the Education Article. 100 N.Y.2d at 441. But here, Plaintiffs failed to 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; *see Levittown*, 57 N.Y.2d at 38, 47. Their novel theory, including their request for "race-conscious" relief, R.30 ¶19, bore "no relation to the discernible objectives of the Education Article," *Paynter*, 100 N.Y.2d at 442.

Plaintiffs' allegations regarding Defendants' staffing decisions, including the failure to create a more racially diverse teaching corps, are illustrative. *See, e.g.*, R.14-15 ¶3; R.46-47 ¶80. 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."

Similarly, Plaintiffs' curriculum arguments were indicative of Plaintiffs' failure to state an Education Article claim. Plaintiffs complained that schools didn't follow the State's "Culturally Responsive-Sustaining Education Framework" curriculum recommendations. R.65-75 ¶¶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" (R.67 ¶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. 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, not Plaintiffs' preferred curriculum in every New York school.

* * *

At bottom, Plaintiffs' conception of the Education Article is limitless. Plaintiffs' complaint 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. This Court could thus affirm the dismissal of Plaintiffs' Education Article claim on these grounds.

2. Plaintiffs did not connect the alleged deficiencies to inadequate legislative funding.

a. Even if Plaintiffs had alleged "gross and glaring inadequacies," such "inadequacies are not, standing alone, enough to state a claim under the Education Article." *NYCLU*, 4 N.Y.3d at 179. A plaintiff must also allege a "causal link" between these inadequacies and the Legislature's school funding decisions. *Paynter*, 100 N.Y.2d at 440; *see also, e.g.*, *NYCLU*, 4 N.Y.3d at 180 (dismissing complaint for "fail[ure] to clearly allege even one" cause for "failure of their schools"); *CFE I*, 86 N.Y.2d at 318 ("[P]laintiffs will have to establish a *causal link* between the present funding system and any proven failure to provide a sound basic education to New York City school children." (emphasis added)). That is because "[t]he causes of academic failure may be manifold, including such factors as the lack of family supports and health care." *Paynter*, 100 N.Y.2d at 441. And the Education Article does not shield students from any and all such causes. *Id.* So long as "the State truly puts adequate resources into the classroom, it satisfies its constitutional promise under the Education Article." *Id.*

b. Here, Plaintiffs stated in conclusory fashion that Defendants' policies and practices "cause the denial of a sound basic education to New York City schoolchildren." R.16-17 ¶5; R.91 ¶152. That "bare legal conclusion[]" need not be accepted as true. *Myers v. Schneiderman*, 30 N.Y.3d 1, 11 (2017). Even if it were accepted as true, Plaintiffs' allegations about the effect of race-neutral admissions policies were not allegations of constitutionally inadequate "maintenance and support" from the Legislature. N.Y. Const. art. XI, §1. Plaintiffs' claim failed because it was "not premised on any alleged failure of the State to provide 'resources'—financial or otherwise." *NYCLU*, 4 N.Y.3d at 180; *see 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," *supra* (discussing R.61-62 ¶100), contained no allegations that such deficiencies resulted from constitutionally adequate funding. Because Plaintiffs failed to tie these allegations to constitutionally deficient school funding resulting in a "district-wide" failure, *NYCLU*, 4 N.Y.3d at 182, the Court can affirm the dismissal of Plaintiffs' claim on these alternative grounds. *See also, 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.").

c. Plaintiffs' complaint also revealed myriad alternative causes for the alleged disparities. Even Plaintiffs admitted that "the demographics of the City's G&T programs reflect disparate *familial resources*." R.20 ¶8 (emphasis added). Plaintiffs' allegations about "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" are not allegations linking disparities to the *Legislature*'s funding. *See* R.22-23 ¶10; *see also* R.52-53 ¶89; R.57-58 ¶96 (alleging students "have been tutored in preparation for the G&T test as toddlers"). Such alleged disparities are beyond the Education Article's reach. *See Paynter*, 100 N.Y.2d at 441 (rejecting "lack of family supports" cause).

In short, Plaintiffs' allegations were 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 did not ask for additional resources. 100 N.Y.2d at 441 n.3. They did not even allege that increased funding could improve the alleged disparities. That failure to allege a "causal connection" remains an independent basis for rejecting Plaintiffs' Education Article claim.

d. It is no answer to say, as Plaintiffs did before the supreme court, that precedent does not require a causal link. Pls. Mem. Law Supp. in Opp'n of Defs. Mot. Dismiss Am. Compl. at 25-27, NYSCEF Doc. No. 175 (Sup. Ct. N.Y. Cnty. 2021) (hereinafter "Pls. MTD Opp'n"). Plaintiffs cited *CFE I*, *Paynter*, and the Second Department's *Davids* decision to support their position, but none supports Plaintiffs' novel theory of liability. In *CFE I*, the Court held that a plaintiff must connect "funding and educational opportunity." 86 N.Y.2d at 318. *Paynter* then left no doubt that the Education Article requires that all plaintiffs plead a lack of resources to survive a motion to dismiss. The Court rejected the plaintiffs' suit because their 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. The flaw in *Paynter*—repeated by Plaintiffs here—was the failure to "allege a lack of

state education resources" or "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"). *Paynter*'s bright-line rule doomed Plaintiffs' Education Article claim here: "[I]f the State truly puts adequate resources into the classroom, it satisfies its constitutional promise under the Education Article." *Id.* at 441.

Nor is the Second Department's decision in *Davids* support for Plaintiffs' Education Article claim. The *Davids* plaintiffs' complaint contained allegations about system-wide inadequate teaching, caused by the failure to "deliver adequate resources into the classroom." Compl. ¶43, *Davids*, 159 A.D.3d at 987. But here, Plaintiffs alleged no such causal link. The *Davids* plaintiffs, moreover, alleged that failure was caused by the State, in particular the state's "statutory scheme which controls the dismissal of teachers." 159 A.D.3d at 990. 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' complaint 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. 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.* R.65-66 ¶104; R.95. As with the remedies sought by the plaintiffs in *Paynter*, Plaintiffs' requested relief would overhaul 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 instead requires something more concrete: the State must 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, with broad berth given to what the State deems to be "reasonable," *see CFE III*, 8 N.Y.3d at 29-30. No allegation found in Plaintiffs' complaint suggests Defendants failed to meet that requirement. This Court could thus affirm the supreme court's dismissal of Plaintiffs' Education Article claim on these alternative grounds.

B. Plaintiffs did not state an Equal Protection claim.

Plaintiffs' complaint also did not state a claim under New York's Equal Protection Clause. The complaint's overarching allegation was about Defendants' race-neutral "test-based" admissions standards instead of equalizing "outcomes" among students of different racial backgrounds. R.91-92 ¶¶156-57. Put simply, Plaintiffs claimed 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). That claim failed 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; *see 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). 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 conceded that discrimination must be intentional for their Equal Protection claim to proceed. *See* R.29 ¶18 n.45; R.47-48 ¶81. But Plaintiffs' allegations of intent, even when accepted as true and given all favorable inferences, were at most allegations of disparate impact. Accordingly, this Court could affirm the dismissal of Plaintiffs' Equal Protection claim on these alternative grounds.

1. By Plaintiffs' complaint's own admission, Defendants' admissions policies are facially neutral.

Plaintiffs did 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. *See* R.20 ¶8; R.22 ¶10; R.49-50 ¶84. Likewise, gifted programs and specialized high schools are open to students of all races. *See* R.20-23 ¶¶8, 10-11; R.52-55 ¶¶88-90, 93. There is no test or program open only to white students and another for only non-white students. Even Plaintiffs admitted that testing was intended to replace more "subjective" metrics for admission. R.49-50 ¶84. And they conceded that "[t]he sole criterion for admission" 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. R.55-56 ¶94.

Plaintiffs' claim turned instead on the outcomes of these facially neutral policies. R.91-92 ¶156. They described 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." R.90 ¶151. They alleged "superior treatment is assured" only for "students who are disproportionately white and from certain Asian backgrounds." *Id.* They attacked 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." R.20-22 ¶¶8-10. And they described 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." R.26 ¶13; *see* R.23 ¶11; R.60 ¶99.

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"). For that reason, Plaintiffs' complaint conceded their Equal Protection claim ought to have failed absent allegations of intentional discrimination, *see* R.29 ¶18 n.45, R.47 ¶81, but elsewhere failed to plead it. They thus failed to state an Equal Protection claim.

2. Plaintiffs did not allege that Defendants intentionally discriminated against students.

Plaintiffs failed to allege intentional discrimination. It is true that Plaintiffs asserted throughout their complaint that Defendants acted intentionally or knowingly. *See* R.29 ¶18; R.47 ¶81, R.59 ¶98; R.91-92 ¶¶155, 157. But those assertions merely allege that Defendants acted

intentionally to *run the school system* (as one must). They were not allegations that Defendants acted intentionally *to discriminate*. For example, Plaintiffs claimed Defendants "intentionally maintain and sanction this system." R.30 ¶18. They said Defendants "intentionally failed to take sufficient action—or often any action—to address the egregious inequities." R.47 ¶81. They said Defendants "intentionally refus[ed] to dismantle, root and branch" schools' "racialized channeling system." R.59-60 ¶98; *see also* R.91 ¶155; R.92 ¶157. But there were no allegations that Defendants themselves "acted with a discriminatory purpose or were motivated by the race or ethnic background of the student bodies." *Weinbaum v. Cuomo*, 219 A.D.2d 554, 556 (1st Dep't 1995). Adverbs could not transform a disparate-impact claim into a claim for intentional and invidious discrimination. *See id.*

At most, Plaintiffs alleged that Defendants were *aware* of racial disparities in the City's schools. *See* R.92 ¶157 (alleging Defendants "intentionally retained" the admissions processes even "know[ing]" they "exclud[e] students of color"). But this and other allegations of Defendants' mere "awareness of consequences," even if true, could not amount to allegations of "[d]iscriminatory purpose" required to state an

Equal Protection violation. *Feeney*, 442 U.S. at 279. Alleging that Defendants acted "'because of'" and "not merely 'in spite of'" any "adverse effects upon an identifiable group" is insufficient. *Id.* Plaintiffs did not plead intentional discrimination, the "necessary element" to state an Equal Protection claim. *New York City Transit Auth.*, 59 N.Y.2d at 350.

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

Plaintiffs' remaining allegations that eight of the City's specialized high schools are vestiges of unconstitutional discrimination inherent in the Hecht-Calandra Act, enacted in 1971, R.92-93 ¶158, were also insufficient. The Act is further confirmation of the race-neutral admissions policies—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." R.55-56 ¶94 & n.95 (quoting N.Y. Educ. Law §2590-g(12)(b) (1997)). But Plaintiffs alleged that the Act was actually intended "to stymie the efforts of a commission" appointed "to study whether admissions testing for the specialized schools was

discriminatory." R.55-56 ¶94. Even if true, Plaintiffs at most alleged that legislators—*50 years ago*—intended to "stymie" efforts to study "potential bias." R.55-56 ¶94; R.92-93 ¶¶158. That threadbare theory was insufficient to state a claim for intentional discrimination *today* for at least four reasons.

a. 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.

b. Even Plaintiffs admitted that the high school admissions process changed in the intervening 50 years. According to their complaint, the "current iteration of the SHSAT" is different from that of seven years ago, let alone 50 years ago. R.57 ¶95. According to their complaint, Defendants "hired a private consulting firm to assess the validity of the SHSAT in 2013." *Id.* And according to their complaint, Defendants have since created SHSAT preparation programs, scholarships, and a program for the admission of low-income students with "sufficiently close" SHSAT scores. R.57-59 ¶¶96-97. These intervening events belie Plaintiffs'

allegations of invidious intent originating five decades ago.

c. 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." R.56 ¶94 n.95 (quoting N.Y. Educ. Law §2590-g(12)(b) (1997)).

d. Nor can Plaintiffs save their Equal Protection Clause claim with allegations about admissions not in their complaint. Before the supreme court, Plaintiffs made new allegations not in their complaint. *See* Pls. MTD Opp'n 50-55 (citing several articles describing the City's G&T programs and specialized high schools); Pls. MTD Opp'n 44-48 (adding new statements by New York Assembly Members, a City Community School Board Member, a NYC School Chancellor, and several others). But these "new" allegations were also about unequal *outcomes*, which is insufficient for claims of intentional discrimination. *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)).

4. Regardless, courts cannot grant the relief Plaintiffs seek, or the relief that Plaintiffs' legal theory would necessarily require.

Plaintiffs also sought race-based relief for their Equal Protection Clause claim, including a race-conscious dismantling of *race-neutral* admissions processes. R.29-30 ¶19; R.91-92 ¶¶156-57. The Court can affirm dismissal of the claim because a court cannot give Plaintiffs that relief.

Plaintiffs' claims 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*, 551 U.S. at 733. And there is no "'authority … to use race as a factor in affording educational opportunities among its citizens,'" as Plaintiffs would demand. *Id.* at 747; *see also Ricci v. DeStefano*, 557 U.S. 557, 594-95 (2009) (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).

The race-balancing that Plaintiffs' disparate impact theories would entail could itself violate the Equal Protection Clause and other bans on intentional racial discrimination. After all, 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.*, R.29-30 ¶19; R.22-23 ¶10; R.45-45 ¶79, R.60 ¶99; *see also Ricci*, 557 U.S. at 579-80; *id.* at 594-95 (Scalia, J., concurring). A court cannot order such relief if it would violate the federal Constitution. *See, e.g.*, *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248-50 (2022) (rejecting court-imposed redistricting plan as an unconstitutional racial gerrymander under federal law); *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (judicial enforcement of racially restrictive covenant is prohibited by the federal Equal Protection Clause).

* * *

This Court should affirm the dismissal of Plaintiffs' equal-protection claim for failing to allege intentional and invidious discrimination, just as other plaintiffs failed when alleging similar facts. *See CFE I*, 86 N.Y.2d at 321. At bottom, Plaintiffs alleged that New York

made an intentional choice to use *race-neutral* admissions policies. Plaintiffs' theory based on disparate outcomes is insufficient. 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 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.").

C. Plaintiffs did not state a claim under the New York State Human Rights Law.

Plaintiffs' final claim was that Defendants' policies and practices violate the New York State Human Rights Law (NYSHRL). R.94-95 ¶¶163-66. The NYSHRL 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." Plaintiffs failed to state a claim for violation of the NYSHRL because

Plaintiffs did not allege that Defendants denied Plaintiffs access to facilities by reason of their race. For the same reasons that Plaintiffs' Equal Protection Clause theories raise constitutional concerns, Plaintiffs' relief sought with respect to the NYSHRL would raise serious constitutional and practical concerns. *See supra*, Part II.B.4. Finally, Plaintiffs did not sufficiently allege actionable harassment under the NYSHRL.

1. Before the supreme court, Plaintiffs contended that Defendants must permit them access not just to *a* City school but to *any and all* schools and programs within the educational institution. But 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.

More fundamentally, before the supreme court, Plaintiffs cited various cases involving *employment* discrimination and asserted that Defendants' admissions policies were analogous and could violate the NYSHRL merely because of their alleged disparate impact. *See, e.g.*, R.93 ¶162 & n.213 (citing *New York City Transit Auth.*, 59 N.Y.2d at 348-49).

But the *employment* provisions are 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 id.* §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, neither this Court nor the Court of Appeals has endorsed a disparate impact theory of liability. *Cf. Campaign for Fiscal Equity, Inc. v. State*, 205 A.D.2d 272, 276-77 (1st Dep't 1994) (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), which forbids educational institutions from "deny[ing] the use of facilities" or "permit[ting] … harassment" "by reason of" a student's race. That text requires intentional discrimination. 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). The defendants argued that the plaintiffs failed to allege that "discriminatory animus" motivated the defendants' actions, and the court dismissed the claim. *See id.* at *16, *21. As *Scaggs* illustrates, 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 failed to allege intentional discrimination, discriminatory animus, disparate treatment, or anything more than disparate impact. *See* R.29 ¶18 n.45 ("Even if not intentional …"); R.47 ¶81 (same); R.93 ¶162 ("disparate impacts constitute unlawful discrimination."); R.94 ¶163 ("discriminatory and inferior outcomes"); R.94 ¶164 ("profound disparate impact"); *see also* Pls. MTD Opp'n 63-68 (arguing only disparate impact). Plaintiffs' NYSHRL claim fails for the same reason as Plaintiffs' Equal Protection Clause claim fails; Plaintiffs did not allege intentional discrimination "by reason of" race. *Supra*, Part II.B.

2. There are no limits to Plaintiffs' contrary theory that race-neutral admissions policies deny students "access to facilities to which

they have equal right." R.94 ¶164. By Plaintiffs' logic, every student could demand admission to Stuyvesant. The NYSHRL 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").

3. Finally, alleged instances of discrimination at unnamed schools were insufficient to state a claim under the NYSHRL. *See, e.g.*, R.18-19 ¶6; R.42 ¶68. In particular, Plaintiffs alleged that there were reports of harassment at two of the City's more than 1000 schools. *See* R.42 ¶68; R.87-88 ¶144. Plaintiffs alleged that the school leadership of P.S. 132 was made aware of two particular instances of harassment, R.42 ¶68, and that a teacher reported racist incidents occurring between 2012 and 2015 to Brooklyn Tech, R.87-88 ¶144. The complaint did not allege that Defendants were or should have been aware of these incidents at these two schools, or that they acquiesced. Plaintiffs incorporated these allegations only by reference into their NYSHRL claim, with the crux of Plaintiffs' claim being the race-neutral admissions processes, *supra*.

R.93-95 ¶¶160-67.

Plaintiffs failed to allege that Defendants "somehow authorized or acquiesced" to the alleged classroom incidents. *JG & PG ex rel. JG III v. Card*, 2009 WL 2986640, at *12 (S.D.N.Y. Sept. 17). For example, in *JG* when parents of students diagnosed with Autism brought an NYSHRL claim against a school district for alleged abuse by teachers, the court dismissed the claim against the school district. *Id.* at *8-9. That was because Plaintiffs failed to allege that the district "authorized or acquiesced" to the teachers' conduct. *Id.* at *12; *see, e.g.*, *Planck v. SUNY Bd. of Trustees*, 18 A.D.3d 988, 991 (3d Dep't 2005) (dismissing complaint even though defendant was "statutorily obligated to oversee the adoption of certain policies which impact local community colleges" because plaintiff "failed to allege any facts which would suggest a connection between that obligation and [a community college's] alleged violation").

Here too, Plaintiffs 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);

compare, e.g., *Ithaca City School District v. New York State Div. of Human Rights*, 926 N.Y.S.2d 686 (2011), *rev'd* 19 N.Y.3d 481 (2012) (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 harassment to persist"). Plaintiffs offered only the conclusory assertion that Defendants "permitted" the harassment (R.94 ¶165), without alleging "specific action taken" by Defendants themselves. *Planck*, 18 A.D.3d at 991. Such conclusory allegations are not enough. *See, e.g.*, *Dasrath v. Ross Univ. Sch. of Med.*, 2008 WL 11438041, *9 (E.D.N.Y. Aug. 6) ("complaint merely parrots the statute"). And it was contradicted by Plaintiffs' other allegations about Defendants' efforts to remove alleged discrimination and improve diversity. *See, e.g.*, R.49-50 ¶84; R.57-59 ¶¶96-98 (describing DREAM and Discovery programs); R.67 ¶107 (describing Culturally Responsive-Sustaining Education Framework). Although Plaintiffs alleged instances of unacceptable cruelty by teachers or students, Plaintiffs did not allege that Defendants acquiesced and could not impute those acts to them under the NYSHRL. Those isolated instances are not a basis for an NYSHRL claim.

CONCLUSION

This Court should affirm the dismissal of Plaintiffs' complaint.

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Douglaston, NY

Respectfully submitted,

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