Appellate Division – First Department Case No. 2022-02719

New York Supreme Court

Appellate Division – First Department

IN THE MATTER OF

INTEGRATENYC, INC.; COALITION FOR EDUCATIONAL 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.

PROPOSED CORRECTED BRIEF OF *AMICUS CURIAE* THE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PLAINTIFFS-APPELLANTS

NEW YORK CIVIL LIBERTIES
UNION FOUNDATION

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Dated: January 19, 2023
New York, NY

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New York County Clerk's Index No. 152743/2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

PRELIMINARY STATEMENT

This is an appeal from an order of the Supreme Court, New York County, dismissing this suit for lack of justiciability.[1] In its four-sentence opinion, the court below failed to consider the merits of the plaintiffs' claims and instead improperly focused on the relief sought in the Amended Complaint, finding that it "presents a nonjusticiable controversy." In dismissing this suit, the Court below erred as a matter of law.

This case should be adjudicated on the merits, and the claims here are the type that the New York courts repeatedly have held are colorable. Plaintiffs-Appellants have pleaded facts that, if true, are more than sufficient to support the cognizable causes of action set forth in the Amended Complaint—violations of the Education Article of the New York Constitution, New York's Equal Protection Clause, and New York State's Human Rights Law—and the trial court erred in dismissing the Amended Complaint for lack of justiciability. The New York Civil Liberties Union writes to address the plaintiffs' claims under the Education Article of the State Constitution and the Equal Protection Clause and explain why the Amended

[1] NY St Cts Elec Filing [NYSCEF] Doc 194, decision and order on motion, in *IntegrateNYC, Inc. et al v State of New York et al*., Sup Ct. New York County, May 25, 2022, Nervo, J., Index No. 152743/2021; *See also* Affirmation of Stefanie D. Coyle in Support of Motion For Leave to File Proposed Brief of Amicus Curiae dated January 19, 2023 ("Coyle Aff."), Exhibit B.

Complaint's allegations of the persistently severe racial segregation of New York City's school children plainly state violations of those constitutional provisions.

In interpreting the Education Article of the State Constitution, the New York Court of Appeals has observed that public education must provide students not only with "basic literacy, calculating and verbal skills" but also with the "knowledge, understanding and attitudes necessary" for meaningful "civic participation" (*Campaign for Fiscal Equity, Inc. v State (CFE I)*, 86 NY2d 307, 316-319 [1995]; *Campaign for Fiscal Equity, Inc. v State (CFE II)*, 100 NY2d 893, 905 [2003]). The skills required for civic participation involve an awareness of and familiarity with the racial and cultural diversity presented by contemporary society. By furthering and perpetuating extreme racial segregation, State and City officials impede student exposure to diverse environments.[2] In these respects, state and local officials fail to assure a "sound basic education" for New York City's children.

Had the court below considered the merits of plaintiffs' Equal Protection claim, it would have also found that it is amply supported by the pleadings in this case. As the Supreme Court and New York Court of Appeals have recognized, the analysis of intentional discrimination on the basis of race involves a fact-intensive

[2] One in six schools in NYC are apartheid schools, meaning that "99-100% of the student body is nonwhite" (Danielle Cohen, *NYC School Segregation Report Card: Still Last, Action Needed Now*, UCLA Civil Rights Project/Proyecto Derechos Civiles, June 2021 at pp 36, 52, https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/nyc-school-segregation-report-card-still-last-action-needed-now/NYC_6-09-final-for-post.pdf) (Coyle Aff., Exhibit C).

inquiry and inferences of impermissible intent can be drawn from a broad array of historic and contextual considerations (*Arlington Heights v Metropolitan Housing Authority*, 429 US 252 [1977]; *Campaign for Fiscal Equity, Inc. v State*, 86 NY2d 307, 321 [1995] [citing to *Arlington Heights*]). The Amended Complaint in this case alleges acts of intentional discrimination and historic and contextual circumstances, such as policies creating significant racial disparities, sufficient to support inferences of intentional discrimination against Black and Brown students.

The trial court's decision to dismiss this case in its entirety is therefore without merit. In focusing upon the relief requested in the Amended Complaint, the court below observed that it is not the function of the judiciary to make policy and concluded that the plaintiffs improperly asked the court "to make educational policy" and, in doing so, presented "a non-justiciable controversy." In this respect, the court below ignored the lesson provided by the New York Court of Appeals in *Campaign for Fiscal Equity v State of New York (CFE III)*, 8 NY3d 14 [2006].

In *CFE III*, the Court considered the failure to provide New York City children "with the opportunity for a sound basic education" and evaluated the efforts to remedy that constitutional violation. In doing so, the Court of Appeals recognized the obligation of the judiciary "to define, and safeguard, rights provided by the New York State Constitution, and [to] order redress for violation of them" (*Id.* at 28). This obligation was acknowledged even as the Court recognized its duty "to defer to the

Legislature in matters of policymaking." Accordingly, the Court of Appeals observed:

> "We have often spoken of this tension between our responsibility to safeguard rights and the necessary deference of the courts to the policies of the Legislature. 'While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute … the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government.' [citations omitted]. When we review the acts of the Legislature and the Executive, we do so to protect rights, not to make policy."

CFE III, 8 NY3d at 28.

In *CFE*, the Court of Appeals enforced constitutional rights by declaring the State to be in violation of its constitutional obligation to provide children with an "opportunity for a sound basic education." It further issued directives to the State to remedy the constitutional wrongs and to bring itself into compliance with the Constitution. Indeed, as the Court of Appeals recognized in *CFE III*, the court's findings of constitutional violations prompted the Legislature to take action to address the deficiencies (*Id.* at 27 [noting "recently enacted legislation designed to allow the State to remedy inadequacies in New York City schools facilities"]). The trial court here bears the same responsibility to protect rights and to direct the State to remedy any wrongs which may be found to exist. As in *CFE,* the judiciary may do so without intruding upon the policymaking authority of legislative and executive

officials. And since it may do so, it must do so to fulfill the promise of the State Constitution and laws.

The plaintiffs-appellants' Brief amply discusses the exploration of "justiciability" and deference to "policymaking" by the Court of Appeals in the *CFE* case and thus *amicus* does not rehearse those arguments further. Accordingly, for these reasons, *amicus* respectfully submits that this Court should reverse and remand the lower court's decision.

INTEREST OF AMICUS CURIAE

The New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the American Civil Liberties Union, and a non-profit, non-partisan organization with over 85,000 members and supporters. Through its Education Policy Center, the NYCLU advocates for equitable access to quality education for all young people in New York. The NYCLU is devoted to the protection and enhancement of fundamental constitutional rights. Among the most fundamental of rights is the right, secured by the Education Article of the New York Constitution, to the opportunity for a "sound basic education."

The NYCLU has regularly participated as *amicus curiae* in cases regarding students' rights under the Education Article of the New York Constitution to the opportunity of a "sound basic education." The NYCLU submitted *amicus curiae* briefs to the Court of Appeals in 1995 and 2003 when the *Campaign for Fiscal*

Equity cases were previously before the Court.[3] The NYCLU also submitted *amicus curiae* briefs to the Appellate Division, Third Department in both 2017 and 2020 in *Maisto v State*, a case alleging the violation of the opportunity for a "sound basic education" in eight small cities across New York State.[4]

Amicus has also frequently participated in litigation regarding racial discrimination, particularly regarding public education, bringing, for example, successful litigation challenging the discriminatory segregation of newly arrived immigrant students in *Tuyizere v Utica City School Dist. Bd. Of Educ.*, Index No. 15-cv-488 (TJM)(TWD) [NDNY April 27, 2015] (Coyle Aff., Exhibit D), and successfully intervening in a case regarding the New York City specialized high schools at issue in this case (*Christa McAuliffe Intermediate Sch. PTO, Inc. v De Blasio*, No. 18 CIV. 11657 (ER), 2022 WL 4095906 [SDNY Sept. 7, 2022]) (Coyle Aff., Exhibit E). The NYCLU also provided counsel for the plaintiffs in the Buffalo school desegregation case (*Arthur v Nyquist,* 426 FSupp 194 [WDNY 1977]). Furthermore, the NYCLU has challenged racial segregation in the staffing of New York City school teachers in a complaint to the federal Office for Civil Rights ("OCR") and successfully defended the remedy imposed by OCR to address such

[3] *See Campaign for Fiscal Equity*, *Inc. v State of New York*, 86 NY2d 307 (1995) and *Campaign for Fiscal Equity*, *Inc. v State of New York*, 100 NY2d 893 (2003).
[4] *See Maisto v State*, 154 AD3d 1248 (3d Dept 2017) and *Maisto v State*, 196 AD3d 104 (3d Dept 2021).

discrimination (*Caulfield v Bd. of Educ. of City of New York*, 486 F Supp 862 [EDNY 1979]).

In addition to its litigation work, the NYCLU has been deeply involved in policy advocacy and organizing regarding school desegregation and integration in New York City.[5]

Amicus submits this brief because this appeal raises important issues regarding the reach of the Education Article of the New York Constitution and the application of the State Equal Protection Clause.

ARGUMENT

I. The Plaintiffs' Claim Under N.Y. Const. Art. XI, § 1.

In *CFE I*, the Court of Appeals held that the Education Article of the State Constitution "requires the State to offer all children the opportunity of a sound basic education" and that the State's failure to fulfill this constitutional mandate would give rise to a judicially cognizable cause of action (*CFE I*, 86 NY2d at 316). Eight years later, the Court of Appeals described the test that a court should perform to determine whether the State has met its responsibility. That test involves

[5] *See* Miriam Nunberg and Toni Smith-Thompson, *Especially Now, Public Schools For All: NYC Should Do Away With Middle and High School Admissions Screens* [2020], https://www.nyclu.org/en/publications/especially-now-public-schools-all-nyc-should-do-away-middle-and-high-school-admission; *Testimony of the NYCLU and the ACLU before The New York City Council Committee on Education and Committee on Civil and Human Rights Joint Hearing on School Segregation in New York City*, New York Civil Liberties Union, [2019] https://www.nyclu.org/en/publications/testimony-school-segregation-new-york-city-schools.

consideration of the specific resources made available to a school district (the "inputs") and the performance of the district's students and schools (the "outputs") (*CFE II*, 100 NY2d at 908). A court must then determine whether there is a causal link between the funding or resource system and any proven failure to provide a sound basic education to the district's plaintiffs (*Id.* at 919). Significantly, there is no serious question that such claims under the Educational Article are justiciable.

The inputs that a court must consider include "teacher quality—including certification rates, tests results, experience levels and the ratings teachers receive from their principals" (*CFE II*, 100 NY2d at 909) and "reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas" (*CFE I*, 86 NY2d at 317). Additionally, students are entitled to "[s]chool [f]acilities and [c]lassrooms" that "provide enough light, space, heat and air to permit children to learn," and instrumentalities of learning "including classroom supplies, textbooks, libraries and computers" (*CFE II*, 100 NY2d at 909, 911, 913). It is also important to consider "whether additional supplemental services—for example, academic intervention services, language services, extended learning opportunities or additional social workers — must be provided to enable students in each of the districts to attain a sound basic education" (*Maisto v State*, 154 AD3d 1248, 1255 [3d Dept 2017]).

In its 2021 *Maisto* decision, the Third Department recently found that "at-risk students… those who came from impoverished backgrounds, had disabilities, or whose primary language was one other than English," often "require early interventions, more time on task and other supplemental programming, as well as support from adequate numbers of guidance counselors, social workers or other similar professionals" (*Maisto v State*, 196 AD3d 104, 152 [3d Dept 2021]). The Appellate Division, therefore, concluded that these interventions and support are constitutionally required "in order to place a sound basic education within the reach" of "at-risk students" (*Id.*).

The outputs that must be considered are "test results and graduation and dropout rates" (*CFE II*, 100 NY2d at 908). The trial court in *CFE II* noted that the rate of school completion can be "symptomatic of 'system breakdown'" and that "dropouts typically are not prepared for productive citizenship" (*Id.* at 914).

Here, the plaintiffs have alleged facts that state a claim for a violation of the right to a "sound basic education" in New York City, as guaranteed by the Education Article of the New York Constitution.

a. Deficiencies in Inputs.

The plaintiffs have alleged ample facts showing deficiencies in the "inputs" required for a "sound basic education." Throughout the Amended Complaint, the plaintiffs paint a clear picture of deficient "inputs" across the NYC school system.

The plaintiffs allege that the DOE provides inadequate teaching staff by "failing to recruit, retain, and support a racially diverse educator workforce to provide challenging and empathic instruction to all students" (Amended Complaint ¶ 5) leading to a "dearth of teachers of color" (Amended Complaint ¶ 121).[6] The DOE also fails to provide support for educators of color leading to high turnover rates for Black and Latinx teachers (Amended Complaint ¶ 135) and fails to provide adequate "training, support, and resources" to educators to provide a "racially equitable and culturally responsive curriculum" (Amended Complaint ¶ 109). These problematic practices negatively impact students as "faculty integration is essential to student integration" (*Caulfield v Bd. of Educ. of City of New York*, 632 F2d 999, 1005 [2d Cir 1980]).

The plaintiffs allege particularly egregious deficiencies with respect to facilities, which should be designed to "provide enough light, space, heat, and air to permit children to learn" (*CFE II*, 100 NY2d at 911). Instead, the Amended Complaint alleges, students of color are "disproportionately relegated to neglected schools—some of which are former factories, others of which are situated above or near major highways—in which the overcrowded classrooms, the battered textbooks, the unsanitary bathrooms, and the presence of vermin all bear witness to

[6] NY St Cts Elec Filing [NYSCEF] Doc 81, amended complaint, in *IntegrateNYC, Inc. et al v State of New York et al.*, Sup Ct. New York County, June 25, 2021, Index No. 152743/2021.

the (lack of) value ascribed by the City and State to their occupants" (Amended Complaint ¶ 6). Students "struggle to focus and speak in class over the constant din of passing cars, motorcycles, and trucks, which also expose the students to high levels of vehicle pollution. The cafeteria is a windowless space in the basement; many classrooms have no windows at all" (Amended Complaint ¶ 100). Students also "frequently encounter vermin, such as rats and cockroaches, in classrooms and hallways" (*Id.*). There are also "recurrent leaks in school hallways," "overcrowded hallways and classrooms," and "no toilet paper in the bathroom[s]" (*Id.*). These neglected and cramped facilities and abysmal conditions fail to meet the minimal standards required by New York's Constitution.

The plaintiffs also detail deficiencies with respect to "instrumentalities of learning" including textbooks and adequate curriculum. The plaintiffs allege unequal resources distributed in New York City between elite schools that are available to students who succeed in passing rigorous entrance exams and "unscreened schools" that draw students "randomly from [a] pool" of applicants."[7] Students of color in "unscreened schools" face "an insufficient number of textbooks, requiring a single textbook to be shared by up to three students," as well as "outdated and dilapidated

[7] *Preferences and Outcomes: A Look at New York City's Public High School Choice Process*, New York City Independent Budget Office, October 2016, https://www.ibo.nyc.ny.us/iboreports/preferences-and-outcomes-a-look-at-new-york-citys-public-high-school-choice-process.pdf (Coyle Aff., Exhibit F).

textbooks" (Amended Complaint ¶ 100). Students also face deficiencies in curriculum (Amended Complaint ¶¶ 104-117), including curricula that fails to reflect the "histories, achievements, and voices of historically marginalized people of color, such that students of color rarely, if ever, recognize themselves in their curriculum" (Amended Complaint ¶¶ 15, 116-117).

The DOE also fails to provide adequate additional supplemental support services, specifically mental health supports, by "failing to provide sufficient training, support, and resources to enable administrators, teachers, and students to identify and dismantle racism, such that students of color regularly experience racialized harms at school, and failing to provide adequate mental health supports to redress those harms" (Amended Complaint ¶ 5). As a specific example, the plaintiffs allege that an English Language Learner student was not provided language-appropriate mental health support and suffered immensely (Amended Complaint ¶ 145), and this type of neglect occurred across the system.

b. Deficiencies in Outputs.

The plaintiffs also describe deficient outputs across New York City schools including unsatisfactory test scores and graduation rates. The plaintiffs allege that deficiencies in K-8 education for students of color leads to lower test scores, particularly for the Specialized High School Admissions Test (Amended Complaint ¶ 13) (showing that only 7, 10, and 8 Black students were admitted to Stuyvesant

High School in 2019, 2020, and 2021 respectively). There are also clear deficiencies in graduation rates across NYC schools—"in 2020, the graduation rate for Black students was 75.9 percent, nearly eight percentage points lower than that of white students. The City's Latinx students graduated at an even lower rate—74.1 percent, or close to 10 percentage points below white students. And English language learners had a graduation rate of only 45.7 percent" (Amended Complaint ¶ 83; *see also Aristy-Farer v State*, 29 NY3d 501, 515 [2017] [finding "poor standardized test proficiency [and] high failure and drop-out rates" as evidence of deficient outputs]).

The Amended Complaint also alleges that the deficient inputs and outputs in NYC public schools are directly related to a lack of resources provided by the Respondents (Amended Complaint ¶¶ 5, 15, 17, 109, 128).

c. Participation and Racial Integration.

The plaintiffs have described unacceptable conditions in the New York City public school system that clearly violate the Education Article of the New York Constitution under the most basic standards respecting a "sound basic education." But, because this suit is, at bottom, a school desegregation case, there is one aspect of the concept of a "sound basic education" that is particularly pertinent here: school integration.

The Court of Appeals has held that "a sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic

participation in contemporary society" (*CFE II*, 100 NY2d at 905). Contemporary society exhibits broad racial and cultural diversity. Participation in such a society requires skills of adaptation, of cross-cultural awareness and of familiarity with and tolerance of difference in "others." The development of such skills requires, at the least, exposure to such diversity. Severe racial segregation impedes such exposure—it reduces the likelihood that students will attend integrated schools and learn from students and teachers who present very different experiences and cultures.

By furthering and perpetuating racial segregation, State and City officials impede student exposure to diverse environments. They deny white and non-white students alike of the opportunity to study and play in an integrated environment. They also convey a message that reinforces a white dominant social hierarchy and that instills feelings of inferiority and disadvantage among Black and Brown children. They convey the message that the continued segregation and subordination of Black and Brown children is an acceptable reality. And they fail utterly to recognize that equal participation in democratic self-government remains an empty promise without the realistic prospects of equal educational opportunity. So understood, school integration is appropriately considered among the crucial "inputs" necessary to a "sound basic education" in New York City and through its perpetuation of racially segregated schools, New York fails in its obligation to students.

While courts have not considered the specific question of desegregated schools as an input of a "sound basic education," it fits squarely into the type of inputs the courts have required and its inclusion is consistent with the evolving nature of the standard. The meaning of a "sound basic education" has changed as various New York courts have considered the minimal standards guaranteed to students by the Constitution. The list of required "inputs" has been characterized as "nonexclusive" (*Paynter v State*, 100 NY2d 434, 451 [2003] [Smith, J. dissenting]). The original list of the "inputs" schools must provide did not include "additional support services," which are now considered critical in order to meet the needs of all students, particularly those with special education and language needs. Further, while computers were mentioned in the original list of "inputs" from *CFE*, the importance of computers and other instructional technology cannot be understated to meet the demands of learning in the twenty-first century.

It is obvious that a standard that sets forth the basic requirements for students' education would evolve as society's understanding of what students need to learn advances (*see Bd. of Educ. of Levittown Union Free Sch. Dist. v Nyquist*, 57 NY2d 27, 57 [1982] [Fuchsberg, J. dissenting] ["The fact is, of course, that in this past century, as high school and college statistics show, the acceptable level of education in our country has risen, not fallen. Responsively, the constitutional demands of our State's education article, must be deemed to have kept pace."]). We know the critical

importance of a racially diverse student body and teaching staff and how such diversity improves learning for all students (New York State Education Department, Educator Diversity Report, at 12, December 2019, http://www.nysed.gov/common/nysed/files/programs/educator-quality/educator-diversity-report-december-2019.pdf) (Coyle Aff., Exhibit G). Studies show that children attending integrated schools have greater cross-racial understanding, reduced racial prejudice, increased levels of critical thinking, and exhibit higher levels of academic achievement than students attending segregated schools (*see* Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, at 5-12, *Parents Involved in Cmty. Schs. v Seattle Sch. Dist. No. 1*, *et al.*, 551 US 701 [2007] (Coyle Aff., Exhibit H); *see also The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms*, The Century Foundation, April 29, 2019, https://production-tcf.imgix.net/app/uploads/2016/02/26171529/Factsheet_Benefits_FinalPDF.pdf) (finding that students in integrated schools have higher test scores, improved self-confidence, and are better prepared to participate in modern society) (Coyle Aff., Exhibit I).

Here, the plaintiffs have alleged unconscionable and systemic racial disparities in the access to and quality of education in NYC schools. These allegations are supported by even more recent research showing that New York schools remain the most segregated in the entire country (Cohen, *supra* at n 2). The

Respondents' failure to remedy the pervasive segregation in New York City schools deprives students of the "opportunity for a sound basic education"—a fundamental "input" necessary for students in the twenty-first century to "meaningfully participate" in contemporary society.

II. The Plaintiffs Have Stated a Prima Facie Equal Protection Claim Under Art. I §11 of the New York Constitution.

The plaintiffs contend that New York City's racially segregated system violates the Equal Protection Clause of the State Constitution. This constitutional provision has been interpreted to furnish protection that is at least as broad as that offered by the Fourteenth Amendment to the federal Constitution (*Brown v State*, 89 NY2d 172, 234 [1996]).[8] When measured against the legal standards imposed by the federal Equal Protection Clause, the allegations in the Amended Complaint provide ample support for this claim.

In *Washington v Davis*, 426 US 229 [1976], the Supreme Court held that discrimination claims under the federal Equal Protection Clause will require strict judicial scrutiny only if they have been initiated for an invidious and discriminatory

[8] The New York Court of Appeals has, on occasion, stated that the two provisions are co-extensive (*Dorsey v Stuyvesant Town Corp.*, 299 NY 512, 530 [1949]). But there are circumstances where the state equal protection clause has been found more protective of individual rights (*compare Vill. of Belle Terre v Borass*, 416 US 1 [1974] with *City of White Plains v Ferraioli*, 34 NY2d 300 [1974] (equal protection challenges to local zoning laws); *compare also Alevy v Downstate Med. Ctr.*, 39 NY2d 326 [1976] with *Regents of the Univ. of California v Bakke*, 438 US 265 [1978] (constitutional standards for reviewing "affirmative action" programs).

purpose. In discussing the "intentional" discrimination requirement, the *Davis* Court acknowledged that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts" (*Davis*, 426 US at 242). It recognized that a "discriminatory racial purpose" need not be "express or appear on the face of [a] statute" (*Id.* at 241). And it noted that a "law's disproportionate impact" is relevant to the inquiry (*Id.*).

The *Davis* standard was amplified the following term in *Arlington Heights v Metropolitan Housing Authority,* 429 US 252 [1977]. In *Arlington Heights,* the Court recognized that "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" (*Id.* at 266). The Court further observed that proof of an impermissible motive may be inferred from "the historical background" of a practice, from the "sequence of events leading up to the challenged decision," and from "departures from the normal procedural sequence" (*Id.* at 267).

As the *Davis/Arlington Heights* standard has been applied over the years, the inquiry into "discriminatory intent" has involved a fact-intensive examination of cumulative examples of policies and practices that have a racially disparate impact and that reinforce examples of intentional racial bias allowing for legal inferences of "intentional discrimination." In *Mhany Management v County of Nassau,* 819 F3d

581 [2d Cir 2016], the U.S. Court of Appeals for the Second Circuit described the *Davis/Arlington Heights* analysis:

> "Because discriminatory intent is rarely susceptible to direct proof, a [trial] court facing a question of discriminatory intent must make 'a sensitive inquiry into such circumstantial and direct evidence of intent that may be available. The impact of the official action whether it bears more heavily on one race than another may provide an important starting point.' But unless a 'clear pattern, unexplainable on grounds other than race, emerges,' 'impact alone is not determinative, and the Court must look to other evidence.' Other relevant considerations for discerning a racially discriminatory intent include '[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes,' '[d]epartures from the normal procedural sequence,' '[s]ubstantive departures,' and '[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.'"

Id. at 606; *see also id*. at 607 [finding no error in district court's analysis finding discrimination based on impact of the municipality's decision and the sequence of events] [internal citations omitted].

In this case, the plaintiffs have satisfied the requirements of the *Davis/Arlington Heights* standard. They have alleged acts of invidious and purposeful discrimination associated with the enactment of the 1971 Hecht-Calandra Law imposing the Specialized High School Admissions Test (Amended Complaint ¶¶ 12, 90-99, 158). They have reinforced that claim of intentional discrimination with a cumulative array of examples of policies and practices that have an unjustified disparate impact upon Black and Latinx students. These other examples include the

adverse racial impact of the Specialized High School Admissions Test upon Black and Latinx students seeking admission to the elite high schools (Amended Complaint ¶¶ 12-14, 93-99); the racial imbalance in the hiring and assignment of teachers (Amended Complaint ¶ 80); Gifted & Talented programs that rely upon criteria that unfairly discriminate against Black and Latinx students (Amended Complaint ¶¶ 84-88); and evidence of disparities in the discipline of Black and Latinx students (Amended Complaint ¶¶ 82, 102). The full range of allegations of intentionally discriminatory behavior, reinforced by policies that have racially disparate impacts, show a clear violation of the state Equal Protection Clause.

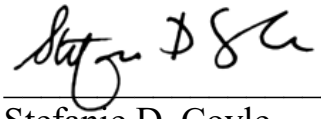
Moreover, in this case, a dominant and important component of the plaintiffs' equality claim rests upon the invidious message conveyed by the persistent and severe segregation imposed by the New York City public school system. That message is one that subordinates Black and Latinx children by relegating them to separate schools that are almost entirely concentrated with other Black and Latinx children and are not as desirable as the schools generally attended by white children and some smaller number of members within Black and Brown communities (Amended Complaint ¶¶ 7-9, 15-16, 78, 84, 87-88, 91, 97, 103, 122, 131, 136-139, 142-143, 151, 166). In this respect, the Amended Complaint harkens back to *Brown v Board of Education,* 347 US 483 [1954].

At the heart of the controversy in *Brown* was whether the Equal Protection Clause could be satisfied by providing schools that were "separate but equal." The Supreme Court famously held that the meager and superficial nod to equality inherent in the "separate but equal" concept was insufficient and impermissible. It was found inadequate because it failed to address the deep and unconscionable social injury presented in that case. That injury flowed from the message conveyed by segregated schools. It was a message that told Black children that they were inferior to their white counterparts and that, on that account, they should be shunned and confined in separate schools. *Brown,* of course, involved *de jure* segregation. But the injurious message was conveyed by the reality of racial segregation. It did not matter whether the segregation was accomplished by a *de jure* mandate or in a *de facto* manner. We cannot ignore the invidious social message conveyed by the persistent racial segregation of New York City's public schools. The nature of that message exposes the gravity of this lawsuit and the importance of reversing the decision of the Court below, so as to permit a full and fair consideration of the claims advanced by the plaintiffs.

CONCLUSION

For the foregoing reasons, *amicus curiae* join in support of the plaintiffs-appellants to urge this Court to reverse judgment of the Supreme Court in dismissing the Amended Complaint.

Dated: January 19, 2023
New York, NY



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PRINTING SPECIFICATIONS STATEMENT

I certify in compliance with Rule 1250.8(j) of the Practice Rules of the Appellate Division that this brief was prepared on a computer using Microsoft Word, the typeface is Times New Roman, the font-size is 14-point type, and the text is double-spaced. The brief contains 5008 words, excluding the sections listed in Rule 1250.8(f)(2).

Dated: January 19, 2023
New York, NY

Stefanie D. Coyle