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COURT OF APPEALS

STATE OF NEW YORK

MIRIAM ARISTY-FARER, ET AL.,
Respondents,

-against-

THE STATE OF NEW YORK, ET AL., NO. 75
Appellants.

NEW YORKERS FOR STUDENTS' EDUCATIONAL
RIGHTS ("NYSER"), ET AL.,
Respondents,

-against-

THE STATE OF NEW YORK, ET AL.,
Appellants.

20 Eagle Street
Albany, New York
May 30, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Karen Schiffmiller
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1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is number 75, Aristy-Farer v. State of
3 New York; New Yorkers for Students' Educational Rights v.
4 State of New York.

5 Counsel?

6 MR. AMEND: I'd like to reserve two minutes - - -
7 I'd like two minutes for rebuttal, please.

8 CHIEF JUDGE DIFIORE: You may have two minutes,
9 sir.

10 MR. AMEND: Thank you.

11 CHIEF JUDGE DIFIORE: You're welcome.

12 MR. AMEND: May it please the court, Andrew Amend
13 for the State defendants. Three points compel dismissal of
14 all of the claims disputed in this Education Article
15 appeal. First, the First Department wrongly allowed
16 plaintiffs to pursue claims for increased funding to
17 hundreds of school districts where no facts about
18 educational services are alleged, despite this court's
19 clear decision that defects in such services are
20 indispensable to an Education Article frame.

21 JUDGE GARCIA: Counsel, you say disputed counts,
22 so would that include the counts - - - I think it's the
23 fourth cause of action against the City and I think
24 Syracuse is the other, specifically pleaded?

25 MR. AMEND: The disputed counts are the first two

1 causes of action in the NYSER complaint, in their entirety,
2 the Aristy-Farer action in its entirety, and the third and
3 fourth causes of action in the NYSER complaint as to all
4 districts other than New York City and Syracuse.

5 So second, the First Department wrongly allowed
6 plaintiffs to proceed with claims that modifications to the
7 Foundation Aid program automatically violated the Education
8 Article and this court's CFE decisions. Those are the
9 first two causes of action in the NYSER complaint.

10 Third, plaintiffs may not salvage their claims
11 via their improperly raised and meritless theory that the
12 Education Article allows challenges to the manner in which
13 the legislature deliberates about school aid appropriations
14 without any requirement to plead and prove a resulting
15 Constitutional injury.

16 Now starting with the first point, this court's
17 decisions make clear that the denial of minimally adequate
18 educational services is the sine qua non of an Education
19 Article claim, and that deficiencies in one or two
20 districts do not provide a basis to infer deficiencies in
21 other districts or the need for a remedy affecting other
22 districts, let alone the entire state.

23 CFE is a case in point. This court there refused
24 to extrapolate from a violation in New York City the need
25 for relief statewide.

1 JUDGE STEIN: Are there any situations, any
2 circumstances in which a cause of action could be brought
3 under the Education Article on a statewide basis, any at
4 all?

5 MR. AMEND: Certainly. We could exa - - -
6 imagine, for example, not that New York has anything like
7 this, but a situation in which a tenth grade education is
8 good enough to get a - - - a state teaching license. And
9 one could imagine a claimant saying that that obviously
10 leads to defects that are - - - are systemic.

11 Funding claims, however, are distinct and unique.
12 There are a few reasons for that. Funding, unlike teaching
13 quality itself, or unlike, you know, let's say there were,
14 essentially, a meaningless high school diploma requirement,
15 those don't go - - - dollars from the state do not go - - -
16 they are not themselves educational inputs. They are not
17 educational services. And because of the important element
18 of local control - - -

19 JUDGE RIVERA: But with - - - but without enough
20 funding, you can't get - - - or the argument goes, right -
21 - - without enough funding - - - if the funding is - - -
22 doesn't reach a certain threshold level, you can't provide
23 the kinds of services that insure an education within the
24 meaning of the Education Article, as this court has
25 previously defined it. Isn't that the whole point of the

1 argument?

2 MR. AMEND: The point that I was trying to make
3 is that the diversity of needs, costs, and conditions in
4 localities across the state, along with the important
5 element of local control that is embedded indication - - -
6 in the Education Article itself, mean that the denial of
7 dollars from the state is not going to have a uniform
8 impact across districts. In fact, the degree of impact is
9 likely to be very different, and that's especially the case
10 here, where scale backs to Foundation Aid were actually
11 implemented in a way as to lessen the impact on the
12 highest-need districts.

13 JUDGE FAHEY: Can I - - - can I ask a question?

14 MR. AMEND: Um-hum.

15 JUDGE FAHEY: Can we take a step back? If we
16 conceive the duty as - - - the Constitution creates a
17 particular duty here. If we can - - - we can conceive the
18 duty, it seems to me, in one of two ways, either as a
19 general duty, creating a Constitutional right, that the
20 Government must do this to its citizens as a whole, or it
21 creates a Constitutional right in the individual recipient
22 of the educational obligation. And that, of course, would
23 then mean that if the duty is viewed that way, then we
24 create a statewide right. Have you given any thought to
25 that in - - - in the structuring of the duty?

1 MR. AMEND: Yes, in fact, that is exactly the
2 point that this court gave thought to in the Levittown
3 complaint. There was an Appellate Division - - -

4 JUDGE FAHEY: Well, I got it from Judge Simons'
5 dissent in the - - - in the CFE I, but it's - - - I think
6 he was quoting Levittown. I think you're right.

7 MR. AMEND: What happened in Levittown, they - -
8 - the point that I had in mind was there was a statement by
9 one of the Appellate Division justices that the State had
10 failed to create a fiscal system that provided for
11 education statewide. And that Appellate Division justice
12 concluded that such a system was itself required by the
13 Education Article. This court rejected that view and held
14 that so long as adequate educational opportunities are
15 provided, it is immaterial how the legislature got there.
16 And this - - -

17 JUDGE RIVERA: So if the legislature decided that
18 the way to get, what you're calling it "there", right, the
19 achieving the - - - the type of minimal education required
20 by the Education Article, if the legislature actually
21 identified the threshold funding that required that, and -
22 - - and did not provide for that threshold funding, would
23 they have a claim? A statewide claim?

24 MR. AMEND: No, Your Honor. Not just based on
25 those allegations alone. They would still have to prove

1 that educational services were below a Constitutional
2 level.

3 JUDGE RIVERA: But this is what I'm saying. Why
4 would they have to do that if the legislature itself
5 identifies for itself, isn't the legislature better or able
6 to make these kinds of determinations than the judiciary?
7 If this is a minimal amount you've got to have to provi - -
8 - to deliver what the Constitution requires - - -

9 MR. AMEND: First of all - - -

10 JUDGE RIVERA: - - - as explained, of course, in
11 the CFE decisions. I understand that part of it.

12 MR. AMEND: Sure. First, one thing I'd like to
13 do. To the extent that there is embedded in that question
14 a premise that the legislature and governor ever did that.
15 They did not.

16 JUDGE RIVERA: Whatever, it's my hypothetical.

17 MR. AMEND: Right.

18 JUDGE RIVERA: If they had done it - - -

19 MR. AMEND: In that - - - in that hyp - - - even
20 in that hypothetical, the determinations that the
21 legislature and the governor make are not themselves the
22 ultimate definition of a Constitutional right. The
23 ultimate definition of a Constitutional right is what
24 services are actually provided.

25 JUDGE STEIN: So are you saying that it - - - it

1 depends on things like what local funding may come into the
2 school system and how all of the funding is - - - is
3 applied in a particular school system? Is that - - - is
4 that - - -

5 MR. AMEND: That - - - that is - - -

6 JUDGE STEIN: - - - your argument?

7 MR. AMEND: - - - definitely a part of the
8 argument. And an important one. Just saying that, you
9 know, the State determined that it thought X-dollars was
10 the amount to provide, and then they didn't provide that,
11 doesn't mean that all that those dollars weren't provided.
12 And if, let's say that the legislature - - -

13 JUDGE RIVERA: I understand, but if - - - if the
14 court - - - I - - - I'm sort of not certain on appreciating
15 the way you're interpreting the - - - the prior cases on
16 this point. If - - - if the court says we're not well
17 placed to figure out what the dollar amounts should be,
18 that's the role of the legislature, but the legislature's
19 got to figure out what that amount is. And if the
20 legislature then says - - - it's my hypothetical, granted -
21 - - this is the amount and then doesn't allocate that
22 amount, don't they then have a claim?

23 MR. AMEND: No, Your Honor.

24 JUDGE RIVERA: A statewide claim?

25 MR. AMEND: No - - - no, Your Honor.

1 JUDGE RIVERA: So what's the point of the
2 exercise of sending it back to the legislature?

3 MR. AMEND: The legislature's amount - - - the
4 amount the legislature allocates from year to year is
5 presumed to be Constitutional, unless it is proven that it
6 actually falls short. And the proof that it has fallen
7 short is that educational services have not been provided.
8 The only Constitutional level of funding is not one that is
9 determined by the legislature or an expert in the abstract
10 or even by a court in the abstract, it is one that is
11 determined by the services that ultimately are provided.
12 So it definite - - - it lacks the first - - -

13 JUDGE RIVERA: So then the State is always open
14 to suit. I'm sort of flipping this the other way. The
15 State is always open to suit, because they always have the
16 opportunity to show that - - - in - - - in some district
17 somewhere, you've fallen short. Your position, of course,
18 is they can only sue with respect to that district. So the
19 analysis that the State goes through is irrespective, is
20 sort of the position I think you're taking.

21 MR. AMEND: The analysis that the State goes
22 through is entitled to a presumption of Constitutionality
23 unless it is demonstrated somewhere that services are, in
24 fact, inadequate.

25 JUDGE RIVERA: But - - - but - - - and then if

1 you don't - - - if the - - - if the legislature doesn't
2 then provide the funds, you still say they don't have a
3 claim, because now they've still got to show that even
4 though the legislature decided this is the amount of
5 funding that is required to satisfy our Constitutional
6 obligation and then doesn't provide those funds, they still
7 have to go in and show, okay, even though the legislature
8 had already decided that was the amount, we still got to go
9 in and prove that the failure to provide the amount indeed
10 had these - - - these consequences. Correct?

11 MR. AMEND: Yes, that - - -

12 JUDGE RIVERA: That's your position?

13 MR. AMEND: That is correct. That's also - - -

14 JUDGE RIVERA: Yeah.

15 MR. AMEND: This also flows from the nature of
16 the holding in CFE III, which was itself not a mandate to
17 fund. It was an approval of a remedial estimate and a
18 remedial estimate as to New York City only. And their own
19 allegations demonstrate that New York City has received
20 operating funds well above - - - twice as much as - - - as
21 many op - - - increased operating funds as the estimate
22 endorsed by this court. And the public documents that we
23 cite that they don't dispute show a fourfold increase.

24 CHIEF JUDGE DIFIORE: Counsel, I - - - I need
25 something clarified. You spoke earlier about the third

1 course of action in the NYSER complaint. Are you
2 requesting that that be dismissed in its entirety, as to
3 everyone, including the New York City and Syracuse - - -

4 MR. AMEND: No. We request that it - - - that
5 the third and fourth causes of action in the NYSER
6 complaint be narrowed to New York City and Syracuse and
7 that all of the other causes of actions be dismissed in
8 their entirety.

9 JUDGE GARCIA: Just to follow up on that, because
10 I - - - I was a little confused as well. I thought part of
11 your argument, at least, was that the accountability claim,
12 which is, I think, the third cause of action, should be
13 dismissed because there was no basis for that kind of
14 claim, whether or not it was Syracuse or the New York
15 Districts. Is that inaccurate?

16 MR. AMEND: Our position on the third cause of
17 action is that any claim based on accountability has to be
18 - - - it's tied to the funding duties, so there has to be a
19 demonstration of a violation of the State's funding duty.
20 So if there is a dia - - - demonstration of a violation of
21 the State's funding duty or a demonstration of insufficient
22 services as to New York City and Syracuse, then that claim,
23 really, it's a type of relief that could be ordered if a
24 violation is shown as to New York City or Syracuse.

25 JUDGE STEIN: So - - - so it's - - - it's a

1 remedy; it's not a cause of action; is that your position?

2 MR. AMEND: I mean, that's what we've argued.

3 It's - - - in - - - in our view, it's - - - it's rather - -
4 - it's - - - it's immaterial. If they can't prove that
5 educational services are deficient in New York City and
6 Syracuse, then they can't proceed under the third or fourth
7 cause of action. If they can prove that they were
8 deficient in New York City or Syracuse, then the third or
9 fourth causes of action would relate to whether the cause
10 was a lack of funding or a lack of accountability for the
11 funds that were provided.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 Counsel?

14 MR. REBELL: Good afternoon. May it please the
15 court, Michael Rebell for the respondents.

16 JUDGE WILSON: Could we start with - - -

17 MR. REBELL: In the sea of the field of education
18 - - -

19 JUDGE WILSON: Could we start with that - - -

20 MR. REBELL: Excuse me?

21 JUDGE WILSON: Could we start with that last
22 point actually? Why are your Counts II, III, and IV,
23 really not just one count, saying there's a Constitutional
24 violation, and you've articulated different types of proof
25 that you might use to demonstrate a Constitutional

1 violation, but why isn't it ju - - - really just one count?

2 MR. REBELL: Your - - - Your Honor, we could have
3 made it one count, and if we made it one count, the count
4 would have been that there is a statewide obligation that
5 is accountable and enforceable to provide all kids in the
6 state, a sound, basic education. And I think my opponent
7 here has just made clear in this dialogue with the court
8 that the State is taking a position, which they have now
9 stated even more blatantly than they did in their briefs,
10 that it's impossible for anybody to ever hold this State
11 accountable for deficiency in funding of a sound, basic
12 education. Their posit - - -

13 JUDGE STEIN: But - - - but - - - but haven't we
14 made it pretty clear that this has to be done on a
15 district-wide basis?

16 MR. REBELL: Your Honor, I don't think that's
17 been made clear. Every previous case was brought by
18 individuals or groups in particular districts. This is
19 actually the first case that has raised the statewide
20 issue, and we've done that for good reason, because we've
21 learned over the last ten years that this is a statewide
22 issue; that the only way New York City, Syracuse, Yonkers,
23 or any other district in the state is going to get an
24 acceptable remedy or is going to get their right to a
25 sound, basic education is if the state sets up an adequate

1 statewide formula. And we've taken the position - - -

2 JUDGE STEIN: But didn't - - - but in - - - in -
3 - - I think it was CFE III, didn't we say New York City
4 only?

5 MR. REBELL: It was in CFE II, Judge Kaye did say
6 that because the proof dealt only with New York City, the
7 court was going to focus its remedy on New York City. Now
8 it is conceivable when the court pointed out that an
9 acceptable funding system for New York City had to have
10 three basic elements. It had to be based on actual costs.
11 It had to ensure that all resources - - - that the
12 appropriate resources were in every school, and that it had
13 to be a good accountability system. She was limiting it to
14 New York City, because that's what the proof showed.
15 However - - - and it is possible that the State could have
16 come up with a formula that said - - -

17 JUDGE STEIN: So how is the proof here any
18 different? Here you have proof of New York City and you
19 have proof of Syracuse, and then the rest of the schools
20 are just district sort of - - - just generally alleged. So
21 how is that different from what we were addressing in CFE
22 II?

23 MR. REBELL: All right. There are two
24 differences, Your Honor. We have challenged the State on
25 two levels. And we're here really to ask you to clarify

1 exactly what my colleague was saying is not the fact, and I
2 think it is the fact, to safeguard the right, there has to
3 be a statewide remedy. We also put in facts about New
4 York, Syracuse, and a number of other districts, after
5 we've clarified what the sound, basic edu - - - actual - -
6 - what the actual cost of the sound, basic education is,
7 and as Judge Rivera was saying, the State's already done
8 that in 2007. We've accepted that amount as being
9 legitimate.

10 JUDGE STEIN: I thought the State said that it
11 was reasonable or rational, but I - - - I didn't understand
12 - - - I didn't understand the court to say this - - - this
13 is - - -

14 MR. REBELL: Well, Your Honor - - -

15 JUDGE STEIN: - - - the - - - the floor.

16 MR. REBELL: - - - I'm - - - I'm not claiming
17 that the - - - the court has ever endorsed the 2007
18 Foundation Aid formula. We are going to ask the lower
19 court to do that. But that's not an issue today. I'm
20 saying the legislature - - - and - - - and some of the
21 questioning was emphasizing - - - it's the legislature's
22 responsibility to determine that amount. They did that in
23 2007.

24 JUDGE STEIN: But how do we know they didn't say
25 we're going to go beyond - - - above and beyond that?

1 MR. REBELL: Well, that's a factual issue that
2 we'll deal with in the lower court. What we're asking this
3 court to do is set the parameter and say, yes, there is an
4 enforceable right that can be brought on a statewide level.

5 JUDGE FAHEY: So that goes back to my - - - to my
6 duty question, whether it's to an individual student or
7 whether it's a general duty statewide, or - - - or district
8 by district. And counsel - - - counsel relied on Levittown
9 - - - the analysis in Levittown to say that, no, it wasn't
10 a statewide obligation. What do you say to that?

11 MR. REBELL: Well, I think CFE made clear that it
12 had to be, Your Honor, because - - -

13 JUDGE FAHEY: How so? Since CFE - - - as almost
14 every judge's question to you here is - - - is pointed to
15 its individual district remedy.

16 MR. REBELL: Well, Your Honor, I don't believe
17 that it can be effectively enforced as an individual
18 district remedy.

19 JUDGE FAHEY: Well, that - - - the - - - that may
20 be true, but - - - but nonetheless, it's the nature of the
21 duty and what's enforceable that - - - that I'm asking
22 about now.

23 MR. REBELL: Well, the nature of the duty has to
24 be - - - let me quote exactly what this court said, both in
25 CFE I and CFE II. It said the "State is obligated to

1 ensure the availability of a sound, basic education to all
2 its children." Now if they have come up with a deficient
3 amount of money, they haven't determined what the actual
4 cost is - - -

5 JUDGE WILSON: In the NYS - - -

6 MR. REBELL: - - - does that mean, we're going to
7 have hold 700 trials - - - I'm sorry, Your Honor.

8 JUDGE WILSON: That's all right. In the NYCLU
9 case, we wrote "a claim under the Education Article
10 requires that a district-wide failure be pleaded." Who
11 were the plaintiffs there?

12 MR. REBELL: In the NYCLU case, it was students
13 attending, I think, it was twenty-six individual schools in
14 different parts of the state. And the importance of
15 emphasizing district-wide there was that the plaintiffs
16 were asking the court to go beyond the power of the
17 district, to look at individual schools and, in a sense,
18 set aside the power of the district to run those schools.

19 So that was looking at a district level these - -
20 - as against an individual school level. What we're
21 talking about here is, whether we can have a statewide
22 claim as against an individual district.

23 JUDGE WILSON: But surely - - -

24 JUDGE RIVERA: But - - - sorry. No, no, go
25 ahead.

1 JUDGE WILSON: Surely there are state - - - there
2 are school districts where the district itself is providing
3 more than the minimal level of education to students, no?

4 MR. REBELL: Undoubtedly, there are, but if the
5 state - - -

6 JUDGE WILSON: In fact, why is a statewide remedy
7 necessary?

8 MR. REBELL: Because the State has chosen to set
9 up a statewide funding system. And as I was going to say
10 in answer to the earlier question, it is conceivable, and
11 Judge Kaye may have had this in mind in CFE II, it is
12 conceivable as a remedy that the court after C - - - that
13 the legislature after CFE II, may have set up a funding
14 system for New York City - - - it's forty percent of the
15 kids - - - and a separate funding system for the rest of
16 the state, and then if we were looking at the remedy, we'd
17 look at the system for New York City and whether it
18 determined actual costs and was accountable and all the
19 rest.

20 But they've chosen not to do that. They've set
21 up one system.

22 JUDGE WILSON: Let me put the question a
23 different way then. If - - - if you prove the liability on
24 a district-wide basis for some number of districts, fewer
25 than the whole, why can't your remedy be statewide?

1 MR. REBELL: Your Honor, let - - - let me be very
2 blunt about this. If we have to prove it on a statewide
3 basis, district by district, this right is not enforceable.
4 I litigated the CFE case, just for New York City. It took
5 thirteen years. Three trips to this court. So if we have
6 to do New York, Syracuse, then another case for Yonkers,
7 then for a number of rural districts, or even if you
8 combined all of them, let's say there are 400 districts in
9 the state that we think are not getting sufficient funding.
10 Some other districts may raise more by local property
11 taxes. Are we going to bring in 400 plaintiffs?

12 JUDGE FAHEY: Well - - - well, the Appellate - -
13 - the Appellate Division - - -

14 MR. REBELL: Are we going to look at the school
15 systems in 400 districts?

16 JUDGE FAHEY: You make a good - - - you make a
17 good point, but at the Appellate Division, they spoke of
18 the need not to do that, because it was an interconnected
19 web.

20 MR. REBELL: Yes, sir.

21 JUDGE FAHEY: Which I thought was descriptive and
22 accurate language. The only problem with that analysis is,
23 is that if you take it to the next level, the budget itself
24 is an interconnected web, and what you do in education
25 affects what you do in corrections, and it affects what you

1 do in parks. All - - - all of these are - - - are
2 balancing decisions and balancing policy decisions, and
3 that's why the district-by-district requirement may make it
4 more rational, but more difficult.

5 MR. REBELL: Well, the - - - the - - - with all
6 due respect, Your Honor, the analogy doesn't hold because
7 education has a preferred place in the New York State
8 Constitution. It's the only state service that is
9 affirmatively set forth as an obligation of the state. So
10 they have to fund education first. And even if it's at the
11 expense of something else, the legislature has to fund
12 education. And that's why having this statewide right is
13 so important.

14 And I'd like to get back to the fact that it's a
15 literal impossibility for us to take every district in the
16 state that we think is underfunded and run a trial for
17 them. And even more than that, Your Honors, let's say we
18 did that. Let's say we took the next ten years, and we
19 were able to have a trial for 400 districts. According to
20 their logic, they could put a remedy into effect, keep it
21 in effect for one year, then in year two, say there are
22 fiscal constraints or there's another recession or who
23 knows what. They lower the amount; they don't fund it. If
24 we don't like, we've got to go into court again - - -

25 JUDGE WILSON: Isn't the solution - - -

1 MR. REBELL: - - - and prove that 400 districts
2 have now been hurt.

3 JUDGE WILSON: But isn't - - - isn't the solution
4 to that getting - - -

5 MR. REBELL: So it's a never-ending cycle of
6 nonenforceability.

7 JUDGE WILSON: Isn't the solution to that getting
8 injunctive relief that is ongoing, that's continuing?

9 MR. REBELL: Well, the injunctive relief
10 presumably - - -

11 JUDGE WILSON: Which you did again in CFE III,
12 right?

13 MR. REBELL: Presumably the injunction would say
14 that they have to come up with the actual cost at that time
15 under those conditions, and based on the CFE precedent and
16 I doubt this court - - - as I think it was Judge Rivera was
17 saying - - - would want to be involved in making that
18 funding decision. So it would be the legislature's
19 decision.

20 And then if the legislature violated - - - let's
21 say they did determine through a good process what the
22 actual cost is, then two years later, they dishonor that;
23 they don't fully fund it, we've got to go and - - - and
24 enforce the injunction. Can that be enforced statewide
25 then or do we have to bring 400 different injunctive

1 claims, proving that each district that would be
2 petitioning has been harmed by it?

3 It obviously is totally unworkable to enforce
4 this Constitutional right on a district-by-district basis,
5 if what you're aiming at is the state funding formula,
6 which is the core of what's needed to provide a sound,
7 basic education.

8 JUDGE RIVERA: Well, do you have to - - - do you
9 have to establish that the - - - the formula does indeed
10 provide sufficient funding to then hold them to it? He's
11 sort of suggesting, and I think there may have been some
12 questions suggesting that the formula may be gives more,
13 that you're still stuck with having to prove that the
14 formula isn't enough and has particular consequences.

15 MR. REBELL: I'm not - - - I'm not certain I
16 understand, Your Honor. You're saying if they come up with
17 a formula that provides more than a sound, basic education
18 - - -

19 JUDGE RIVERA: It's sort of what I asked him, but
20 I'm asking you now, so my question to him was, if - - - if
21 the legislature develops that formula - - -

22 MR. REBELL: Right.

23 JUDGE RIVERA: - - - right, and - - - and the
24 formula is supposed to ensure that the State meets its
25 obligation and then they fail to actually fund the formula,

1 if you will, did you have to show again that the
2 consequence of that is every district is shortchanged,
3 right?

4 MR. REBELL: Well, certainly we're - - - we're -
5 - - we're taking the position - - -

6 JUDGE RIVERA: That that - - - that - - - and - -
7 - and you heard his answer.

8 MR. REBELL: Yes, we're taking a position
9 obviously, we - - - we shouldn't have to do that. And what
10 we're asking this court to do, really, is give the
11 parameters for what's going to go on at the trial level
12 here, because we think we can show that. We think in 2007,
13 in fact, the State did establish what the formula should
14 be. We accepted that as being Constitutionally valid. And
15 then - - - and they funded it for two years. And then they
16 decided because of the recession - - -

17 JUDGE RIVERA: But - - - but - - -

18 MR. REBELL: - - - that they couldn't.

19 JUDGE RIVERA: But if you take the position that
20 the State has - - - has argued that the formula gives more,
21 it exceeds the amount, why aren't you left with having to
22 show that when they don't meet that higher benchmark, that
23 nevertheless what they have provided is still not enough.
24 Why are you left with still that burden?

25 MR. REBELL: Under the circumstances, that's

1 probably what we would have to prove, but they have a
2 Constitutional obligation, as spelled out in CFE II, page
3 930, three guidelines, "Determine the actual cost." That's
4 the first thing. They come up with a formula that says the
5 actual cost is X, but we're going to give X plus Y, fine.
6 And if they decide to stop giving Y, as long as they're
7 giving X, there's no Constitutional problem.

8 JUDGE STEIN: So you want us to tell them that
9 they have to ascertain what the bare minimum is, what the
10 floor is, and then do at least that much.

11 MR. REBELL: That's exactly right, Your Honor.
12 And it's not us saying - - -

13 JUDGE STEIN: That's - - - whether that's
14 district-wide, which I know isn't what you're proposing - -
15 -

16 MR. REBELL: Yes.

17 JUDGE STEIN: - - - or statewide, that's what
18 you're - - -

19 MR. REBELL: In essence, this court in CFE II - -
20 -

21 JUDGE RIVERA: Are - - - are you taking the
22 position we didn't already say that?

23 MR. REBELL: You did say it. That's exactly what
24 I was going to say, Your Honor. In CFE II, at page 930,
25 the three guidelines were spelled out by Judge Kaye very

1 clearly. Determine the actual costs, make sure there's
2 sufficient resources are in every school, and make sure
3 there's a decent accountability system.

4 JUDGE FAHEY: Can I - - -

5 MR. REBELL: We're saying that has to be applied
6 statewide.

7 JUDGE FAHEY: And can I - - - I notice your time
8 is almost up, but so I'm clear. Are you arguing that this
9 is asking for a response from this court based on a failure
10 of a - - - to - - - to give a - - - to meet the remedies
11 set out in the trio of CFE cases, or are you alleging that
12 there's a new violation based on the subsequent response
13 after CFE was started?

14 MR. REBELL: Well, Your Honor, we're asking this
15 Court, essentially, to establish a template for guiding the
16 local - - -

17 JUDGE FAHEY: But I - - - I need to kind of know.
18 Are you - - - are you - - - the best you can, the answer to
19 this question. Is it a remedy or is it a new violation?
20 If the question's unfair - - -

21 MR. REBELL: It's a new violation.

22 JUDGE FAHEY: Okay.

23 MR. REBELL: It's a new violation.

24 JUDGE FAHEY: All right. So - - - so - - -

25 MR. REBELL: And we're asking this court - - -

1 JUDGE FAHEY: So I'm clear then. The subsequent
2 actions, the - - - the property tax, the gap elimination,
3 those four actions that you focused in on, those are new
4 violations that are new Constitutional violations. They're
5 not - - - we're not going to the remedy that was - - - was
6 - - - was crafted in CFE III or II, okay.

7 MR. REBELL: We do have an argument for that in
8 our first cause of action, but it's a relatively minor one,
9 compared to the statewide point that we're trying to stress
10 here.

11 JUDGE FAHEY: I see.

12 MR. REBELL: And Your Honor, if I could just end
13 by emphasizing, you know, the language in Article 1,
14 Section 1 itself, says the legislature shall provide for
15 the maintenance in support of a system in which all the
16 children of the state may be educated. And I emphasize
17 that given the tenor of the argument today, because if we
18 don't have a requirement for an enforceable right against
19 the State, there's no way they can be held to maintain an
20 appropriate system that provides a sound, basic education
21 for all children in the state, not just those for one or
22 two districts that we can litigate at a time. Thank you
23 very much.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 Counsel, what about your opponent's argument that

1 to go district by district, not only would it be
2 impractical, but I think his words were - - - counsel's
3 words were "a literal impossibility" to do that?

4 MR. AMEND: There's no basis for that whatsoever.
5 In CFE, this court said that there is - - - there are steps
6 that need to be taken to address a violation that was shown
7 in New York City, and the State may implement statewide
8 measures, if it wishes to. That made - - - that language
9 meant exactly what it said. And there are - - - CFE is not
10 the only litigation.

11 There was recently a trial involving a number of
12 upstate districts, ultimately that was the - - - the trial
13 that resulted from the Hussein decision by this court. Is
14 the State - - - and the State prevailed in that trial. Is
15 the State now going to be forced to defend its allocation
16 of aid to other districts, based on what is attempted to be
17 shown here?

18 JUDGE STEIN: But what do you say to the argument
19 that it's a practical impossibility to - - - to enforce
20 this court's determinations, if required to do it district
21 by district by district?

22 MR. AMEND: Judge Wilson's answer to that is an
23 injunctive remedy that says, okay, the State needs to
24 perform a costing out study where violations have been
25 shown and it has to take steps that are - - -

1 JUDGE RIVERA: But - - - but - - -

2 MR. AMEND: - - - that will satisfy the court.

3 JUDGE RIVERA: I understand that, but isn't that
4 what CFE basically does? Isn't that what those years of
5 litigation and the decisions from this court basically say,
6 this is the State's obligation. You've got to meet that
7 obligation or you've shortchanged the students in the
8 public schools, and that violates the Constitution. Go
9 figure out the costs, and make sure you provide the funds
10 to address those costs.

11 MR. AMEND: That is not at all what this court
12 held with respect to any district, except New York City.
13 There has never been a proof of a Constitutional violation
14 in any district, except - - -

15 JUDGE RIVERA: Let's - - - let's - - -

16 MR. AMEND: - - - New York City.

17 JUDGE RIVERA: - - - let's go with that answer.
18 But if the legislature then come back and says to do that,
19 we're going to do it for the entire state, since our duty
20 and obligation applies to every single district and every
21 student in this state.

22 MR. AMEND: Yes, but then you can - - -

23 JUDGE RIVERA: And if you fail to comply with
24 what the legislature identifies as the way to provide that
25 minimal funding, don't they have a claim?

1 MR. AMEND: No, Your Honor.

2 JUDGE RIVERA: A statewide claim?

3 MR. AMEND: No, they do not, because what the
4 legislature does for any district outside of New York City
5 in that case is something that goes above and beyond its
6 obligation. And I would note that Foundation Aid as
7 envisioned to be phased in statewide initially was 5.5
8 billion dollars - - - 2.45 billion dollars - - -

9 JUDGE RIVERA: Isn't - - - isn't that your
10 defense? Don't they keep - - - don't they have an
11 opportunity to perhaps show evidence otherwise?

12 MR. AMEND: I don't know what evidence - - -

13 JUDGE RIVERA: They've made their assertions.
14 Your response is - - -

15 MR. AMEND: There is - - -

16 JUDGE RIVERA: - - - our - - - our formula and
17 what we've done is good enough.

18 MR. AMEND: There is no - - - there are no facts
19 that they can prove that would show that CFE or the
20 Foundation Aid base - - - the Foundation Aid formula, which
21 vastly exceeded an amount this court endorsed as reasonable
22 in CFE was anything other than a policy choice to exceed
23 the minimum.

24 JUDGE RIVERA: Thank you.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.

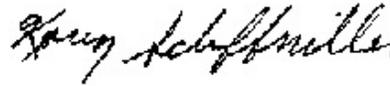
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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Aristy-Farer v. State of New York; New Yorkers for Students' Educational Rights v. State of New York., No. 75 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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