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COURT OF APPEALS
STATE OF NEW YORK

INTEGRATENYC,

Respondent,

-against-

STATE OF NY,

Appellant.

NO. 75

20 Eagle Street
Albany, New York
September 10, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Joey Oliveros
Official Court Transcriber

1 CHIEF JUDGE WILSON: Good afternoon, everyone.
2 The first case on today's calendar is IntegrateNYC v. State
3 of New York.

4 Counsel?

5 MR. GRUBE: May it please the court. Mark Grube
6 for the State appellants. May I reserve two minutes for
7 rebuttal?

8 CHIEF JUDGE WILSON: Yes.

9 MR. GRUBE: State appellants and plaintiffs share
10 much common ground in their aspirations for the education
11 of the city's children. The Education Department has
12 sought to combat systemic racism in the state schools,
13 recognizing it as a complex problem deeply rooted in our
14 history, culture, and institutions. But plaintiff's claim
15 under the education article for court-ordered relief is not
16 the proper means to achieve those common goals.

17 In NYCLU v. State, this court held that a
18 plaintiff must plead a clear articulation of the asserted
19 failing of the state. Plaintiffs have failed to do so
20 because their complaint turns on such questions as which
21 books are used in school classrooms, which teachers are
22 hired, and how students are assigned to schools. Those
23 matters are committed to local control under our state's
24 system of constitutional government. That's demonstrated
25 through the history of the education article, the text, and

1 this court's precedent.

2 JUDGE HALLIGAN: Can I ask you about a different
3 - - - over here - - - a different part of your argument?
4 It seems to me that both the city and the state are arguing
5 that the other is responsible for any failings. I know you
6 argue there aren't any failings. But what are we to make
7 of that?

8 MR. GRUBE: Well, this court is routinely asked
9 to determine questions of allocation of authority between
10 state and local government. For instance - - -

11 JUDGE HALLIGAN: So you're not saying no one is
12 responsible. You're saying that the - - - your counterpart
13 is instead responsible?

14 MR. GRUBE: Well, what we've said is that it's a
15 complex problem that is the result of hundreds of years of
16 inequity, so - - -

17 JUDGE HALLIGAN: Right. But if a case - - -

18 MR. GRUBE: Right.

19 JUDGE HALLIGAN: - - - a case comes to us with
20 both the city and the state - - -

21 MR. GRUBE: Right.

22 JUDGE HALLIGAN: - - - that's a - - - you know, a
23 joint issue that we have to resolve.

24 MR. GRUBE: Right. And so as in Tax Equity Now
25 New York, which this court heard last year, which concerned

1 alleged racial disparities in New York City's property tax
2 system, there, the court was tasked with the same question.
3 And it concluded that the alleged deficiencies were
4 attributable to the city and allowed claims against the
5 city to go forward, but not the state. And that - - -

6 JUDGE SINGAS: But didn't we reject that in CFE
7 II?

8 MR. GRUBE: Well, what CFE II concerned was
9 questions of funding. And it said when there are
10 allegations of funding, that the state is ultimately
11 responsible, regardless of how the local government uses
12 the funds to which it is given.

13 CHIEF JUDGE WILSON: So well, take - - -

14 MR. GRUBE: But - - -

15 CHIEF JUDGE WILSON: - - - take your example
16 about curriculum choice. Is there a situation where a,
17 let's say a school - - - let's say New York City School
18 District, could make a curricular choice about books that
19 was so extreme that the state would say, wait a minute, we
20 have a responsibility to step in here?

21 MR. GRUBE: Well, certainly there would be
22 remedies under the Human Rights Law, the equal protection
23 clause, if, for example - - -

24 CHIEF JUDGE WILSON: No, no, no, no. I'm not
25 asking about what remedies a private person might have.

1 I'm asking about a responsibility that the state might have
2 to step in and say to New York, no, no, no, this curricular
3 choice is not something you can teach here.

4 MR. GRUBE: Well, the Office of the Attorney
5 General enforces the HRL and enforces nondiscrimination
6 mandates. So if there - - -

7 CHIEF JUDGE WILSON: How about the Department of
8 Education?

9 MR. GRUBE: The Department of Education has
10 various tools. There's carrots and sticks. In NYCLU v.
11 State, this court discussed the registration review tool,
12 which is a tool that the state can use to have enhanced
13 control over underperforming schools. And what this court
14 said in NYCLU v. State is that that's not the type of
15 remedy that is - - - the judiciary oversees or manages, but
16 that is left to the state and the democratic process to
17 determine whether those resources - - - how they should be
18 allocated in that manner.

19 If I may briefly turn back to the question of the
20 history of the education article. It arose in the 19th
21 century in the context of the legislature for much of the
22 19th century was inconsistent in whether it provided
23 adequate funding for schools. And in the Constitutional
24 Convention, the people took that discretion away from the
25 legislature and gave the courts a significant but limited

1 power to ensure that adequate resources are put into state
2 schools.

3 JUDGE GARCIA: But where do you get the "adequate
4 resources" part of that statement from that history?

5 MR. GRUBE: Well - - - because that's what - - -
6 it arose from the free school movement. And parents,
7 before the education article, often had to pay what was
8 known as the rate bill, which was they had to cover teacher
9 salaries. They had to cover whatever the state did not
10 cover. And the education article said that the state is
11 responsible so that all children can receive a free
12 education. And that's why it's grounded in funding.

13 The text of the provision as well speaks - - -

14 CHIEF JUDGE WILSON: It's actually the free
15 common school movement, right?

16 MR. GRUBE: Free common school.

17 CHIEF JUDGE WILSON: And what significance do you
18 give to the word "common" there? I mean, there was a
19 common school movement, right? And - - -

20 MR. GRUBE: Right.

21 CHIEF JUDGE WILSON: - - - part of that was for
22 standardization.

23 MR. GRUBE: Right. And what this court said in
24 REFIT is that it constitutionalized the existing system at
25 the time of the state-local partnership, where local

1 governments were given significant control over what kind
2 of education would be provided. And this was grounded in
3 what - - - what was said in Levittown, the presumption that
4 the best choices in education are made when local needs are
5 accountable and are in charge of making those kind of
6 determinations.

7 JUDGE GARCIA: So the only - - -

8 JUDGE HALLIGAN: Is it - - -

9 JUDGE GARCIA: - - - responsibility of the state
10 would be to ensure a certain amount of money sufficient in
11 itself to secure a sound basic education is pushed out the
12 door, and then we're done?

13 MR. GRUBE: In Painter, this court said - - - and
14 other precedents - - - that the state has satisfied its
15 constitutional obligation when it's provided adequate
16 resources. That said, of course, the state - - -

17 JUDGE GARCIA: Because in that context, wasn't -
18 - - weren't the challenges of that nature? I mean, in a
19 case where you've alleged you haven't provided sufficient
20 resources, then they've satisfied their obligation by
21 providing sufficient resources, right?

22 MR. GRUBE: Right. And in NYCLU v. State, this
23 court said that there has to be a clear articulation of the
24 state's failing that - - -

25 JUDGE HALLIGAN: But is it your position that

1 only funding could make out a violation of the education
2 article? Could a curricular choice never rise to the level
3 of failing to provide a sound basic education?

4 MR. GRUBE: Well, that's our position. But the
5 court doesn't need to draw a bright-line rule.

6 JUDGE HALLIGAN: Just to give you an example, if
7 I can. Suppose - - - and hopefully this is far-fetched - -
8 - that the schools decided, for example, that they would
9 only teach math to boys and not girls, or vice versa. I
10 realized there would also be, I would suppose, a host of
11 other claims one could bring to challenge that. But would
12 that be something that could make out a failure to provide
13 a sound basic education?

14 MR. GRUBE: Well, as Your Honor noted, there
15 would be a number of other grounds.

16 JUDGE HALLIGAN: Right. But focusing - - -

17 MR. GRUBE: And I - - -

18 JUDGE HALLIGAN: - - - on the education article.

19 MR. GRUBE: And I think the court could leave
20 that open - - - that question open today, because what this
21 court said in CFE II, one example it gave, was if the state
22 passed a statute that it would not fund schools after 5th
23 grade, which is similar to Your Honor - - -

24 JUDGE HALLIGAN: So you acknowledge there might
25 be - - -

1 MR. GRUBE: There might.

2 JUDGE HALLIGAN: - - - some choices that could be
3 so egregious, although not a funding determination
4 specifically, that they could still make out a violation of
5 the education article?

6 MR. GRUBE: Well, I would say that there would be
7 more grounds for finding a violation of the education
8 article in that case. I'm not conceding that there's
9 anything beyond funding. But certainly, this court could
10 craft an opinion that would leave that question open for
11 another day, as it has throughout its jurisprudence on this
12 issue, leaving the contours of the education article open
13 for future challenges.

14 CHIEF JUDGE WILSON: I think your - - - your - -
15 -

16 MR. GRUBE: I do - - -

17 CHIEF JUDGE WILSON: The light is on.

18 MR. GRUBE: Thank you.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. GRUBE: I will be fine. Thank you.

21 MR. SHWEDER: May it please the court. Jeremy
22 Shweder for the City defendants. I'd like to reserve two
23 minutes for rebuttal, please.

24 CHIEF JUDGE WILSON: Yes.

25 MR. SHWEDER: Okay. The First Department's



1 decision was based on a series of incorrect factual
2 interpretations as well as incorrect factual understandings
3 about what plaintiffs had alleged. On each of plaintiff's
4 claims for this court to affirm, it's going to have to
5 break new ground or it's going to have to alter controlling
6 precedent. And we can start with the education article
7 claim.

8 Now there are really three principles that go
9 together here that are textual and prudential. You can
10 start with the text. A claim only exists against the
11 state. That is textual. This is the - - - the education
12 article says the legislature shall provide for the
13 maintenance and support of a system of free common schools.
14 You don't have to look any farther than that to know that
15 this can only be a claim against the state.

16 And I'd like to answer the question about what
17 would happen if it is the - - - and you know, my colleague
18 here is saying this is all a local school district issue.
19 Well, there are levers that the state can undertake to
20 force compliance if a local school district is not doing
21 what it needs to do. Education Law 306, the commissioner
22 can remove local school officers and it can with - - -
23 withhold money. That's a serious stick right there.
24 Education Law 308, the commissioner can institute - - -

25 JUDGE RIVERA: And if it doesn't do those things,

1 why are you off the hook?

2 MR. SHWEDER: Well, to begin with, a claim can
3 only exist against the state. So that - - - there is no
4 claim against a local school district. That's Donahue. I
5 mean, you can just look to Donahue, and you can look to the
6 text. I mean, Donahue said there's no duty flowing from a
7 local school district to individual pupils. So a claim
8 would go against the state.

9 And this goes to the second and third part. It
10 has to relate to funding because we want - - - the state -
11 - - the claim has to be against the state, and it has to
12 relate to things that the state can control. And we do not
13 want states getting involved in local school decision-
14 making. That's a throughline from all the decisions of
15 this court.

16 So that's why there has been - - - and the third
17 part of this is that it has to be districtwide. And that
18 goes to the same idea that we want this claim to be about
19 funding. We want it to be against the state. We want it
20 to be something that the state can control. And that is
21 funding at a districtwide level.

22 That is a neat, understandable, practical, and
23 prudential way to approach these cases in Education Law.
24 And this court has never found that a local school district
25 can be responsible under the Education Law. I think it - -

1 - that's the making new law part. It's also kind of
2 breaking the text part because the text says it is the
3 legislature that can provide. And if there's concerns
4 about what a school district would do if it wasn't obeying
5 the commissioner and the Education Department, there are
6 levers that can be taken to force that.

7 I want to bring up that there's - - - there is
8 another angle to this. And if the court is not interested
9 in kind of making a categorical ruling about whether this
10 can be about funding, whether this can be about - - -
11 whether a local school district can't be sued, I think that
12 there's a real causation problem in the actual allegations
13 here. And this goes to the factual part of how the First
14 Department erred.

15 I think that this court could really just say,
16 it's not enough, if you're alleging novel inputs - - -
17 which everybody acknowledges these are novel inputs here -
18 - - to just opine that this is what is needed for a sound
19 basic education. You're going to have to also have some
20 coherent way of saying these inputs we're alleging cause
21 the kind of outputs that this court has recognized are what
22 we know to be the things that tell us that there's not a
23 sound basic education.

24 And I think it's really important here to look at
25 the complaint because the complaint, ninety pages, has one

1 paragraph that alleges outputs, just one. And I'd like to
2 point the court to it. It's on the record at 48. It's
3 paragraph 83. And basically - - - 48, 83 - - - that
4 paragraph alleges two outputs.

5 One is low graduation rates. The other is
6 inability to get advanced Regents diplomas, which would - -
7 - nobody would ever consider that part of what's required
8 for a sound basic education. There are zero paragraphs in
9 the complaint that allege causation, that allege that their
10 inputs are what have caused these things to happen, or
11 like, a deficiency of those inputs in the New York City
12 system. So there's a serious causation problem.

13 What - - - their kind of theme in this - - - in
14 their complaint is to basically say, there are studies that
15 show that X input will help outputs. But they never
16 actually tie it back to something going on in the New York
17 City School District. They never actually say the
18 deficiency of this input is causing a deficient output in
19 New York City. And you can look at - - -

20 JUDGE RIVERA: What about their argument
21 regarding the standardized test, which is not about
22 deficiency, it's about choosing something that they allege
23 is a barrier for students to access particular resources in
24 the school?

25 MR. SHWEDER: I think the allegation there - - -

1 first of all, I think that's more about the equal
2 protection. But to the extent it goes - - -

3 CHIEF JUDGE WILSON: Well, it might be - - - it
4 might be more about the Human Rights Law claim, which I
5 would like you to address.

6 MR. SHWEDER: May I finish this point - - -

7 CHIEF JUDGE WILSON: Please.

8 MR. SHWEDER: - - - quickly? Okay. Because the
9 - - - that would just - - - that allegation would only go
10 to the idea of can they get into the most selective
11 schools. Nobody would ever say that under the education
12 article that that's what's required, that you must be able
13 to get in - - -

14 JUDGE RIVERA: Well, isn't it the allegation that
15 this is a resource of gifted and talented programs that are
16 open to students if they succeed or excel or otherwise
17 reach whatever cutoff you have on these tests?

18 MR. SHWEDER: But - - -

19 JUDGE RIVERA: And the test - - - I mean, in
20 employment law, tests are challenged all the time.

21 MR. SHWEDER: I'd like to get to that under - - -

22 JUDGE RIVERA: The - - - the test may - - -

23 MR. SHWEDER: I'd like to get to that - - -

24 JUDGE RIVERA: - - - indeed affect one's access.
25 In this case, they're saying access to a taxpayer-funded

1 resource.

2 MR. SHWEDER: Yeah. But that - - - the - - -
3 that may go to - - -

4 JUDGE RIVERA: Which you've made exclusive - - -

5 MR. SHWEDER: - - - the state Human Rights Law
6 claim.

7 JUDGE RIVERA: - - - through a testing protocol,
8 which they argue is flawed and unconstitutional. But let's
9 hear what you say.

10 MR. SHWEDER: That all goes to the equal
11 protection Human Rights Law claim. As it relates to the
12 education article claim, there - - - there has never been -
13 - - I mean, many of these - - - of - - - the decisions from
14 this court have basically said we're talking about a sound
15 kind of a floor, right? Nobody would ever say that it's an
16 education article violation if you are unable to get into
17 the most selective schools.

18 JUDGE RIVERA: Why isn't it the floor to be able
19 to equally compete for exclusive programs? Why isn't that
20 a floor?

21 MR. SHWEDER: That's - - - that would be - - -
22 that would again be the court moving in a very different
23 direction.

24 JUDGE RIVERA: Okay. But I'm asking. Why
25 couldn't it? Is there something that we have said or

1 something in the education article or anything else you
2 want to point to that would prohibit such an
3 interpretation?

4 MR. SHWEDER: I'd start with the text. "The
5 legislature shall provide for the maintenance and support
6 of a system of free common schools". That's all it says.
7 And that has been interpreted - - -

8 JUDGE RIVERA: Well, how is it a free common
9 school if indeed a particular population doesn't have equal
10 access to compete for a resource that's supposed to be open
11 and available to all students if they satisfy the criteria?

12 MR. SHWEDER: This court has said over and over
13 again that equality is not the goal of the education
14 article.

15 JUDGE RIVERA: No. This isn't - - - I'm not
16 talking about equality, unless you mean equality in the
17 sense of the opportunity to compete with everyone else for
18 those slots.

19 MR. SHWEDER: They have the opportunity to
20 compete with everyone else for those slots.

21 JUDGE RIVERA: Well, that's their argument, that
22 they really don't.

23 MR. SHWEDER: That's not part of the case
24 anymore. That's not part of the case anymore. The
25 arguments that, oh, we don't really know how to prepare for

1 this - - -

2 JUDGE RIVERA: Okay.

3 MR. SHWEDER: - - - or those kinds of things.
4 That is out of the case with what the First Department
5 said.

6 JUDGE RIVERA: Okay.

7 MR. SHWEDER: So when you push aside all of those
8 parts of the complaint, you're left with one paragraph of
9 output allegations, and really only one valid output
10 allegation in there, and zero paragraphs of causation.

11 And the First Department erred here because it
12 gave them credit for causation that didn't exist. If you
13 look at 589 of the record, the court said, "According to
14 plaintiffs, a diverse curriculum teacher force, sufficient
15 resources, and affirming school environments are associated
16 with improved outcomes".

17 That's true. That's kind of the, we have studies
18 that show that if you do this, there are improved outcomes.
19 The wrong part of what the court said was the improved
20 outcomes plaintiffs allege would include better
21 standardized test score and increased number of - - -

22 JUDGE TROUTMAN: What about - - - as it was
23 indicated earlier, the question of the equal protection
24 cause of action and the testing as to the city?

25 MR. SHWEDER: Sure. So let me go to the equal

1 protection claim. There are - - - there are some serious
2 allegations - - - I mean, serious problems with the - - -
3 with finding that - - - that the allegations here show
4 intent. And I think everybody recognizes they must show
5 that there is an intent to discriminate. The First
6 Department recognized that foreseeability is not enough.
7 So what are the allegations related to the city?

8 One thing that we have is a substantial number of
9 allegations showing that the city has tried to prevent and
10 taken measures to provide - - - to prevent the type of
11 racial imbalances that are there. We've fought against the
12 Hecht-Calandra Act from the very beginning. We continue to
13 do so. We have changed the discovery program from through
14 - - -

15 JUDGE SINGAS: But there continues to be
16 inequities, right? So doesn't that amount to an equal
17 protection violation, like the city's failure to address
18 those inequities?

19 MR. SHWEDER: No. That's - - -

20 JUDGE SINGAS: Like, you're aware of them?

21 MR. SHWEDER: That's dis - - - that's disparate
22 impact.

23 JUDGE SINGAS: What's that?

24 MR. SHWEDER: That's disparate impact. And - - -
25 and that's very different. And I think that that is a

1 fundamental error in the way that plaintiffs are
2 approaching this equal protection claim, is that disparate
3 impact is not the same as intentional. You need to show -
4 - - this is Arlington Heights. You need to show all these
5 different circumstances that would make you think that - -
6 - that the municipality is changing course in some way or
7 it's not doing things the way it regularly does. All the
8 evidence here shows that we are actually taking steps to
9 try to prevent the racial imbalances.

10 JUDGE RIVERA: Well, there's not evidence. There
11 are allegations. So let's get to that. As I understand
12 what you were now arguing, you're arguing the merits.

13 MR. SHWEDER: Not at all, Your Honor. I'm
14 arguing with their allegations because they need to - - - I
15 mean, if they're going to allege equal protection - - -

16 JUDGE RIVERA: Yes.

17 MR. SHWEDER: - - - they have to - - - they have
18 to show some sort of indicia that there's intent.

19 JUDGE RIVERA: What is your understanding of
20 their theory of intent?

21 MR. SHWEDER: It - - - for - - - as to the city,
22 there is literally only one thing.

23 JUDGE RIVERA: Okay.

24 MR. SHWEDER: And that is that we have not vetted
25 the SHSAT test well enough. That is the only thing that's

1 related to the city. Everything else shows that the city
2 is actually working against this, including that we're
3 being sued by plaintiffs for the actions that were taken in
4 the discovery program.

5 We're getting it from one side where we have - -
6 - where we have these plaintiffs saying, you have to do
7 more. And then when we do more, we're getting it from the
8 other side, from plaintiffs who are saying, wait, that's an
9 equal protection violation, what you're doing. This all is
10 pretty strong evidence, allegations, whatever you want to
11 call it at this point, that we are not actually in that
12 Arlington Heights factors.

13 But let me go to the vetting, okay? So their one
14 allegation, it's on paragraph 95, page 57 of the record.
15 That is literally the only thing that they say about the
16 city. So they - - - because we don't control the Hecht-
17 Calandra Act. So they say that it's not well vetted. But
18 this combines disparate impact and intentional
19 discrimination in a way that is not appropriate because a
20 disparate impact claim involves two parts.

21 First, you have to show racial disparities, which
22 we acknowledge exist here. Second, you have to show that
23 there's not a legitimate basis to account for that, right?
24 And that's when it - - - when you're talking about tests,
25 that's kind of baked into the allegation you're making,

1 that there's something wrong with this test. But it's not
2 a separate indicia of intent. It's all part of the
3 disparate impact claim.

4 So I think there's a real risk that if you allow
5 this to go forward, you're kind of collapsing the
6 difference between a disparate impact claim and a claim of
7 intentional discrimination. And I think that's really the
8 big problem with their claim as against the city. I think
9 the - - -

10 CHIEF JUDGE WILSON: Counsel, your red light's
11 been on for a while.

12 MR. SHWEDER: Can I - - - can I just address the
13 - - - the Human Rights claim? I mean, because I think
14 that's a big part of the case. If you prefer - - -

15 CHIEF JUDGE WILSON: You do - - - you've saved
16 time for rebuttal. Why don't you take it then?

17 MR. SHWEDER: Thank you.

18 MR. DRAPER: Thank you, Your Honors. Paul
19 Draper, arguing on behalf of the intervener appellant,
20 Defending Education. I'd like to reserve one minute for
21 rebuttal, if I may.

22 CHIEF JUDGE WILSON: Yes.

23 MR. DRAPER: So at bottom, plaintiffs in this
24 case claim that New York City school system somehow creates
25 a racial caste system precisely because it doesn't use race

1 as a factor in admissions, teacher hiring, and curriculum
 2 development. That claim is as wrong as it sounds. And
 3 plaintiffs should lose their case for two reasons. First,
 4 their claims are not justiciable. And second, their claims
 5 fail on the merits. In my limited time, I'd like to focus
 6 on justiciability.

7 This court has repeatedly said that this court is
 8 not capable of overriding the decisions of policy experts
 9 in matters of discretion and policies-laden decisions. And
 10 that includes education.

11 JUDGE HALLIGAN: How do you square that - - -
 12 over here. How do you square that view with the decisions
 13 in the CFE trilogy?

14 MR. DRAPER: I don't think CFE undercuts that at
 15 all, Your Honor. So you know, I think the - - - I think
 16 CFE is very consistent with that. I'm not - - - could you
 17 - - -

18 JUDGE HALLIGAN: How so?

19 MR. DRAPER: - - - maybe articulate - - - sorry.

20 JUDGE HALLIGAN: How so?

21 MR. DRAPER: Could you maybe - - - I'm - - - I'm
 22 not sure why it would undercut it.

23 JUDGE HALLIGAN: Well, if the proposition you're
 24 articulating is true, then why would the disputes in CFE
 25 have been justiciable?



1 MR. DRAPER: Right. So I - - - I don't think,
2 Your Honor, that there's no potential claim related to the
3 education system that's not justiciable. The question is
4 whether particular claims brought by a particular
5 plaintiff.

6 JUDGE HALLIGAN: Right. And why is - - - why are
7 these distinct from the types in CFE in a way that makes
8 them nonjusticiable, in your view?

9 MR. DRAPER: Right. So I think the reason these
10 claims aren't justiciable, Your Honor, is because the
11 plaintiffs here are not claiming any sort of discrete
12 individual harm to them that violates a statutory or
13 constitutional obligation. What they're claiming is that
14 they would - - -

15 CHIEF JUDGE WILSON: Wait. That's two pieces to
16 that. Do you think they're not claiming any discrete harm
17 to them?

18 MR. DRAPER: I think they have not alleged, for
19 example, Your Honor, that any of the plaintiffs here or
20 anyone has been denied admission - - - for example, take
21 their admissions arguments - - - has been denied admission
22 to a - - - to a selective school in New York City on
23 account of their race.

24 They argue that if the city adopted a different
25 admission system that prioritized race over what the city

1 describes as academic merit, then the city would achieve a
2 more racially proportionate admissions outcome. But they
3 have not - - - they have not alleged at all that anyone has
4 been denied admission to a school on account of their race
5 where they would have otherwise qualified.

6 CHIEF JUDGE WILSON: Well, haven't - - -

7 MR. DRAPER: That would put this case - - -

8 CHIEF JUDGE WILSON: - - - haven't they alleged
9 that some of the schools, based on, essentially, geography
10 are in poorer shape and provide a poorer level of education
11 than others do and that those schools are ones that have
12 larger minority populations?

13 MR. DRAPER: So they've alleged that some schools
14 are worse than others, Your Honor. That bleeds a little
15 bit into the merits of the education article claim. This
16 court has always said - - - to sort of touch on what my
17 colleagues have already articulated - - -

18 CHIEF JUDGE WILSON: I thought you were talking
19 about justiciability.

20 MR. DRAPER: Yeah. So I think the question about
21 where - - - where to allocate finite resources is exactly
22 the kind of discretionary decision that this court - - -

23 JUDGE HALLIGAN: But that was - - -

24 MR. DRAPER: - - - has said is not justiciable.

25 JUDGE HALLIGAN: I think that was one of the



1 questions, maybe a fundamental question, at issue in the
2 CFE cases.

3 MR. DRAPER: Right. So the question - - - what
4 is justiciable is if the city or the state has violated
5 their core minimal obligations under the education article.
6 That's not a discretionary decision. So the education
7 article - - -

8 JUDGE HALLIGAN: Isn't that - - -

9 MR. DRAPER: - - - and what CFE addressed.

10 JUDGE HALLIGAN: - - - the question before us?

11 MR. DRAPER: The - - - well, the question - - -
12 the plaintiffs have not alleged a violation of the
13 education article that is justiciable. So a violation of
14 the education article - - -

15 JUDGE HALLIGAN: I'm trying to understand whether
16 that goes to an argument that they failed to state a claim,
17 as opposed to that issue is not justiciable.

18 MR. DRAPER: Well, I think they've done both,
19 Your Honor. But I think it's important - - - this is why
20 it's important to understand particularly exactly what
21 their claims are. So their claim here is not that none of
22 the students in the district - - - in - - - in the New York
23 City schools have access to a sound basic education because
24 the state and city have failed to fund them.

25 What they've alleged is that the state and the

1 city have not allocated their finite resources enough to
2 provide exactly the same standard of education to every
3 student in the district. Even if you accept that claim as
4 true, that is a question of discretionary allocation of
5 resources.

6 CHIEF JUDGE WILSON: So if they allocated - - -

7 MR. DRAPER: And the education article - - -

8 CHIEF JUDGE WILSON: - - - if they allocated zero
9 to some set of schools that were schools that had
10 predominantly populations of color, that's discretionary,
11 nonjusticiable?

12 MR. DRAPER: Well, if they did that intentionally
13 on the basis of - - -

14 CHIEF JUDGE WILSON: Well, their allocations are
15 intentional.

16 MR. DRAPER: They've alleged a conclusory
17 allegation in some of their equal protection arguments.

18 CHIEF JUDGE WILSON: So wait. So justiciability
19 turns on the same intent that the equal protection clause
20 turns on?

21 MR. DRAPER: No, Your Honor. The justiciability
22 argument, first, you have to look and say, what are they
23 claiming?

24 CHIEF JUDGE WILSON: Yeah.

25 MR. DRAPER: And then you have to ask, is that



1 particular claim justiciable? The fact that they - - -

2 CHIEF JUDGE WILSON: And so a claim - - -

3 MR. DRAPER: - - - might be able to allege - - -

4 CHIEF JUDGE WILSON: - - - a claim that they have
5 allocated resources in such a way that communities of color
6 get fewer resources is not justiciable?

7 MR. DRAPER: I think the - - - the claim that
8 they've allocated - - - may I continue with the - - -

9 CHIEF JUDGE WILSON: Please.

10 MR. DRAPER: - - - that it's - - - if they are
11 allocating resources with the intent of depriving students
12 of a certain racial background of the minimum sound basic
13 education required by the education article across the
14 school district, that might allege a equal protection
15 violation.

16 But I think the two important things to
17 understand here is that they're not alleging that students
18 across the district of any race are deprived a sound basic
19 education because they agree the - - - what they're
20 alleging is that particular schools in the district perform
21 worse than other schools in the district. That is exactly
22 the kind of thing that this court has said is not an
23 education article claim because the education article is
24 concerned with districtwide failures.

25 CHIEF JUDGE WILSON: Thank you.

1 MR. DRAPER: Once you get outside of that core
 2 education article claim, or any of these other things, once
 3 you get outside of an equal protection claim where you're
 4 saying that a particular student was denied admission, for
 5 example, on the basis of their race, even though they
 6 otherwise qualified, that would be something this court has
 7 said is justiciable and is required by the equal protection
 8 clause. Once you get outside of that - - -

9 CHIEF JUDGE WILSON: Thank you. Your - - - your
 10 - - -

11 MR. DRAPER: - - - you're arguing about
 12 discretion - - -

13 CHIEF JUDGE WILSON: - - - your red light's on.
 14 Got it.

15 MR. DRAPER: - - - then - - - then you're in
 16 nonjusticiable territory.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. DRAPER: Thank you, Your Honor.

19 MR. ROSENBAUM: Good afternoon, Your Honors.
 20 Mark Rosenbaum on behalf of the respondents here. Your
 21 Honor, may it please the court. The issue before Your
 22 Honors this afternoon is simply, at this very early stage,
 23 the beginning stage of litigation, whether or not we have
 24 stated causes of action, whether or not the amended
 25 complaint states that.



1 Most of the discussion this afternoon from the
2 other side as well as their papers are factual questions.
3 And that, as Your Honor recognized, is precisely what the
4 discovery and the process of developing - - -

5 JUDGE TROUTMAN: With respect to the education
6 article, do you have to allege a districtwide failure? And
7 did you do so?

8 MR. ROSENBAUM: We did - - - we do have to argue
9 here - - - allege, Your Honor, a districtwide - - - a
10 districtwide injury. The court said that, for example, in
11 the NYCLU case, where there were twenty-seven schools,
12 there wasn't a districtwide problem. That was a problem
13 that, Your Honor, dealt with in the Aristy-Farar case,
14 where for Buffalo or Eureka, for unnamed districts, there
15 was no statement of a districtwide problem.

16 But we've done that here, Your Honor, because
17 what exists in the New York City school system, hyper-
18 segregated school system, one of the most segregated, if
19 not the most segregated school system in the United States,
20 is the creation of a two-tier system, districtwide
21 policies, districtwide policies of admissions, of
22 enrollment, and of the provision of the basic inputs which
23 this court has recognized in CFE II at 909 through 914 - -
24 - 914 and at 317 and 319 of CFE I. That is a districtwide
25 problem.

1 And the problem is that predominant - - - these
2 schools, these segregated schools, these unscreened
3 schools, Your Honor, are not providing a sound basic
4 education.

5 JUDGE HALLIGAN: Can I ask you about - - - to
6 follow up on your reference to CFE?

7 MR. ROSENBAUM: Yes.

8 JUDGE HALLIGAN: My recollection, if it's
9 correct, is that the complaint in CFE had fairly more
10 specific allegations about output deficiencies. Is that -
11 - - is that a fair characterization; do you think? And - -
12 - and if so, what are we to make of that in terms of the
13 viability of the education article claim?

14 MR. ROSENBAUM: I want to be frank with Your
15 Honor. I don't remember that case establishing - - -
16 stating more specific outcomes. But let's talk about what
17 the outcomes are that we've alleged here because they more
18 meet the standard of what this court has said is required.

19 Here's what we say. Your Honor, stated in CFE
20 II, one parameter - - - I'm going to go through all of them
21 - - - one parameter, and that is graduation rates. The
22 graduation rates for the kids whom we represent, for black
23 and brown kids, is horrendous. One out of four kids who
24 are black or brown are not graduating from New York City
25 schools. That's eight and ten percent lower than white and

1 Asian students.

2 JUDGE HALLIGAN: And how is that tethered in
3 terms of the allegations in your complaint to what I take
4 to be the primary focus, or certainly a primary focus, of
5 your complaint, which is the admissions test for the
6 selective schools.

7 MR. ROSENBAUM: Great question, Your Honor.

8 JUDGE HALLIGAN: What's the causation link there
9 that you've alleged?

10 MR. ROSENBAUM: I just want to put a pin in the
11 outputs because I haven't completed all the outputs - - -

12 JUDGE HALLIGAN: Okay.

13 MR. ROSENBAUM: - - - that we've described. But
14 I want to answer your question directly, first of all. The
15 core of this case, there are several pillars of this case.
16 One are the tests that you all were talking about. We have
17 alleged that those tests are pedagogically unsound - - -
18 unsound. We have alleged that they are culturally and
19 racially biased. We have alleged they are - - -

20 JUDGE HALLIGAN: But how does that go to a
21 broader - - - broader ramifications for students outside
22 those who are applying to the specialized high schools?

23 MR. ROSENBAUM: The broader inputs, Your Honor,
24 are essentially differential from what we're talking about
25 regarding the test. We have alleged inputs with respect to

1 instrumentalities of learning, teaching, curriculum, access
2 to arts, sports, and extracurricular activities, and the
3 physical plans of the schools. We have done that at
4 paragraphs 100, 15 and 16, 5 and 6, 87 and 88, 103 and 104.

5 JUDGE GARCIA: And those are many numbers. But
6 if you look at those allegations as against the CFE
7 allegations, there's much more specificity as to computers
8 and other hard core instrumentalities.

9 MR. ROSENBAUM: I don't think that's correct,
10 Your Honor.

11 JUDGE GARCIA: Well, then I would suggest you
12 read the CFE complaint.

13 MR. ROSENBAUM: Let me answer it this way, Judge
14 Garcia. What we have alleged with respect, for example, to
15 instrumentalities of learning is that with respect to
16 textbooks, that the kids in the unscreened schools are
17 getting dilapidated, out-of-date, and insufficient supply
18 of textbooks, three kids to a textbook. We've alleged that
19 there is not paper, which is one of the things that was
20 talked about in CFE. We have alleged that there are not
21 markers. We have alleged that there is not lab equipment.

22 JUDGE GARCIA: Those are very general
23 allegations. But again, in the CFE complaint, they seem to
24 have specific numbers as to the disparities that they were
25 alleging, rather than, you know, there's no markers,

1 there's no toilet paper in one school. Those are the type
2 of allegations I see in your complaint.

3 MR. ROSENBAUM: We have - - - let me answer that
4 this way, Your Honor. We have alleged a number of the
5 specific sorts of inputs deficiencies that Your Honor and I
6 are talking about. If they do not have the particularity
7 with which you are describing, I want to say two things.
8 First of all, because we're on a motion to dismiss, all
9 facts are treated as true.

10 JUDGE GARCIA: But we said in Aristy - - -

11 MR. ROSENBAUM: But we can always - - -

12 JUDGE GARCIA: - - - and you've made this point
13 before, but we said in Aristy, although it is a liberal
14 standard, it's a standard. And there's a reason for this
15 standard. And we said that in Aristy in one of those
16 cases.

17 MR. ROSENBAUM: Yes, you did.

18 JUDGE GARCIA: So how do you meet that standard
19 with these types of allegations?

20 MR. ROSENBAUM: In Aristy, the problem was that
21 there were no allegations of causation, that the - - - the
22 specific problem was you couldn't get from the input claims
23 to the output claims. There were arguments about a \$290
24 million deficit. There was a general argument that certain
25 schools didn't have what was required. But in terms of the

1 actual causation, the linkage, that was missing. And that
2 - - - if that were missing in our case, then it would be a
3 different story.

4 JUDGE GARCIA: But how, for example, would you
5 say a certain curriculum is causing these outputs?

6 MR. ROSENBAUM: That is another great question,
7 Your Honor. And the Appellate Division dealt with that at
8 pages 297 and 300 and in footnote 10. Here's what we say
9 with respect to, for example, the curriculum. We say a
10 couple of things.

11 We say that the curriculum is outdated. We say
12 that - - - and I agree with counsel with respect to this.
13 We do make the claim, which was not made previously - - -
14 we're certainly not barred from talking about additions to
15 the education article. This court said that over and over
16 again. But what we - - - what we've said is that what
17 these children are getting are textbooks and curriculum
18 that demean or ignore certain cultures. For example, at
19 paragraph 116, we talk - - -

20 JUDGE GARCIA: But that still, assume that's
21 true, has to cause a deficiency in a sound basic education
22 as we've defined it, which is real, standard, but limited
23 in certain ways.

24 MR. ROSENBAUM: And we make that causation
25 argument. If Your Honor looks at footnote 10 of the

1 Appellate Division decision, that talks about the fact that
2 the state itself recognized that the sort of curriculum
3 you're talking about, which essentially blocks out other
4 cultures, kids from K to 5, eighty-three percent of the
5 authors they're reading are white authors.

6 And what - - - what footnote 10 points out, using
7 the state's own reports, the state's own reports, is that
8 the sort of curriculum we say is required, if in fact were
9 implemented, because it's not in these kids' - - - in these
10 kids' schools, but if it were implemented, would lead to
11 higher academic achievement, would lead to more self-
12 esteem, would lead to critical thinking, and would lead to
13 civic engagement. And it - - - and that - - - that's - - -
14 that paragraph refers to a growing body of research that
15 supports those claims.

16 The city says - - - and this is the bottom part
17 of footnote 10 - - - that if these sorts of curriculum were
18 applied, there would be less absenteeism, higher academic
19 performance, greater graduation rates, lower dropout rates,
20 more self-esteem for the kids, and that there would be more
21 critical thinking, and that would lead to more
22 opportunities for higher education, and it would lead to
23 better work, and it would lead to greater civic engagement.
24 It would lead to critical thinking, which is, after all,
25 the essence of that. That meets our standard just on what

1 the state and the city say.

2 And we have - - - we are extraordinarily
3 transparent in this complaint in that we lay out those
4 experts who have said that if these - - - these sorts of
5 curriculum we're talking about were added to these schools,
6 put in place in these schools, the sort of outputs, the
7 dismal, abysmal outputs that are - - - characterize the
8 schools where these kids attend, that that would address
9 those matters. And that meets our pleading criteria in
10 this particular matter.

11 JUDGE CANNATARO: Counsel, can you go back to the
12 outcomes? Because you said you had a list. You really
13 only got to graduation rates. I assume there's more.

14 MR. ROSENBAUM: There are - - - there is, Your
15 Honor.

16 JUDGE CANNATARO: What is properly alleged in the
17 complaint regarding outcomes?

18 MR. ROSENBAUM: Okay. And I'm tracking, Your
19 Honor, from this court's decision in CFE II, pages 909 to -
20 - - to 914 to 919. Here's what - - - here's the second
21 one, Your Honor. One of the issues is, in fact, what
22 happens with the Regents diplomas. That is treated as a
23 "virtual key" to colleges and good worker - - - work
24 opportunities.

25 Here's the - - - here's the numbers with respect

1 to that we allege. For black students, the number of
 2 diplomas is eight percent, eight percent. For Latino kids,
 3 it's twelve percent, twelve percent. That is markedly
 4 lower. It's almost a quarter lower than what white and
 5 Asian kids are getting. It's more than a quarter. It's -
 6 - - it's four times less than what those kids are getting.
 7 That is a - - - that access to the - - - to Regents
 8 diplomas is part of CFE II too.

9 A third area that we've alleged is with respect
 10 to the specialized schools. And that's why that's so
 11 important, Judge Halligan, because it's a measure of how
 12 these kids are learning, how much they're learning, whether
 13 even if they're even in the game. On those schools, Your
 14 Honor, they might as well - - -

15 JUDGE HALLIGAN: So to make sure I understand,
 16 your argument about the specialized schools test is that -
 17 - - is what exactly that the - - - that the - - -

18 MR. ROSENBAUM: It is principally - - -

19 JUDGE HALLIGAN: - - - disparate success in - - -
 20 in gaining entrance reflects broader deficiencies in the
 21 schools, or is it something else?

22 MR. ROSENBAUM: That's - - - that's not the
 23 principal argument.

24 JUDGE HALLIGAN: Okay.

25 MR. ROSENBAUM: The principal argument is what

1 Your Honor touched upon when you were - - - when you were
2 questioning. And that is, under the equal protection
3 clause and the Human Rights Law, those schools are shut off
4 to these kids with respect to - - -

5 JUDGE HALLIGAN: Yeah. But I'm asking you to
6 focus on the education article, if you would. What - - -
7 what is the nub of the claim about how the specialized
8 school tests bear on your education article claim?

9 MR. ROSENBAUM: Okay. And I want to answer this
10 as directly as I can. I'm not evading your question. I -
11 - - I want to say that the centerpiece are the other two
12 claims that we're talking about. But what I'm saying is
13 it's not irrelevant to these - - -

14 JUDGE HALLIGAN: But you are making an education
15 article claim, right?

16 MR. ROSENBAUM: We are. And the education
17 article claim is that you can draw the inference from the
18 fact that so few kids are in - - - get opportunities to go
19 to these schools, that they are getting a deficient
20 education. They're not even in the running.

21 JUDGE HALLIGAN: So we should infer from the
22 disparate admission statistics that there are deficiencies
23 in the rest of the city school system?

24 MR. ROSENBAUM: Exactly right. And - - -

25 JUDGE HALLIGAN: That - - - how does that

1 causation - - - the rigor of that causation argument, or
2 perhaps the lack of it, measure up against what the court
3 did in the CFE cases?

4 MR. ROSENBAUM: I don't think it's as strong as
5 it was in the CFE with respect to the funding. I think it
6 is one reasonable inference to be drawn. We don't need
7 that with respect to the five areas that I've talked about,
8 which the court has recognized.

9 JUDGE CANNATARO: You don't need causation?

10 MR. ROSENBAUM: No, no, no. We need causation.
11 But what I'm saying to Judge Halligan is that with respect
12 to whether or not we have shown the inputs, what I'm saying
13 is, the - - - the test is it is one inference that can be
14 drawn. It's not a core inference can be drawn. Our case
15 survives without - - - with respect to the education
16 article. Without it, I think it is one inference that can
17 fairly be drawn.

18 Our experts will say that the fact that these
19 kids are out of the running demonstrate that they're not -
20 - - they're at schools where they're not getting the same
21 sort of education. If they were in the screen schools - -
22 - if they were in the screen schools - - -

23 JUDGE GARCIA: I'm sorry. I thought the argument
24 was they're not getting into the screen schools at the same
25 rate because they're not in schools before that that offer

1 them a sound basic - - -

2 MR. ROSENBAUM: That is correct. They're - - -
3 but that's from the very beginning.

4 JUDGE GARCIA: But aren't the students who are
5 getting into those schools also, many of them, coming from
6 those same schools?

7 MR. ROSENBAUM: Say that again, Your Honor.

8 JUDGE GARCIA: Aren't the students who get into
9 the specialized schools coming from those same schools?

10 MR. ROSENBAUM: From the unscreened schools?

11 JUDGE GARCIA: Yeah.

12 MR. ROSENBAUM: Not - - - not - - -

13 JUDGE GARCIA: Before they get to high school.

14 MR. ROSENBAUM: What - - - what we're saying - -
15 - what we're saying, Your Honor, is that it's a segregate -
16 - - let me see if I answer you correctly. If I don't - - -
17 if I'm not - - -

18 JUDGE GARCIA: I might just be misunderstanding
19 the process, but - - -

20 MR. ROSENBAUM: I may not be stating it clearly.
21 I don't - - - I don't - - - what we're saying is it is a
22 systemwide prob - - - problem and that - - - that the kids
23 who are going to the screened schools - - -

24 JUDGE GARCIA: From the beginning?

25 MR. ROSENBAUM: From the beginning. Those are

1 superior schools. I'm not saying that the other schools
2 are - - - I'm saying that the other schools do not meet the
3 sound basic education standard.

4 JUDGE GARCIA: That has to be the argument for an
5 education article claim?

6 MR. ROSENBAUM: Exactly right. And it's not a
7 hard case to make, Your Honor. Those kids are not getting
8 the basic inputs they need in each of the categories that
9 Your Honors have identified.

10 JUDGE GARCIA: But if the argument - - - and
11 maybe I have the argument wrong - - - is from the
12 beginning, they're segregated out of these screened
13 schools, how is it that from the beginning, that they're
14 not getting a sound basic education? That sounds like it
15 happens early enough in the process where they haven't had
16 an opportunity - - -

17 MR. ROSENBAUM: That's what we allege in the - -
18 -

19 JUDGE GARCIA: - - - to not get a sound basic
20 education.

21 MR. ROSENBAUM: That's what we allege in the - -
22 - in the case - - - in this case, Your Honor, that even
23 beginning in the elementary schools, when there were - - -
24 kids were getting screened at age four to - - - to get - -
25 - to get into these pipelines - - -

1 JUDGE GARCIA: So where is the deficiency in the
2 sound basic education at age four?

3 MR. ROSENBAUM: All the way through. It is a
4 systemwide - - -

5 JUDGE GARCIA: We start at four. What education
6 have they had there that's not a sound basic education?

7 MR. ROSENBAUM: I'm saying - - - that is utilized
8 to show, Your Honor, that it's not a pedagogically sound -
9 - - it is not a - - - it is a culturally biased system from
10 day one. But in terms - - - but what we allege is
11 precisely what Your Honor is getting at. That is from
12 elementary to middle to high school, these kids who are
13 going to the unscreened schools are not receiving a sound
14 basic education.

15 JUDGE CANNATARO: But aren't the kids that are
16 going to the screened schools getting the same - - -
17 they're going through the same educational system; are they
18 not?

19 MR. ROSENBAUM: They're - - - in name, yes. But
20 it's a two-tier system, Your Honor. It is a - - - the - -
21 - the segregation, which is the - - - which is the engine
22 here and which is separating kids into schools that meet
23 sound basic education - - -

24 JUDGE RIVERA: Okay. So - - -

25 MR. ROSENBAUM: - - - and go way beyond it.

1 JUDGE RIVERA: So what's missing in the racially
2 segregated schools with respect to the students that you're
3 talking about are denied the sound basic education?

4 MR. ROSENBAUM: They're missing - - - they're
5 missing the five inputs which - - -

6 JUDGE RIVERA: Go ahead.

7 MR. ROSENBAUM: - - - this court has recognized.
8 The instrumentalities of learning, the textbooks are out of
9 date. They're dilapidated. There's not enough of them,
10 three kids to a textbook. They don't even have paper.
11 They don't even have markers. They don't have - - -

12 JUDGE RIVERA: Are you comparing that to what the
13 screened schools have - - -

14 MR. ROSENBAUM: I'm just - - -

15 JUDGE RIVERA: - - - or just as a general
16 assertion?

17 MR. ROSENBAUM: As an absolute matter, Your
18 Honor, as an absolute matter. If we want to make the
19 comparisons - - -

20 JUDGE RIVERA: No, I'm asking you.

21 MR. ROSENBAUM: I'm - - - I'm - - - and I'm
22 saying to you, as an absolute matter - - -

23 JUDGE RIVERA: That's what you alleged.

24 MR. ROSENBAUM: That is what we are alleging.

25 JUDGE RIVERA: Don't even need to look at the

1 screened schools?

2 MR. ROSENBAUM: Exactly right.

3 JUDGE RIVERA: Okay.

4 MR. ROSENBAUM: We do - - - when we get to equal
5 protection, we can talk about what's happening.

6 JUDGE RIVERA: Yes. But I'm saying for this
7 argument.

8 MR. ROSENBAUM: But absolutely right. If it were
9 a system of itself - - -

10 JUDGE RIVERA: Okay. So it's the - - - go ahead.

11 MR. ROSENBAUM: Okay.

12 JUDGE RIVERA: You said there were five.

13 MR. ROSENBAUM: With respect to the physical
14 buildings themselves, we allege that these are the - - -
15 the parlous state of the conditions there. They are
16 overcrowded. There are leaky roofs and hallways. There is
17 vermin in those schools. Those buildings are dilapidated.
18 They are unsanitary.

19 With respect to arts - - - arts, sports, and
20 extracurricular activities, which this court has
21 recognized, these kids don't have a shot at that. They
22 don't have those sorts of opportunities at all. Sometimes
23 when they're even in the same building, they don't have
24 those sorts of opportunities.

25 With respect to teachers, what we allege is that

1 the teachers there are not - - - they are not recruited.
2 They are not retained. And they don't get the supports
3 they need, as an absolute matter. And with respect to the
4 curriculum, what we're arguing is that that curriculum - -
5 -

6 JUDGE RIVERA: These are - - - these are
7 perennial arguments, also a system that existed at the time
8 CFE I, II were filed?

9 MR. ROSENBAUM: Say that again, please.

10 JUDGE RIVERA: It's a perennial argument. These
11 are the traditional arguments made regarding funding,
12 regarding the differences in the school system.

13 MR. ROSENBAUM: We are not - - - you're - - - you
14 are - - - in terms of the inputs - - -

15 JUDGE RIVERA: Yes.

16 MR. ROSENBAUM: - - - Your Honor is exactly
17 right. These - - - these are garden-variety inputs that
18 the court recognized in - - - in the CFE cases and have
19 repeated many times.

20 JUDGE GARCIA: And I thought in CFE they had
21 specific numbers on types of degrees, the reviews of those
22 particular teachers. They had specifics as to those
23 teachers and how qualified they were for - - - to teach a
24 core curriculum. And this does not sound like CFE
25 allegations to me.

1 MR. ROSENBAUM: What - - - what I meant to say,
2 Judge Garcia, is that they are within those established
3 categories. The argument with respect to teachers is that
4 they have the least experienced teachers. And in addition,
5 with respect to those teachers - - - again, I go back to
6 the paragraph - - - page 300 of the Appellate Division
7 opinion. What we're saying there - - - may I finish my
8 answer to Your Honor's question?

9 CHIEF JUDGE WILSON: Yes, please. Yeah.

10 MR. ROSENBAUM: What I'm saying there, Your
11 Honor, is that what those numerous studies have showed,
12 what the research demonstrates, and what the experts all
13 say, and what we will show at trial, is by not having a
14 diverse body of teachers - - - and we have multiple
15 allegations on this - - - that is not present in their
16 schools, and there is a causation factor with respect to
17 the matters I've talked about, academic achievement, with
18 respect to graduation, with respect to dropouts, that that
19 - - - and we are prepared to prove that that is a factual
20 matter - - -

21 JUDGE HALLIGAN: May I - - -

22 MR. ROSENBAUM: - - - that that absence - - -

23 JUDGE HALLIGAN: May I ask one question, Chief?

24 CHIEF JUDGE WILSON: Yes.

25 JUDGE HALLIGAN: On the state HRL claim, right,

1 296(4), I think, requires proof that you've been denied the
2 use of facilities to a person otherwise qualified. So can
3 you point me where in the complaint you allege that there
4 are students who are denied admission and are otherwise
5 qualified, just the - - - the paragraphs in the complaint?

6 MR. ROSENBAUM: Those are the paragraphs that
7 describe the plaintiffs - - - the plaintiffs themselves and
8 the organi - - - organizations themselves.

9 JUDGE HALLIGAN: And so your view is that they -
10 - - they describe - - - they allege that the students are
11 otherwise qualified?

12 MR. ROSENBAUM: But that's where Your Honor's
13 questions about the test come in, because to the extent
14 that they are using those tests - - - and there's no
15 disagreement here. And incidentally, the city expanded
16 that test to five other schools that they called
17 specialized schools.

18 But with respect to those tests, what we are
19 arguing is that is a phony way, it is a pedagogically
20 unsound way, it is - - - it is an inappropriate way to
21 determine who should get into those schools and that there
22 are children who if they were going to the schools that met
23 basic standards, and even if they - - - even for some who
24 did not, that they don't have a fighting chance because the
25 use of those tests have no basis whatsoever. That is a

1 clear violation of 296 Section - - -

2 JUDGE HALLIGAN: So you're resting on - - -

3 MR. ROSENBAUM: - - - Subsection 4.

4 JUDGE HALLIGAN: - - - on deficiencies in the
5 test, as opposed to anything about the - - - the pool of
6 students you say are denied.

7 MR. ROSENBAUM: Exactly right.

8 JUDGE HALLIGAN: Okay. Thank you.

9 MR. ROSENBAUM: Exactly right.

10 CHIEF JUDGE WILSON: So I do have one more
11 question for you - - -

12 MR. ROSENBAUM: Sure.

13 CHIEF JUDGE WILSON: - - - back to the
14 Constitution claim. So you've said that some of the
15 schools in the city are providing a sound basic education
16 and some are not.

17 MR. ROSENBAUM: Correct.

18 CHIEF JUDGE WILSON: And for some of the failures
19 or inputs, if we want to call them that, that you identify,
20 they are perhaps not things that are directly funding
21 related. But some of them, like a leaky roof, substandard
22 facilities and so on, perhaps sound more like a funding
23 claim. But I didn't understand - - - and maybe I
24 misunderstood - - - that you weren't really bringing a
25 funding claim like the CFE cases.

1 MR. ROSENBAUM: We are not - - -

2 CHIEF JUDGE WILSON: Is that right?

3 MR. ROSENBAUM: We're not saying that the reason
4 that those are leaky roofs isn't because the state hasn't
5 funded those schools properly. We're saying that the
6 system is not working.

7 CHIEF JUDGE WILSON: Right. So does that mean
8 that you think that the state has provided sufficient funds
9 to the city, and the city is misallocating the funds?

10 MR. ROSENBAUM: What we're saying, Your Honor, is
11 that that is a factual matter to be developed at trial.

12 CHIEF JUDGE WILSON: I wonder what you pleaded is
13 what I'm asking. What - - -

14 MR. ROSENBAUM: Well, what we pleaded is that the
15 - - - the buildings themselves, as we - - - as you and I
16 are talking about it right now - - -

17 CHIEF JUDGE WILSON: Uh-huh.

18 MR. ROSENBAUM: - - - is a causation - - - is - -
19 - is what's causing the outputs. And with respect to what
20 caused the leaky roofs and the buildings themselves, we're
21 saying that that is a result of a segregated system that is
22 not giving these kids their constitutional due in terms of
23 that.

24 CHIEF JUDGE WILSON: So just to be clear, so
25 you're not saying that there's a lack of funding?

1 MR. ROSENBAUM: We haven't identified that as yet

2 - - -

3 CHIEF JUDGE WILSON: Okay. Right. That's - - -

4 MR. ROSENBAUM: - - - as what the - - - the facts
5 may in fact develop with respect to that.

6 CHIEF JUDGE WILSON: Well, I'm asking what you're
7 pleading, right, because we're going to limit you to the
8 pleading. So if you haven't pleaded that, the - - - the
9 facts may show something that you didn't plead, and you're
10 not recovering for that.

11 MR. ROSENBAUM: But what we have alleged is that
12 the segregation in the system itself has put these kids in
13 buildings which are not capable of getting the output
14 results.

15 CHIEF JUDGE WILSON: I understand that part of
16 it. I just wanted to confirm my understanding. You're not
17 really making a funding claim like the funding claims in
18 CFE.

19 MR. ROSENBAUM: That is correct, Your Honor.

20 CHIEF JUDGE WILSON: Okay. Thank you.

21 MR. ROSENBAUM: Okay. Thank you, all.

22 MR. GRUBE: Thank you. I'd like to briefly make
23 two points that are somewhat related, and both arise from
24 CFE II. I understood plaintiff's counsel to identify two
25 categories of deficiencies in his argument. One of them

1 was the traditional CFE inputs that we talked about. And I
2 understand him to have just acknowledged that those
3 deficiencies are not attributable the state.

4 And also, I would note that in the complaint,
5 they are pled in a conclusory fashion, as compared to the
6 other more aspirational inputs that are in the complaint.
7 And as to those, I would note that this court held in CFE
8 II that state guidance, state standards, Regents diplomas,
9 these are aspirational standards, not the constitutional
10 floor that the education article sets.

11 And one last point I'd like to make is that, in
12 CFE II, this court noted the importance of setting clear
13 parameters for education article claims. So to the extent
14 anything proceeds, it's important that the court set clear
15 parameters. And I didn't hear much about arguments about
16 the curriculum or diversity teacher workforce.

17 And so the court should make clear what can go
18 forward so that - - - this court looked at the experience
19 of New Jersey and noted the twelve different trips back to
20 the New Jersey Supreme Court in the Abbott litigation and
21 emphasized the importance of, at an early part of the stage
22 of the litigation, giving clear guidance so that the
23 parties will know what is expected of them. Thank you.

24 CHIEF JUDGE WILSON: Thank you.

25 MR. SHWEDER: Your Honors, I'd like to make a



1 brief causation point on the education article claim before
2 I talk about the human rights claim. This panel twice
3 asked my friend to identify where the causation was for the
4 outputs. And twice he said, great question, and then
5 pointed to the First Department's decision. And I've
6 explained how the First Department really got this
7 factually wrong.

8 My - - - plaintiffs have really provided a cheat
9 sheet to this court to see where zero allegations of
10 causation exist. Read their brief. Every time they say,
11 we allege causations between the input and the output, they
12 cite to the First Department decision or they cite to
13 nothing. There is nothing in the complaint alleging
14 causation.

15 And that even applies when you get to the
16 facilities argument. They say there are these poor
17 facilities and textbooks. They never make a causal
18 connection to poor graduation rates.

19 Last point on the output. You can't just say,
20 white people graduated eighty-four percent, black people
21 graduated at seventy-six percent, Latino people graduate at
22 seventy-four percent, and say that's a bad output. We have
23 no context for that. You need to compare that to other
24 statewide districts to understand. That could be the best
25 in the state. We don't know. You could add ten percentage

1 points to that and just assert - - -

2 JUDGE RIVERA: The best could - - - the best
3 might not be enough as a matter of law, correct?

4 MR. SHWEDER: No. I - - - that's - - -

5 JUDGE RIVERA: What you are describing or
6 defining as the best, as a matter of law, the court might
7 say, no, it's not.

8 MR. SHWEDER: I don't think that that's something
9 that could be said as a matter of law. I think that if
10 you're alleging this, you need - - - you know, we're
11 talking about a baseline education. You need to understand
12 how this compares to have any idea because they could add
13 ten percentage points to that and just make the same
14 assertion. You don't get to go forward on that kind of
15 output allegation.

16 That's CFE, where they very specifically looked
17 at the test scores, the graduation rates, and compared them
18 to other states. I mean, you can go through that. That's
19 what they did. They compared them. That's how they knew
20 that they were poor.

21 Okay. I'll get to the - - - I'll get to the
22 state Human Rights Law claim because this is important.

23 CHIEF JUDGE WILSON: It is important. But let me
24 limit you to a minute because you've had several chances to
25 do it, and you dodged them before. So you got a minute,

1 and that's it. And I'm going to cut you off.

2 MR. SHWEDER: Okay. Thank you. The court took a
3 very simplistic approach below. And it just said, well,
4 because you know, they ignored this court's precedent,
5 which basically says our state human rights claims track
6 the federal claims. That's the easy way to resolve this.

7 The court just didn't look at that. And it said,
8 well, because you allow for disparate impact claims to go
9 forward under the employment, then we should - - - you
10 know, there's not really good reason not to allow them to
11 go forward under denial of access to education. But that's
12 not a proper way to look at that. It's not textual at all.
13 And it ignores this court's precedent saying that the state
14 human rights claims laws track the federal laws. And we
15 know that under the title - - -

16 JUDGE SINGAS: Doesn't the Executive Law tell us
17 not to do that?

18 MR. SHWEDER: I'm sorry. I didn't hear the first
19 part.

20 JUDGE SINGAS: The Executive Law tells us not to
21 do that, not to look at federal analogs; is that right?

22 MR. SHWEDER: Well, this - - - this court has
23 rejected that idea very recently in McCabe. It did it in
24 Doe v. Bloomberg, where we said we're not just going to
25 look at that and ignore the text and the history of the

1 statute and say that we're not going to do that.

2 So if you - - - if you take a textual approach
3 here, it's really clear that this is supposed to be about
4 intent. "By reason of", that's what it talks about, that
5 you're discriminating "by reason of", denying the use of
6 facilities, permitting harassment. That is all very about
7 intent.

8 Now, you can look to the employment context, and
9 that "because of" language exists there too. But that's
10 not why the Supreme Court in *Griggs*, in *Inclusive*
11 *Communities*, said that that's why it can go under disparate
12 impact. It said it for a very different reason, because
13 there were parts of the - - - of the statutes there that
14 said - - - you know, for instance, "otherwise make
15 unavailable". It refers to the consequences of an action
16 rather than the actor's intent. And my position - - -

17 CHIEF JUDGE WILSON: Counsel.

18 MR. SHWEDER: - - - is that you can look at
19 (1) (a), 296(1) (a), and that kind of language exists there.
20 It's not the "because of". It's - - -

21 CHIEF JUDGE WILSON: Please wind yourself up.

22 MR. SHWEDER: Okay. It's something else. And
23 I'd say the First Department just didn't do any sort of
24 textual analysis. And a textual analysis here would allow
25 you to both find that the claim they bring under denial of

1 access to education requires intent, and in the employment
2 context, that a disparate impact, going forward. Thank
3 you, Your Honors.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. DRAPER: Thank you, Your Honors. I'd like to
6 make a point just about the core of the justiciability
7 doctrine and relate that back to the plaintiff's claims
8 here. So at its core, justiciability is about what the
9 court is able to manage, as opposed to sort of policy
10 education experts. And what the court requires in order to
11 do that is it must have a judicially manageable legal
12 standard. That's the kind of term this court and other
13 courts have used to describe the justiciability doctrine.

14 And so you can see the difference here between
15 plaintiff's claims and the kind of claims that are
16 justiciable. So in CFE, for example, the plaintiffs came
17 in and said, this entire district lacks the required
18 minimum for a sound basic education. They're not hitting
19 minimum graduation rates. They're not learning the basics
20 of reading, writing, mathematics. That's different from
21 what the plaintiffs are claiming.

22 And if you - - - and my friend on the other side
23 came up here, and he talked about, you know, that we would
24 have better graduation rates if the - - - the city adopted
25 the curriculum plaintiffs prefer. We would have more

1 equitable admission rates if the city adopted some kind of
2 different test. Things would just be better if plaintiffs'
3 preferred policies were adopted instead of the policies
4 that the city has in place. That is not a judicially
5 manageable standard.

6 If this court were to let those allegations move
7 forward, we would be back here in a few months, in a year,
8 deciding whether the policy that the city adopted instead
9 meets the plaintiff's preferred criteria for - - - for just
10 how good the city has to be before it meets - - - it meets
11 that standard. That's not a judicially manageable
12 standard. In practice, this is not a judicable case.
13 Thank you.

14 CHIEF JUDGE WILSON: Thank you.

15 (Court is adjourned)

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C E R T I F I C A T I O N

I, Joey Oliveros, certify that the foregoing transcript of proceedings in the Court of Appeals of IntegrateNYC v. State of NY, No. 75 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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