APL-2024-00099

To be argued by:
PHILIP W. YOUNG
30 minutes requested

Court of Appeals
State of New York

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-Respondents,

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-Appellants,

and

PARENTS DEFENDING EDUCATION,

Intervenor-Defendant-Appellant.

REPLY BRIEF FOR CITY APPELLANTS

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PRELIMINARY STATEMENT

Rather than grapple with the many pleading deficiencies that the City identified in its opening brief—deficiencies that warrant dismissal as a matter of law—plaintiffs retreat from their allegations and try to reframe their sweeping cause of action as a traditional Education Article claim. This Court should not be fooled. The cornerstone of plaintiffs' complaint is an aspirational antiracist theory of Education Article liability. Whether one agrees with plaintiffs' goal or not, their theory is flatly inconsistent with this Court's definition of a "sound basic education," and the Education Article's limited role in establishing a "constitutional floor."

What's more, plaintiffs have no answer to the plain text of the constitution—and the relevant constitutional history—which show that Education Article claims run against the State, not local school districts. That interpretation is confirmed by this Court's decision in *Donohue v. Copiague Union Free School District* as well as more recent decisions limiting Education Article claims to the State funding context.

Next, plaintiffs do not really dispute that the success of their equal protection claim hinges on this Court imputing the intent of the State legislature to the City. After all, without those allegations about the passage of the Hecht-Calandra Act, plaintiffs' remaining allegations about the City's awareness of disparate impact are plainly insufficient. But there is no basis to impute the State's intent in 1972 to the City today. Indeed, plaintiffs concede that "the State has foisted" the Hecht-Calandra Act's admissions requirement on the City against its will.

As to the State HRL claim, plaintiffs do not dispute that they have made no allegations about any individual plaintiff being denied access to an academic program. And they make no serious effort to rehabilitate their conclusory denial-of-access allegations about the organizational plaintiffs. Finally, plaintiffs have no real answer to the statutory text, legislative history, and federal case law confirming that disparate impact claims are not cognizable under section 296(4). That the State HRL as a whole is subject to a liberal construction analysis makes no difference.

ARGUMENT

POINT I

PLAINTIFFS' BELATED ATTEMPT TO REHABILITATE AND CABIN THE EDUCATION ARTICLE CLAIM IGNORES THEIR OWN ALLEGATIONS

The First Department's decision upholding the Education Article claim against the City was error for two reasons, and plaintiffs' attempt to defend that decision misses the mark. First, plaintiffs' complaint fails at the threshold because Education Article claims are not cognizable against local school districts. Second, and in any event, plaintiffs' allegations that they were deprived of a "sound basic education" are insufficient as a matter of law because they are conclusory, they do not allege a district-wide failure, and they rely on a novel theory of Education Article liability that is inconsistent with this Court's case law.

A. The constitutional text, history, and this Court's decisions all confirm that Education Article claims are not cognizable against individual school districts.

Plaintiffs have no response to the plain text of the Education Article and the record of the pertinent constitutional convention,

both of which confirm that the Education Article imposes an affirmative duty on the State, not individual school districts. N.Y. CONST. art. XI, § 1 ("[t]he *legislature* shall provide for … a system of free common schools, wherein all the children of this state may be educated" (emphasis added)); Revised Record of the Constitutional Convention of the State of N.Y., Vol. III, at 691 (explaining that the Article is "an explicit direction to the Legislature" to "use the power of the State" to "foster" the "principle of universal education").

While it is undoubtedly true that the City must comply "with constitutional mandates" (Brief for Respondents ("Resp. Br.") 33-34), that truism does not answer the question of whether the Education Article authorizes a cause of action against local school districts. This Court answered that question in *Donohue v. Copiague Union Free School District*, holding that the Education Article's "general directive" to "the Legislature" to "maintain[] and support[] a system of public schools" "was never intended to impose a duty flowing directly from a local school district to individual pupils to ensure that each pupil receives a minimum level of education." 47 N.Y.2d 440, 443 (1979).

That the plaintiff sought compensatory damages in *Donohue*, rather than equitable relief, makes no difference, despite plaintiffs' argument to the contrary (Resp. Br. 34). Plaintiffs do not explain why the remedy sought should make any difference in determining which types of defendants may be sued under the Education Article.

Tellingly, plaintiffs do not defend the First Department's misplaced reliance on *New York Civil Liberties Union v. State*, 4 N.Y.3d 175 (2005) (R597), a case that did not even involve a school district defendant (*see* Brief for City Appellants ("City Br.") 30-31). Instead, they argue that *Donohue* is outdated because it "did not consider" the "state-local partnership" that "later decisions" like *New York Civil Liberties Union* have "explicitly recognized" (Resp. Br. 34). But local control over school operations—which is the central feature of that state-local partnership—has been part of New York law for "centuries." *Bd. of Educ. of Levittown v. Nyquist*, 57 N.Y.2d 27, 45-46 (1982). And this Court referenced the "state-local partnership" concept in *New York Civil Liberties Union* only to explain why "a claim under the Education Article requires that a district-wide

failure be pleaded." 4 N.Y.3d at 181-82. It did not hold that Education Article claims are cognizable against local school districts.

Further, this Court has held over and over again that Education Article claims must be based on allegations of inadequate State funding—something the City has no control over. *See, e.g.*, *Aristy-Farer v. State of N.Y.*, 29 N.Y.3d 501, 510, 517 (2017); *Paynter v. State*, 100 N.Y.2d 434, 440 (2003); *N.Y. Civ. Liberties Union*, 4 N.Y.3d at 180; *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 919 (2003) ("*CFE II*").

Plaintiffs protest that this Court's precedent "does not 'delineate the contours of all possible Education Article claims,'" so there must be room for a claim unrelated to State funding (Resp. Br. 26-27 (quoting *Aristy-Farer*, 29 N.Y.3d at 511 and *Paynter*, 100 N.Y.2d at 441)). Yet, in *Aristy-Farer*, this Court declined plaintiffs' request to broaden the "way[s] to plead an Education Article violation" and reiterated its longstanding position that "an Education Article claim *requires* two elements: the deprivation of a sound basic education, and causes attributable to the State." 29 N.Y.3d at 511, 517 (emphasis added); *accord Paynter*, 100 N.Y.2d at

441 (key question is whether "the State truly puts adequate resources into the classroom").

Plaintiffs also argue that claims outside of the State funding context must be permissible because this Court has "recognized cognizable inputs beyond the categories it initially framed" in the *CFE* cases (Resp. Br. 27-28 (citing *Aristy-Farer*, 29 N.Y.3d at 514-15)). But the inputs that plaintiffs identify are just variations on the same traditional teaching, facilities, and instrumentalities of learning inputs that this Court has always looked to. *See Aristy-Farer*, 29 N.Y.3d at 514-15 ("a lack of qualified teachers," "low levels of support staff," and "outdated curricula," among others). And, of course, this Court found the allegations about those inputs sufficient in *Aristy-Farer* because they were paired with allegations about "a causal link between inadequate state funding and the failure of [the] school districts to provide a sound basic education." *Id.* at 515. There are no similar allegations here.

Plaintiffs next complain that imposing a State funding pleading requirement for Education Article claims amounts to a "double-causation requirement" (Resp. Br. 27). Not so. The causation

question in Education Article cases is simple (if notoriously difficult to adjudicate): whether there is "a causal link between inadequate state funding and the failure of [the] school districts to provide a sound basic education." *Aristy-Farer*, 29 N.Y.3d at 515. Input and output metrics are the way to prove that causal link.

Finally, plaintiffs' protestation that the "City and State both disclaim responsibility" and seek to "blame each other" (Resp. Br. 31-32; *see also id.* at 46), appears to be based on plaintiffs' misguided assumption that their grievances must amount to a valid cause of action against someone. But the Education Article was not meant to serve as a mechanism for resolving all disputes about education policy. In many—if not most—cases, the proper mechanism is the political process.

In short, the First Department erred in holding that Education Article claims are cognizable against individual school districts. This Court can and should dismiss plaintiffs' Education Article claim against the City on that basis alone.

B. Plaintiffs' "sound basic education" allegations are deficient as a matter of law.

In any event, the Education Article claim also fails on the merits because plaintiffs' allegations about being denied a "sound basic education" are insufficient as a matter of law.

1. This issue is preserved.

Despite plaintiffs' arguments to the contrary (Resp. Br. 24, 31), the issue of whether plaintiffs have alleged a district-wide denial of a "sound basic education" is preserved. The City has always argued, from the very beginning, that the novel and aspirational education plaintiffs demand is inconsistent with this Court's definition of a "sound basic education"—a definition that focuses on standard student achievement metrics like graduation rates and standardized test scores (*see, e.g.*, Sup. Ct. NYSCEF No. 131 at 15 (arguing that "none of the individual [p]laintiffs assert that they have been denied a sound basic education as defined by the caselaw"); Sup. Ct. NYSCEF No. 187 at 3 (arguing that plaintiffs' education "goals" "do not constitute the legal standard for the constitutionally required sound basic education that is the gravamen of an Education Article

claim"); First Dep't NYSCEF No. 27 at 3, 17, 38-41 (making similar arguments about how plaintiffs "improperly seek[] to redefine 'sound basic education' by focusing not on basic academic skills but rather on the aspirational goal of 'challenging' and 'disrupt[ing]' the 'complex systems of biases and structural inequities' in American society"). That can and should be the end of the preservation analysis, as the parties have always understood this to be the central issue with respect to the Education Article claim. *See People v. Weber*, 40 N.Y.3d 206, 219 (2023) (Wilson, J., dissenting) (expressing agreement with the majority that "our preservation doctrine concerns the preservation of issues, not arguments").

Plaintiffs nonetheless suggest that any subsidiary argument about output allegations in particular is unpreserved (*see* Resp. Br. 24). That is not the proper level of analysis for preservation purposes. But in any case, while the City's specific arguments in the lower courts focused more extensively on the sufficiency of plaintiffs' input allegations, the City has never conceded that plaintiffs' output allegations were sufficient to state an Education Article claim. Indeed, plaintiffs acknowledged that the City made specific "output-

related" arguments in the First Department (*see* First Dep't NYSCEF No. 36 at 17 n.6).

Since the City raised the issue of whether plaintiffs' output allegations were sufficient in Supreme Court—and even made specific "output-related" arguments in the First Department—that issue is preserved for this Court's review even if one adopts a more granular approach to the preservation doctrine. *See, e.g.*, *Geraci v. Probst*, 15 N.Y.3d 336, 342 (2010) (issue preserved where the parties' arguments "alert[ed] Supreme Court to the relevant question," and "the issue was placed squarely before the court").

2. Plaintiffs cannot simply retreat from their aspirational theory of liability and reframe the question as one of causation.

Rather than acknowledge that they are asking this Court to break new ground by endorsing a novel and aspirational theory of Education Article liability, plaintiffs attempt to shoehorn their complaint into the traditional input/output framework that this Court has consistently applied to Education Article claims (*see* Resp. Br. 22, 25, 29-31).

A quick review of plaintiffs' complaint puts the lie to that framing. Plaintiffs' 86-page amended complaint is focused on, in the First Department's words, "novel" "inputs to ameliorate the effects of racism and poverty" (R594-95)—things like adopting a culturally responsive curriculum, eliminating allegedly culturally biased admissions criteria, establishing recruitment policies that attract a more diverse teacher corps, training teachers to combat structural racism, and ensuring that students can assess their own biases and place in society (*see, e.g.*, R15, 43-84). That novel theory is the centerpiece of plaintiffs' complaint. Indeed, attorneys representing the plaintiffs have described this case to media outlets as a "first of its kind" lawsuit, one that seeks "system-wide changes" and the establishment of "a constitutional right to an anti-racist education."[1]

In this Court, however, plaintiffs argue that this is just another ordinary Education Article claim, so the City's "attack on inputs alone means that [it is] simply challenging causation" (Resp. Br. 25). And, according to plaintiffs, that causation question—

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[1] Christina Veiga, *NYC students file lawsuit taking aim at admissions screens, school segregation*, CHALKBEAT NEW YORK (Mar. 9, 2021), https://perma.cc/Z4DS-6LH7.

whether "allegedly deficient 'inputs' cause[] students to receive less than a sound basic education"—is "a question of fact that can only be resolved after development of the record" (*id.* at 25, 30-31). Plaintiffs are wrong, for two reasons.

First, the City is not "attack[ing] … inputs alone" (Resp. Br. 25)—it also challenges the sufficiency of plaintiffs' output allegations (*see* City Br. 42-44). Second, plaintiffs' input allegations are deficient as a matter of law, so there is no need for further "development of the record" (Resp. Br. 25). As the First Department acknowledged, "[n]o court has yet found" that plaintiffs' "novel" inputs "are necessary for a sound basic education" (R594-95). And, as the City explained in its opening brief (City Br. 32-37), this Court's Education Article case law strongly suggests that any alleged absence of those novel inputs is insufficient as a matter of law.

Plaintiffs are wrong to frame this issue as a simple causation question (*see* Resp. Br. 25, 30-31). Even before this Court reaches the causation issue—whether the allegedly deficient inputs caused the allegedly deficient outputs—it must answer a more fundamental question: are the novel inputs and outputs plaintiffs demand

mandated by the constitution? That is an issue that can be resolved on the pleadings as a matter of law.

In any event, even if plaintiffs are right to frame this dispute in terms of causation, it would make no difference. Proximate cause is not always a question of fact for a jury to resolve. *See, e.g.*, *Hain v. Jamison*, 28 N.Y.3d 524, 529 (2016) ("there are instances in which proximate cause can be determined as a matter of law"). After all, this Court has repeatedly dismissed Education Article claims at the pleading stage based on a failure to sufficiently allege causation. *See N.Y. Civ. Liberties Union*, 4 N.Y.3d at 179 ("Plaintiffs' failure to sufficiently plead causation by the State is fatal to their claim"); *Paynter*, 100 N.Y.2d at 440-41 (affirming dismissal where "[t]he cause [plaintiffs] allege" is unrelated to "any deficiency in teaching, facilities or instrumentalities of learning, or any lack of funding"); *Aristy-Farer*, 29 N.Y.3d at 517 (affirming dismissal where "the complaint contains no allegation of causation linking the State's one-time withholding of $290 million" to the "failure to provide a sound basic education"). That plaintiffs' allegations might relate to causation does not insulate them from scrutiny at the pleading stage.

Plaintiffs' attempt to distinguish *Paynter* is unavailing (Resp. Br. 30-31). In that case, this Court rejected plaintiffs' "novel theory" about how tuition and residency requirements reinforced and exacerbated the racial and economic segregation that already existed in the City of Rochester, because that theory did not fit within the traditional framework of an Education Article claim. *Paynter*, 100 N.Y.2d at 438-43. Plaintiffs' theory of liability here is remarkably similar to the one proffered by the *Paynter* plaintiffs, even though the two groups of plaintiffs have different views about the segregative effects of "residence-based placement" (Resp. Br. 31).

That plaintiffs here have gestured to some traditional "input failings" (Resp. Br. 30), unlike the plaintiffs in *Paynter*, makes no difference because those traditional input allegations are insufficient as a matter of law (*see* City Br. 39-42; *see also infra* at 17-19). And the distinction plaintiffs attempt to draw between the "allegations of academic failure" in *Paynter* and the allegations about "meaningful civic participation" in this case is a distinction without a difference (Resp. Br. 30-31). This Court determines whether "allegations of academic failure" state a cause of action under the Education Article

by analyzing whether graduating students can meaningfully participate in contemporary society through voting, serving on a jury, and finding a job. *CFE II*, 100 N.Y.2d at 903, 905-08. That is not a new "requirement" that post-dated *Paynter*, as plaintiffs wrongly suggest (Resp. Br. 31). *See Paynter*, 100 N.Y.2d at 439-40 (explaining that, under *CFE I*, a "sound basic education" consists of the "skills necessary to enable children to eventually function productively as civic participants"); *CFE II*, 100 N.Y.2d at 905 (decided the same day as *Paynter* and discussing the "meaningful civic participation" requirement).

As the City explained in its opening brief (City Br. 38-39), this Court's repeated efforts to cabin the scope of Education Article claims in cases like *Paynter* and *Aristy-Farer* reflect a recognition that reading the Education Article too broadly would raise serious separation of powers concerns. By adhering to judicially manageable standards that focus on the State's funding mechanisms, this Court has soundly avoided wading into complex debates about education policy and curriculum—debates that are best resolved through the political process. *See, e.g.*, *Hoffman v. Bd. of Educ.*, 49 N.Y.2d 121,

125-26 (1979). To avoid violating basic separation-of-powers principles, this Court should reject plaintiffs' novel theory of liability.

In any event, plaintiffs have also failed to meaningfully rebut the City's showing that their allegations about more traditional instructional inputs are deficient as a matter of law (*see* City Br. 39-44).[2] Instead, plaintiffs simply restate those allegations and assert, without further analysis, that they are "sufficient" under this Court's case law (*see* Resp. Br. 11-12, 29-30). But many of the allegations plaintiffs cite on this front do not concern traditional inputs at all. They are the very allegations that the First Department described as "novel" and unsupported by any case law (*see id.* at 12 (citing allegations about a culturally responsive curriculum and the racial diversity of the City's teachers, among others)).

As to the remaining traditional input allegations, plaintiffs do not dispute most of the arguments that the City made in its opening brief. For example, plaintiffs do not dispute that their allegations

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[2] Further, it is too late for plaintiffs to seek leave to re-plead, despite their claim to the contrary (Resp. Br. 30), since they did not request that alternative relief in Supreme Court or the First Department.

about inadequate facilities and instrumentalities of learning are limited to some "unscreened high schools," and that there are no similar allegations about the City's middle and elementary schools (City Br. 41-42). Nor do plaintiffs dispute that they made no allegations that the City's teachers are "[in]adequately trained to teach" subjects like reading, writing, mathematics, science, and social studies (*id.* at 40). Indeed, plaintiffs do not meaningfully dispute that their traditional input allegations fall well short of showing a "district-wide failure" to provide students with a sound basic education—a required element of an Education Article claim. *See N.Y. Civ. Liberties Union*, 4 N.Y.3d at 182.

Plaintiffs face the same problem with their nod to traditional outputs. They do not dispute that their complaint makes no allegations about standardized test scores, English proficiency, or students' ability to "gain admission to city or state colleges" (City Br. 42-43). Indeed, plaintiffs do not even dispute that their complaint fails to allege that the City's public-school students are unable to vote, serve on a jury, or find a job (*id.* at 18, 33, 43-44)—an output metric that is fundamental to this Court's definition of a sound basic

education. *See, e.g.*, *CFE II*, 100 N.Y.2d at 908; *Aristy-Farer*, 29 N.Y.3d at 505. Instead, the "myriad deficient outputs" that plaintiffs identify (Resp. Br. 24-25) are output allegations that further their novel antiracist theory of Education Article liability, not the traditional output allegations that this Court has always demanded.

This Court should not be deceived by plaintiffs' attempt to reframe their complaint as asserting a traditional Education Article claim. In reality, plaintiffs ask this Court to break new ground by endorsing a novel and aspirational antiracist theory of Education Article liability. This Court should decline that invitation, adhere to its precedent, and reaffirm the judiciary's limited role in adjudicating Education Article claims: determining whether the State is meeting its basic constitutional obligation to provide sufficient funding to public schools so that students receive a "sound basic education." *Campaign for Fiscal Equity v. State of N.Y.*, 86 N.Y.2d 307, 316-18 (1995).

POINT II

PLAINTIFFS CANNOT RELY SOLELY ON THE CITY'S AWARENESS OF DISPARATE IMPACT TO SUPPORT AN EQUAL PROTECTION CLAIM

Plaintiffs do not seriously dispute that, to allege discriminatory intent under the Equal Protection Clause, they need more than allegations of disparate impact and the City's good faith efforts to remedy that disparate impact (*see* Resp. Br. 35-51). *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979) ("disparate impact and foreseeable consequences, without more, do not establish a constitutional violation"). But the only other allegation they have is that the State's enactment of the Hecht-Calandra Act in 1972 was motivated by discriminatory intent. And, as the City explained in its opening brief, there is no basis to impute the State's intent to the City (City Br. 47-48). So, with that allegation cast aside, plaintiffs have no viable equal protection cause of action against the City.

Plaintiffs' argument that the State legislature's intent can be imputed to the City because the City "retains significant discretion" in administering the specialized high schools (Resp. Br. 46-47), is meritless. That the Education Law permits the City to expand the

number of specialized high schools and develop "curriculum and testing content" for those schools (*id.*), does not support an inference that the City shares the purported discriminatory views of the legislators who passed the Hecht-Calandra Act in 1972. Indeed, plaintiffs concede that the State "foisted" that law on the City against its will, to stymie the City's "efforts to study cultural bias in the existing admissions test" (*id.* at 45, 47). And the City has used what little discretion it was given in the Hecht-Calandra Act to try to *increase* racial and socioeconomic diversity at the specialized high schools (*see* City Br. at 50-51 (describing the DREAM program and the Discovery program)).

As part of those efforts, the City lobbied the State legislature "to amend or repeal the Hecht-Calandra Act" so that it could use other admissions criteria aside from the standardized test that plaintiffs object to. *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253, 268-69 (S.D.N.Y. 2019). What's more, plaintiffs have no response to the conundrum the City faces on this front (*see* City Br. at 51-52), with one set of plaintiffs complaining that the City's specialized high school diversity efforts go too far, *see*

Chinese Am. Citizens All. of Greater N.Y. v. Adams, 116 F.4th 161, 164-65 (2d Cir. 2024), and the other set complaining that those efforts do not go far enough (R59-60; Resp. Br. 50).

Plaintiffs also argue that the Hecht-Calandra Act was "part of a broader pattern of actions that perpetuated racial segregation in the City's public schools"—actions like adopting "test-based admissions" for middle schools and the Gifted and Talented program (Resp. Br. 43-44, 47). But again, the plaintiffs' allegations about the City's use of race-neutral admissions testing show only that the City was aware of racial disparities in the demographics of certain schools and took good faith steps to remedy those disparities, not that the City acted with any discriminatory animus towards Black and Latino students (*see* City Br. 48-50, 53). So these are just more allegations about disparate impact, not discriminatory intent.

And while it is "possible to infer intent" based on the existence of disparate impact and the "inadequacy" of remedial efforts (Resp. Br. 37-39, 48, 50), such allegations by themselves are insufficient to state a cause of action under the Equal Protection Clause. *Penick*, 443 U.S. at 464. The cases that plaintiffs (and the First Department)

cite do not hold otherwise (Resp. Br. 39, 48, 51; *see also* R599-603). As the City explained in its opening brief, in all of those cases, unlike here, there was some *additional* evidence of discriminatory intent aside from disparate impact and the foreseeability of that impact (City Br. 49-50, 53). Plaintiffs have no answer to that point.

For that reason, the City's "admission" that there are "racial disparities" in in the demographics at some of its schools and that there is a "need for reform" (Resp. Br. 49-50), is not enough to establish discriminatory intent. Instead, it shows just the opposite. After all, plaintiffs' own allegations reveal that the City (1) adopted a Culturally Responsive-Sustaining Education strategy that is "similar" to the one plaintiffs demand in their complaint (R66-68, 95-96), (2) took steps to increase racial and socioeconomic diversity at the specialized high schools (R58-59), and (3) amended the Gifted and Talented admissions process "to address the racial disparities in who has access" to that program (R21, 50-51). Those allegations are incompatible with plaintiffs' conclusory discriminatory intent allegations and show that the equal protection claim is deficient as a matter of law.

POINT III

PLAINTIFFS HAVE NOT SHOWN THAT THEIR CONCLUSORY DENIAL-OF-ACCESS ALLEGATIONS STATE A CAUSE OF ACTION UNDER THE STATE HRL

Plaintiffs' denial-of-access allegations are insufficient to state a cause of action under the State HRL for two reasons. First, their allegations are conclusory and vague—plaintiffs do not make any specific factual allegations that they were denied access to specific schools or academic programs by reason of their race. Second, plaintiffs' discriminatory intent allegations are insufficient for the reasons discussed above (*see supra* at 20-23), and they cannot rely on a disparate impact theory of liability under section 296(4).

Plaintiffs' claim that the City has waived the first argument (Resp. Br. 57-58), is meritless. The City challenged the sufficiency of plaintiffs' section 296(4) allegations in Supreme Court (*see* Sup. Ct. NYSCEF No. 131 at 26 (arguing that "[t]here are no claims in the Amended Complaint by any [p]laintiff that s/he was denied admission to any DOE school based on his/her race or ethnicity")). And the City reiterated and expanded on that argument in the First

Department (*see* First Dep't NYSCEF No. 27 at 51-53). That is sufficient to preserve the argument for this Court's review. *See Geraci*, 15 N.Y.3d at 342. If plaintiffs wanted to take counter-steps (*see* Resp. Br. 58), they had the opportunity to take them in Supreme Court, but they elected to rest on the allegations in their amended complaint.

Plaintiffs fare no better on the merits. They do not dispute that the amended complaint does not allege that *any* of the 14 individual plaintiffs were denied access to a City school or academic program (*see* R31-34 (alleging, to the contrary, that six of the individual plaintiffs attend a specialized high school and others attend screened schools)). And the City did not "ignore[] the allegations about the organizational [p]laintiffs" (Resp. Br. 58). To the contrary, the City described those allegations in its brief and explained why they were deficient (City Br. 55-56).

Plaintiffs' only response is to protest that the City "improperly seeks to impose a heightened pleading standard" by relying on federal case law (Resp. Br. 58-59). But even under the CPLR's more liberal notice pleading standard, a plaintiff must still go beyond bare

legal conclusions and provide some factual specificity. *See, e.g.*, *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141-42 (2017); *accord Katsoris v. Bodnar & Milone, LLP*, 186 A.D.3d 1504, 1506 (2d Dep't 2020) ("conclusory" allegations without "any factual support" cannot survive a motion to dismiss). The amended complaint falls well short of that standard because it does not allege any specific instances where an individual plaintiff—or a student member of an organizational plaintiff—was denied access to a particular academic program or school by reason of his race (*see* R31-34, 36, 38-39, 42).

Next, as to the disparate impact issue, plaintiffs largely ignore the City's textual arguments showing why section 296(4) is limited to claims of intentional discrimination (*see* City Br. 61-62). The statutory prohibitions in subsection four—especially its core reference to "deny[ing] the use of [] facilities … by reason of [] race"—are framed in a way that points to a prohibition on intentional misconduct. Exec. Law § 296(4). And the provision's carveout for single-sex educational institutions, *see id.*—which operates to permit intentional discrimination in denying access in that one unique

context—likewise confirms a statutory focus on disparate treatment, not disparate impact. These points are only strengthened when the text is considered in tandem with the provision's distinctive enactment history.

Instead of responding to those arguments, plaintiffs point out that other language in section 296(4) is similar to section 296(1)'s prohibition on employment discrimination—a prohibition that courts have interpreted to encompass disparate impact liability (Resp. Br. 53-54). But that argument is misplaced for two reasons.

First, this Court's section 296(1) case law is not dispositive, because the reasoning underlying those cases has never been extended to denial-of-access claims under section 296(4). What's more, as the City noted in its opening brief, this Court has not always been consistent when addressing whether disparate impact claims are cognizable even in the employment context (City Br. 57).

Second, that the text of section 296(1) is similar in some ways to the text of section 296(4) is not dispositive, either (Resp. Br. 53-54). Both Title VI and Title VII display some textual similarities, *compare* 42 U.S.C. § 2000d (prohibiting the "exclu[sion]" of persons

from federally funded programs and activities "on the ground of race"), *with id.* § 2000e-2(a)(1) (prohibiting discrimination in employment "because of such individual's race"), yet courts have held that only Title VII allows for disparate impact claims (*see* City Br. 59). And federal courts in New York have repeatedly held that section 296(4) is analogous to Title VI, not Title VII. *See, e.g.*, *Minto v. Molloy Univ.*, 715 F. Supp. 3d 422, 431 (E.D.N.Y. 2024); *Padmanabhan v. N.Y. Inst. of Tech. Campus*, No. 18-cv-5284, 2019 U.S. Dist. LEXIS 162261, at *16 (S.D.N.Y. Sept. 20, 2019). Both Title VI and section 296(4) find their inspiration in the Equal Protection Clause, which requires intentional discrimination (*see* City Br. 59).

Plaintiffs' only response to this argument is to note that Title VI uses the phrase "on the ground of race" while section 296(4) uses the phrase "by reason of … race" (Resp. Br. 56).[3] Plaintiffs' point, presumably, is that this minor textual difference means that section 296(4) and Title VI are not analogous. But federal courts have held

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[3] Plaintiffs also note that the City's arguments about Title VI and Title IX are "newly raised on appeal" (Resp. Br. 56). Tellingly, however, plaintiffs do not contend that the disparate impact issue is waived. After all, the City argued in both Supreme Court and the First Department that disparate impact claims are not cognizable under section 296(4).

otherwise. And in any event, that argument is flatly inconsistent with plaintiffs' earlier argument that sections 296(1) and 296(4) should be interpreted identically notwithstanding their minor textual differences (*see* Resp. Br. 53-54). Plaintiffs cannot have it both ways. What's more, plaintiffs are focusing on the wrong part of the statute. As the U.S. Supreme Court has explained, to determine whether an antidiscrimination statute encompasses disparate impact liability, courts should look to whether the text "refers to the consequences of actions" or "the mindset of actors"—not the "because of" or "by reason of" race language. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 533 (2015).

Finally, plaintiffs do not meaningfully respond to the enactment history the City described in its opening brief (City Br. 60-61), which revealed that (1) the precursor to section 296(4) was adopted in 1935—decades before the earliest acceptance of disparate-impact claims under federal employment discrimination law, *see* L. 1935, ch. 852, § 1, (2) the provision was originally placed in the Tax Law to serve as an implied condition on tax-exempt status, and (3) the provision should be given the "same meaning"

today, even after its 1958 move to the Executive Law, *Matter of N. Syracuse Cent. School Dist. v. N.Y. State Div. of Human Rights*, 19 N.Y.3d 481, 494 (2012).

Instead of disputing any of that enactment history, plaintiffs simply note, without further discussion, that the State legislature amended the State HRL in 2019 to clarify that the entire law should be liberally construed "regardless of whether" similarly worded federal civil rights laws "have been so construed" (Resp. Br. 57). But this Court has always "liberally construed" the State HRL "to accomplish the [remedial] purposes of the statute." *Cahill v. Rosa*, 89 N.Y.2d 14, 20 (1996). The 2019 amendments are nothing new and they did not make any substantive changes to the scope of liability under section 296(4).

Indeed, this Court recently analyzed a nearly identical liberal construction amendment to the New York City Human Rights Law ("City HRL") and, in rejecting plaintiffs' broad reading of the phrase "marital status," concluded that "any such broad construction must" still "be reasonable and grounded in the language of the local law." *Matter of McCabe v. 511 W. 232nd Owners Corp.*, No. 91, 2024 N.Y.

LEXIS 1991, at *8 (2024) (quoting *Doe v. Bloomberg L.P.*, 36 N.Y.3d 450, 462 (2021)). The Court held that plaintiffs' reading did not "comport" with the structure and legislative history of the law and pointed out that, had the City Council "intended" to adopt plaintiffs' broad definition of "marital status," "it would have amended the statute to say exactly that." *Id.* at *2, 20. That the statute should be liberally construed was not enough.

So too here. Had the State legislature wanted to amend section 296(4) to explicitly authorize disparate impact claims, it has had many opportunities to do so. Its failure to do that, coupled with the text and enactment history discussed above, counsels against expanding liability here.

CONCLUSION

The Court should reverse the decision below and grant the City's motion to dismiss the complaint for failure to state a cause of action.

Dated: New York, NY
February 28, 2025

Respectfully submitted,

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Corporation Counsel
of the City of New York
Attorney for City Appellants

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 5,719 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

PHILIP W. YOUNG

APL-2024-00099

Court of Appeals
State of New York

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-Respondents,

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-Appellants,

and

PARENTS DEFENDING EDUCATION,

Intervenor-Defendant-Appellant.

AFFIRMATION OF ELECTRONIC SERVICE

PHILIP W. YOUNG, affirms under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the following is true and that this document may be filed in an action or proceeding in a court of law: on February 28, 2025, I served copies of the accompanying Reply Brief for City Appellants on all parties, by sending the

same to the following person(s) by e-mail at the designated e-mail address(es), with such persons having consented to such electronic service:

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Dated: New York, New York
February 28, 2025

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EXHIBIT

CONFIRMATION OF RECEIPT
OF ELECTRONIC SERVICE

From: Colon-Bosolet, Melissa
To: Young, Philip (Law); Farra, Karma O.; Hasbrouck, Alyssa M.; Claeyssen, Ernesto R.; Jean, Natalie T
Cc: Joyce, Eamon P.
Subject: RE: [EXTERNAL] Re: IntegrateNYC - service copy of City Reply Brief
Date: Friday, February 28, 2025 5:20:52 PM

Received. Thank you.

MELISSA COLÓN-BOSOLET

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From: Young, Philip (Law) <phyoung@law.nyc.gov>
Date: Friday, Feb 28, 2025 at 5:18 PM
To: Farra, Karma O. <kfarra@sidley.com>, Hasbrouck, Alyssa M. <ahasbrouck@sidley.com>, Claeyssen, Ernesto R. <eclaeyssen@sidley.com>, Jean, Natalie T <njean@sidley.com>
Cc: Joyce, Eamon P. <ejoyce@sidley.com>, Colon-Bosolet, Melissa <mcolon-bosolet@sidley.com>
Subject: RE: [EXTERNAL] Re: IntegrateNYC - service copy of City Reply Brief

Just adding a couple more Sidley folks to see if I can get a confirmation of receipt for this service copy of the City's reply brief. Many thanks!

Phil

Philip W. Young
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Subject: RE: [EXTERNAL] Re: IntegrateNYC - service copy of City Reply Brief

Thanks, both.

Eamon & Melissa—Just following up to confirm receipt.

From: James Hasson <james@consovoymccarthy.com>
Sent: Friday, February 28, 2025 2:56 PM
To: Grube, Mark <Mark.Grube@ag.ny.gov>
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Subject: [EXTERNAL] Re: IntegrateNYC - service copy of City Reply Brief

Received, thanks!

On Fri, Feb 28, 2025 at 2:54 PM Grube, Mark <Mark.Grube@ag.ny.gov> wrote:

> Received, thank you.
>
> **Mark S. Grube**
> Senior Assistant Solicitor General
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Subject: IntegrateNYC - service copy of City Reply Brief

Counsel,

Attached is a service copy of the City's reply brief. Could you please confirm receipt before the end of the day today?

Thanks,
Phil

From: Grube, Mark <Mark.Grube@ag.ny.gov>
Sent: Monday, October 28, 2024 10:18 AM
To: Joyce, Eamon P. <ejoyce@sidley.com>; James Hasson <james@consovoymccarthy.com>; Young, Philip (Law) <phyoung@law.nyc.gov>
Cc: Colon-Bosolet, Melissa <mcolon-bosolet@sidley.com>; taylor@consovoymccarthy.com
Subject: RE: [EXTERNAL] RE: IntegrateNYC - consent to email service

The State parties consent to email service of all papers in this appeal.

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Sent: Monday, October 28, 2024 10:01 AM
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Yes, that's fine for plaintiffs.
Best,
Eamon

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Can confirm on behalf of PDE.

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On Mon, Oct 28, 2024 at 9:54 AM Young, Philip (Law) <phyoung@law.nyc.gov> wrote:

> Counsel,
>
> Out of an abundance of caution, can you all just re-confirm that you consent to email service of the record and brief in this appeal?
>
> Thanks,
> Phil
>
> **From:** James Hasson <james@consovoymccarthy.com>
> **Sent:** Wednesday, July 24, 2024 12:32 PM
> **To:** Young, Philip (Law) <phyoung@law.nyc.gov>
> **Cc:** Colon-Bosolet, Melissa <mcolon-bosolet@sidley.com>; Grube, Mark <Mark.Grube@ag.ny.gov>; Joyce, Eamon P. <ejoyce@sidley.com>; taylor@consovoymccarthy.com
> **Subject:** Re: [EXTERNAL] RE: IntegrateNYC - consent to email service
>
> Yes that's fine with us.
>
> James Hasson
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> On Wed, Jul 24, 2024 at 12:31 PM Young, Philip (Law) <phyoung@law.nyc.gov> wrote:
>
> > James & Taylor,
> >
> > Just following up on this. Thanks
> >
> > Phil
> >
> > **From:** Joyce, Eamon P. <ejoyce@sidley.com>
> > **Sent:** Tuesday, July 23, 2024 9:58 AM
> > **To:** Grube, Mark <Mark.Grube@ag.ny.gov>; Young, Philip (Law) <phyoung@law.nyc.gov>; James Hasson <james@consovoymccarthy.com>; Colon-Bosolet, Melissa <mcolon-bosolet@sidley.com>; taylor@consovoymccarthy.com
> > **Subject:** [EXTERNAL] RE: IntegrateNYC - consent to email service
> >
> >
> >
> > Phil,
> > Yes, that's also fine with plaintiffs too. Speaking of which, if any of you have gotten a case opening letter from the Court of Appeals, it would be great if you could forward it electronically.
> > Thanks,
> > Eamon
> >
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The State parties consent to email service of all papers in the Court of Appeals in this appeal.

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[EXTERNAL]
Counsel,

Could you let me know if you would consent to email service of all papers in the Court of Appeals for this case? If you'd still like to receive a paper courtesy copy, I can also do that.

Thanks,
Phil

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