To be Argued by:
MATTHEW SCHOCK
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

In the Matter of the Application of

DAVID A. CURRY, LUIS NIVELO and ROMEL ALVAREZ,

Petitioners-Appellants,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK STATE EDUCATION DEPARTMENT, NEW YORK STATE BOARD OF REGENTS, MARYELLEN ELIA as Commissioner of Education and MERRYL H. TISCH as Chancellor of the Board of Regents,

Respondents-Respondents,

– and –

EAST RAMAPO CENTRAL SCHOOL DISTRICT,

Intervenor-Respondent.

BRIEF FOR PETITIONERS-APPELLANTS

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QUESTIONS PRESENTED

1. Do Petitioners, who are parents of children attending public schools in the East Ramapo Central School District, have standing under CPLR § 78 to challenge Respondents' failure to ensure that students in the East Ramapo Central School District have the opportunity for a sound basic education, as guaranteed by the New York State Constitution?

The Supreme Court answered this question "no."

2. Can the Court, in the nature of a writ of mandamus under CPLR § 78, compel Respondents to intervene and take necessary action to ensure that students in the East Ramapo Central School District have the opportunity for a sound basic education, as guaranteed by the New York State Constitution?

The Supreme Court answered this question "no."

NATURE OF THE CASE

In this Article 78 proceeding, three parents, on behalf of their school-age children, petitioned for an order directing the New York State Education Department, the Commissioner of Education, the New York State Board of Regents, and the Chancellor of the Board of Regents (collectively, the "State") to comply with their constitutional duty to provide all students in the East Ramapo Central School District ("East Ramapo" or the "District") with the opportunity to receive a sound basic education, as guaranteed under Article IX, Section 1 of the New York State Constitution ("Education Article"). The Supreme Court denied the petition, and the parents now appeal.

As the Court of Appeals has recognized, the State has an affirmative, non-discretionary obligation under the Education Article to provide every student with the opportunity to receive a sound basic education. To satisfy that obligation, the State has delegated to Respondents the duty to oversee and supervise local school districts and ensure those districts have the resources necessary to provide all students the opportunity for a sound basic education. While local boards of education are responsible for budgeting and allocating those resources, the Court of Appeals has made clear that the State cannot stand idly by where a local board, through a continuing pattern of neglect and mismanagement, has failed to deliver the opportunity for a sound basic education. Rather, the State has an affirmative,

non-discretionary duty to intervene and take any necessary and appropriate actions to remedy the board's failure.

In 2014, Respondent Board of Regents commissioned a comprehensive investigative report of the East Ramapo Board of Education ("Board"), which had grossly mismanaged the District's finances for years. The report concluded that as a direct result of the Board's ongoing mismanagement and neglect, East Ramapo students had been deprived of essential education resources—resources the State has a duty to provide—and were suffering dismal and unacceptably low educational outcomes.

Between 2015 and 2016, the State received at least four additional reports documenting and confirming that the Board had defaulted on its obligation to provide essential resources to the District's schools, leaving thousands of students without the basic staff, programs, and services necessary to achieve State-mandated academic standards. Despite documenting the Board's continuing failures over the past year, none of the Respondents took any concrete or meaningful action to remedy the Board's fiscal mismanagement.

Given the dire and deteriorating situation in East Ramapo, Petitioners David A. Curry, Luis Nivelo, and Romel Alvarez petitioned on behalf of their children for an order compelling the State to comply with its ministerial, non-discretionary,

constitutional duty to intervene to provide all students in East Ramapo with the opportunity for a sound basic education.

On September 19, 2017, the Supreme Court dismissed the Petition, holding that Petitioners lacked standing and that the State's constitutional duty was not mandatory and non-discretionary.

Petitioners' children have suffered direct harm as a result of the State's failure to intervene to address the Board's documented pattern of mismanagement. They continue to be denied the opportunity to receive a sound basic education guaranteed them under the Education Article. The State, therefore, must intervene. Although Respondents have discretion in determining the appropriate means by which to remedy the Board's ongoing mismanagement, *their obligation to act is affirmative and non-discretionary*. Accordingly, Petitioners respectfully request that this Court reverse the Supreme Court's decision and enter an order directing Respondents to take all necessary and appropriate action to immediately remedy the ongoing constitutional violations in East Ramapo.

STATEMENT OF FACTS

East Ramapo is located in Rockland County, about 25 miles from New York City. (R-47.[1]) Petitioners David A. Curry, Luis Nivelo, and Romel Alvarez are

[1] "R" citations refer to the Record on Appeal.

parents of children attending elementary, intermediate, and high schools in the District.

In 2015, approximately 24,000 of the 33,000 school-age children residing in East Ramapo attended private school. Nine thousand students were enrolled in District schools. (R-54.) 91% of District students were African-American, Latino, or Haitian; 83% were economically disadvantaged; 20% had disabilities; and 27% were classified as English Language Learners ("ELLs"), meaning that according to test results, they could not communicate fluently or learn effectively in English. (*Id.*; R-111.) Nearly all of the private school students attend yeshivas, which are Orthodox Jewish schools. (R-54.)

The Board comprises nine East Ramapo residents who are elected to three-year terms. (R-114; R-58.) Since 2005, members of the Orthodox Jewish community have held a majority of the Board's seats. (R-58.) In recent years, the Board's management has been subject to accusations of directing excessive funding from the District's budget to transportation for private school students and other expenditures to support private schools, which has resulted in ongoing federal legal action. (R-116.)

A. Respondents Documented the Inadequate Educational Opportunities in East Ramapo More Than Three Years Ago.

On June 10, 2014, in response to ongoing conflict in the District, then-Commissioner John B. King, Jr. appointed Henry M. Greenberg, a former federal

prosecutor and advisor to the New York attorney general, to investigate the Board's conduct and fiscal decisions. (R-117–18.)

Greenberg's November 17, 2014 report to Respondent State Education Department ("SED") concluded that the Board had: (i) shown favoritism toward Orthodox Jewish students who attended private schools in East Ramapo; (ii) exercised "abysmal" fiscal management, putting the district "on the precipice of fiscal disaster"; and (iii) shown an "inexcusable" lack of transparency. (*Id*.) Greenberg wrote that the Board's preference for "the interests of private schools over public schools" was clear from the Board's past budget decisions. (R-77.)

Although the District's budget has shrunk overall in recent years, Greenberg's report showed that the Board made no meaningful effort to distribute the "pain of deep budget cuts fairly among private and public schools." (R-81.) Between 2009 and 2014, the Board eliminated more than 445 public school personnel, froze purchases of essential supplies, and reduced or cut several public school academic and extracurricular programs, including full-day kindergarten, instrumental music, non-English language courses, high school electives, athletics, and transportation for field trips. (R-78–81.)

These cuts decimated the educational opportunities available to East Ramapo students. For example, in response to an appeal submitted by Petitioner David A. Curry on behalf of his son, Respondent Commissioner of Education

("Commissioner") directed the Board to ensure that elementary schools in the District provided art and music programs, which are required by regulation. (R-241–42.) But despite the Commissioner's direction, Mr. Curry's son continued to be deprived of essential educational resources, including art and music instruction, and the Commissioner did not intervene to enforce her directive. (R-31.)

During the same 2009-14 time period in which the Board cut public school funding, it substantially *increased* funding that benefited private school students. Transportation spending, a significant portion of which covers gender-segregated busing of Orthodox Jewish children to more than fifty yeshivas, grew to over 11% of East Ramapo's budget. (R-62–64, R-81.) Special education spending, most of which has benefited private school students who attend as many as forty yeshivas and other schools outside the District, topped 26% ($60 million) of the 2013–14 budget—nearly five points above the statewide special education spending average. (R-60, R-65.)

The Board's mismanagement has also created additional unnecessary costs, further diminishing resources for District students. For example, the Board paid for expenses associated with defending unlawful special education placements in private schools in violation of the Individuals with Disabilities Education Act. (R-66.) The Board's decision to retain expensive outside counsel in that

proceeding and others generated legal fees exceeding $7 million between 2008 and 2014 (R-75)—an overpayment of more than $2 million. (R-124–25.)

Greenberg also found that fundamental financial mistakes contributed to the Board's mismanagement of East Ramapo's budget. In 2016, four of the Board's past five proposed annual budgets had been rejected based on inaccurate estimates and unrealistic revenue projections, which ultimately led to the depletion of nearly all of the District's resources, including its reserve funds. (R-69–72.) Without reserve funds, the Board now risks losing the ability to manage the District's finances at all, which in turn puts East Ramapo students at risk. (R-71.)

Greenberg recommended that the State provide a mechanism to ensure that education funds were allocated fairly and to protect District students (R-96), warning that without "State intervention, it will be impossible for the District to achieve fiscal stability now or in the foreseeable future." (R-98.) He also recommended that the State monitor the District to ensure the Board allocates resources appropriately and provides sufficient services to ELL and immigrant students. (R-105.) These recommendations have not been implemented, and District students continue to suffer the consequences of the Board's irresponsible actions. (R-24.)

B. Subsequent Reports Have Confirmed the Dire State of Public Education in East Ramapo.

In the time since receiving the Greenberg Report, Respondents, through the SED, have issued or received at least four additional reports highlighting the continued inadequacy of educational opportunities for East Ramapo students and the Board's mismanagement underlying those deprivations. Each of these reports made additional recommendations for remedial action. To date, however, Respondents have not implemented these recommendations in any meaningful way, and the documented deficiencies continue to undermine and weaken the District's ability to deliver a constitutional sound basic education to its students.

1. The ELL Report

In February 2015, SED released a report showing that the District had woefully underserved (or in some cases, failed to serve at all) its ELL students—which comprise *at least 27%* of East Ramapo students. (R-127; R-111.) The report showed that during the 2014–15 school year, the Board funded only *one* Spanish Transitional Bilingual Education program, *which served just 27 of the District's 1,604 Spanish-speaking ELLs*. (R-128–30.) It also found that the District's only Beginner and Intermediate ELL courses were electives and did not lead to accrual of credits toward graduation, which SED described as "a serious problem and a barrier to educational access that must be remedied immediately." (R-130.)

As a result of such blatant underservice, the District was required to submit and implement a Corrective Action Plan ("CAP") to address the numerous areas in which it had failed to comply with the Commissioner's ELL regulations. (R-139; R-142.)

The CAP addressed not only the areas in which the District had failed to comply with the Commissioner's ELL regulations, but areas in which the District needed to improve. Yet in spite of the CAP, neither the Board nor Respondents have taken significant action to remedy these deficits. (R-27.) As a result, thousands of East Ramapo ELL students are being denied the language services necessary to provide them a sound basic education—services that the Commissioner's regulations mandate.

2. The Focus Report

In June 2015, SED conducted a diagnostic evaluation of East Ramapo's poor academic performance, in accordance with the "Focus district" program. (R-180.) That report—the agency's second on East Ramapo—showed "Inadequate" ratings for East Ramapo on six different district improvement metrics. (R-185–86.)

The report further showed the Board had taken no action to address inadequate public school staffing, leaving the District unable to respond to the urgent need to improve student academic achievement. (R-190.) The Board conceded that it allocates funds capriciously according to its "views," and has no

system to evaluate the impact of spending programs. (R-192.) Thus, while many public schools have wanted for resources to provide basic educational, ELL, and extracurricular programs, "[t]oo many [other] activities in the district lack[ed] purpose." (R-196.) This report put the State on notice that the deficiency of educational opportunities and threats to future financial stability in the District remained practically unchanged.

3. The OCR Report

In October 2015, the U.S. Department of Education's Office of Civil Rights ("OCR") addressed allegations by the Spring Valley chapter of the N.A.A.C.P. that the District discriminated against certain students on the bases of race and national origin. (R-202.) The OCR report found alarming racial discrepancies in the District's out-of-district special education placements. In 2010–11, nearly 40% of eligible white students received such placements, compared to 14.3% of eligible Asian students, 12.7% of eligible black students, and 6% of eligible Latino students. (R-204.)

The OCR report also uncovered evidence of discrimination in how the District managed bilingual special education programs. The District did not evaluate students' English language proficiency before admitting them to bilingual programs, despite a legal obligation to do so; indeed, some students who were admitted to the programs identified their native language as English. (R-209.) The

report found that the Board gave preferential treatment to bilingual Yiddish/English programs, affording them separate scheduling and school environments, which were not available in Spanish/English programs. (R-209–10.) The Board offered no reasonable explanation for these disparities (*id*.), and as a result was put under OCR monitoring for a year while it implemented a resolution agreement to remedy civil rights issues. (R-215.)

The inequitable and deficient state of East Ramapo's special education programs has not changed. Despite the ever-growing body of evidence that East Ramapo special needs students have not received constitutionally adequate educational opportunities, Respondents have failed repeatedly to take any corrective action with sufficient binding effect to remedy the violations.

4. The Monitors' Report

In an attempt to respond to the persistent problems in East Ramapo, SED announced on August 13, 2015, that it would appoint a team of three experts (the "Monitors") to evaluate and monitor the Board's activities for four months and make recommendations to SED for further action. (R-244.) The Monitors' December 14, 2015 report confirmed yet again that "the East Ramapo Board of Education has persistently failed to act in the best interests of public school students." (R-258.)

Like the Greenberg report, the Monitors' report recommended "increased authority . . . including the power to veto board decisions where necessary." (R-265.) It also recommended an independent monitor to review issues connected to school board elections (R-266–67), and urged Respondent Regents to help the Board understand its role better by expanding Board member training requirements, including meeting with a human rights expert. (R-268.)

To address teaching and learning issues, the report advised the Regents to adopt several remedial measures, all of which require the Board to provide additional resources to District schools. First, it recommended making sure that teachers in positions established with federal Title I funds do not have to cover classrooms, but can instead focus on providing targeted interventions to struggling students, which is their charge. (R-268–69.) Second, it recommended that the Regents ensure the provision of full-day kindergarten, as well as enriched academic options for all students. (R-269–70.) Finally, it recommended staff-oriented changes, including enhanced professional development opportunities and a more rigorous hiring protocol. (R-270–71.)

The team's fiscal management recommendations centered on efficiency and the need for financial support. The Monitors' report recommended streamlining the District's general operations and considering longer transportation contracts and more efficient bus routes. (R-272–73.) It also urged the Regents to review

ELL program policies and procedures and reinstate support services for *all* students where they are needed. (R-274–76.) And it recommended responsible local contributions to the District's budget, as well as dedicated State support. (R-276–79.)

The Monitors' report underscored the distressed financial condition of the District. Less than a week after the report was released, Moody's affirmed a negative outlook for the District's outstanding debt obligation of nearly $11 million. (R-287.) Moody's analysis noted that "the district will continue to face financial strain from rising special education, instruction and transportation costs," and that "[w]ithout additional revenues or expense reductions, the [district's] fund balance will likely deteriorate." (*Id*.)

When the Monitors presented their report to the Regents, they made clear that their recommendations were a complete set, and not a menu of options from which the Regents were meant to "pick and choose." (R-34.) The Regents unanimously accepted all of the Monitors' recommendations. (R-34.)

The Monitors' report documents and confirms as of December 2015 the Board's continuing fiscal mismanagement of the District's funding and resources—mismanagement the Greenberg Report identified over a year prior—and further documents the Board's neglect of ELL and special education students, as detailed in two previous reports.

C. Respondents Ignored Petitioners' Request for Intervention.

On August 31, 2015, Petitioners' counsel sent a letter to Respondents, stressing the urgent need for the Board to take substantive actions to address the clear and continuing lack of constitutionally adequate educational opportunities for District students. (R-295.) While recognizing implementation of the Monitors' recommendations would take time, the letter concluded by cautioning that "[i]f the Board fails to adopt such measures in the coming weeks, and if the State fails to intervene directly, we will have no alternative but to take legal action to compel such intervention." (R-296.) After the State failed to intervene to correct the Board's continuing mismanagement, Petitioners instituted this Article 78 proceeding to compel the State to take prompt remedial action.

The record before the court below demonstrates that, despite the Monitors' efforts, the Board's misuse and mismanagement of District funding and resources have not been corrected. Put simply, the Monitors have done all they can do, and the obligation to act is now on the Respondents. Because the Board has not taken necessary and appropriate corrective action, even as recommended in four separate investigations and reports conducted or received by Respondents, Respondents must intervene immediately and take all necessary and appropriate remedial action to ensure that the Board allocates the resources necessary to safeguard the right of

East Ramapo students to a sound basic education. Petitioners initiated this action for the express purpose of compelling Respondents to do so.

STANDARD OF REVIEW

This Court reviews a Supreme Court decision on an Article 78 petition de novo. *See Hunts Point Terminal Produce Coop. Ass'n, Inc. v. N.Y.C. Econ. Dev. Corp.*, 36 A.D.3d 234, 244 (1st Dep't 2006) ("Our authority 'is as broad as that of the trial court'" (quoting *N. Westchester Prof'l Park Assocs. v. Town of Bedford*, 60 N.Y.2d 492, 499 (1983))). On a motion to dismiss an Article 78 petition, "all of the allegations contained in the petition are deemed to be true and the facts contained in the petition must be considered in their most favorable light." *Parisella v. Town of Fishkill*, 209 A.D.2d 850, 851 (3d Dep't 1994). By contrast, the court should not consider allegations in support of the motion to dismiss. *See Fed'n of Mental Health Ctrs. v. DeBuono*, 275 A.D.2d 557, 561 (3d Dep't 2000).

ARGUMENT

I. The Lower Court Erred in Holding That Petitioners Lack Standing Under Article 78.

Despite the lower court's holding to the contrary, Petitioners clearly satisfy the two-part test for Article 78 standing. First, Petitioners have shown "injury in fact" by alleging a legally cognizable interest in this action. *See Graziano v. Cty. of Albany*, 3 N.Y.3d 475, 479 (2004). Second, they have shown that their injury "fall[s] within the zone of interests or concerns sought to be promoted or protected

by" the Education Article of the New York State Constitution (the "Education Article"). *Id.* In addition, Petitioners have standing to compel public officers to perform their public duties, even absent personal aggrievement where, as here, the matter is of great public interest. *Cortes v. Mujica*, 54 N.Y.S.3d 499, 510 (N.Y. Sup. Ct. 2016) (citing *Hebel v. West*, 25 A.D.3d 172, 176 (3d Dep't 2005)). And even if there were some doubt as to whether Petitioners had sufficiently alleged standing, their petition should not have been dismissed pre-merits on "heavy-handed" standing principles. *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 413 (1987).

A. Petitioners Have Shown Injury in Fact.

Showing injury in fact requires only "a sufficiently cognizable stake in the [action's] outcome so as to cast the dispute in a form traditionally capable of judicial resolution." *Graziano*, 3 N.Y.3d at 479; s*ee also Sun-Brite*, 69 N.Y.2d at 413 (to show injury in fact, "the petitioning party must have a legally cognizable interest that is or will be affected by the [agency's] determination").

Petitioners easily meet this standard. Petitioners are residents of New York whose children attend public schools in East Ramapo, where, as a direct result of Respondents' refusal to rectify the District's gross mismanagement, the students lack the educational resources essential for the opportunity for a sound basic education. (R-15; R-18.) The deprivation of those constitutionally prescribed

resources constitutes harm to Petitioners because their children have been deprived of their right to a sound basic education. (R-13.) No further showing is required for standing. *See Cortes*, 54 N.Y.S.3d at 507–10 (holding that when there is a challenge to the availability of "services and programs" in a public school, parents of children attending the school have standing to sue both in their individual capacities and on behalf of their children).

Contrary to the trial court's opinion below, there is no requirement that Petitioners show "specialized injury," and the trial court's reliance on case law stating that principle is misplaced. *See Sun-Brite*, 69 N.Y.2d at 413 ("While something more than the interest of the public at large is required to entitle a person to seek judicial review . . . [,] proof of special damage or in-fact injury is not required in every instance . . . ."). *Sun-Brite* held that owning property near an area where recent zoning changes gave way to radio tower construction "may give rise to an inference of damage or injury" where "loss of value of individual property may be presumed from depreciation of the character of the immediate neighborhood." *Id*. at 414. The *Sun-Brite* court thus held that in some situations, the mere implication of injury in fact could be sufficient to confer standing—precisely the opposite of the trial court's holding in this case. If this Court affords any weight to the "specialized injury" analysis, it should be in the form of an inference like the one in *Sun-Brite*: *i.e.*, attending East Ramapo's chronically

underfunded and grossly mismanaged public schools may give rise to an inference of injury, where loss of constitutional protections may be presumed from the lack of opportunity for a sound basic education.

Even if Petitioners were required to show some kind of specialized injury, they have done so, and their petition should not have been denied on that ground. Contrary to the lower court's holding, Petitioners' injury is different in kind and degree from injury to the public at large because Petitioners' children *attend public schools in East Ramapo*. (R-13.) The injury Petitioners have suffered stems from the fact that their children are being denied the opportunity for a sound basic education at public schools. And although the protection of constitutional rights is a matter of broad public interest, the public at large cannot claim the specific injury Petitioners suffered. (R-54.) Indeed, most school-age children in the East Ramapo community do not attend public schools. (*Id*.); *see also In re Save the Pine Bush, Inc. v. Common Council*, 13 N.Y.3d 297, 306 (2009) (injury in fact where petitioners showed that their "use of a resource [wa]s more than that of the general public").

B. Petitioners' Injury Is Within the Zone of Interests Protected by the Education Article of the New York State Constitution.

The zone of interest test is not difficult to satisfy. It merely ensures that standing is not granted to litigants "whose interests are only marginally related to, or even inconsistent with, the purposes of the [relevant law]." *Soc'y of Plastics*

Indus. v. Cty. of Suffolk, 77 N.Y.2d 761, 774 (1991). Indeed, New York courts recognize that "while the universe of potential plaintiffs must be circumscribed in order to avoid misuse of legal challenges to administrative actions, we must preserve access to the courts for those who have been wrongly injured by administrative action (or inaction) directly flowing from statutory [or constitutional] authority." *Mahoney v. Pataki*, 98 N.Y.2d 45, 52 (2002).

Petitioners have alleged that their injury—deprivation of a constitutional right—is within the zone of interests protected by the New York Constitution. (R-13.) And the law supports their claim. The New York Court of Appeals has held that the Education Article guarantees each student the right to a "sound basic education"—*i.e.*, "a meaningful high school education, one which prepares them to function productively as civic participants." *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 908 (2003). The core "injury or interest that falls within the zone of interests that the Education Article protects . . . [is] the students' constitutional right to a sound basic education." *Brown v. State*, 144 A.D.3d 88, 92–93 (4th Dep't 2016) (citing *Paynter v. State*, 100 N.Y.2d 434, 439 (2003)). Petitioners allege a deprivation of that core interest and their injury therefore satisfies the zone of interest test. *Cf. Cortes*, 54 N.Y.S.3d at 509 (similar deprivation was in the zone of interest of similar legislation).

C. Petitioners Have Standing Because Their Case Presents Issues of Great Public Interest.

Even absent personal aggrievement, New York citizens have standing to compel public officers to perform their public duties, particularly where the matter is one of "great public interest." *Police Conference of N.Y., Inc. v. Municipal Police Training Council*, 62 A.D.2d 416, 417 (3d Dep't 1978); *see also Albert Elia Bldg. Co. v. N.Y. State Urban Dev. Corp.*, 54 A.D.2d 337, 341 (4th Dep't 1976). This case contains two matters of such great interest. First, Petitioners seek to safeguard the educational well-being and rights of their children and their children's peers, implicating the constitutional rights of all East Ramapo students to a sound basic education. This action thus bears directly on New York's public interest in education—specifically its "unanimous recognition of the importance of education in our democracy." *Campaign for Fiscal Equity*, 100 N.Y.2d at 901. Second, the questions at issue in this mandamus action concern the duties of State actors that affect every public school student in the District, and the consequences of abdicating those duties clearly "implicate concerns beyond the immediately affected parties." *Cortes*, 54 N.Y.S.3d at 510. Accordingly, even if Petitioners had failed to establish standing under the traditional two-part test, they have established it by way of the great public interests this action addresses.

D. Petitioners Deserve to Have Their Article 78 Claim Decided on the Merits.

Even if Petitioners' standing could be refuted—and it cannot—Petitioners' claims should not be dismissed on standing grounds. The burden to show standing is low: "[s]tanding principles, which are in the end matters of policy, should not be heavy-handed; . . . it is desirable that . . . disputes be resolved on their own merits rather than by preclusive, restrictive standing rules." *Sun-Brite*, 69 N.Y.2d at 413. "Only where there is a clear legislative intent negating review or lack of injury in fact will standing be denied." *Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 11 (1975) (internal citations omitted). No such legislative intent or lack of injury in fact exists here, and the court below had no other sufficient basis on which to dismiss the petition. *See Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) ("On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" and the court should "accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory."); *see also Cortes*, 54 N.Y.S.3d at 509–10 (granting standing where injury in fact existed and there was no contrary legislative intent). Accordingly, the trial court's dismissal of the petition on standing grounds should be reversed.

II. The Lower Court Erred in Holding That It Cannot Compel Respondents to Comply with Their Constitutional Duty to Ensure the Opportunity for a Sound Basic Education.

Mandamus is available to enforce a "clear legal right" where a public officer or body has failed to perform a duty enjoined by law. *See* CPLR § 7803; *see also In re Cty. of Fulton v. State*, 76 N.Y.2d 675, 678 (1990) ("A party seeking relief in the nature of mandamus must show a 'clear legal right' to that relief.") (citation omitted). Mandamus applies when the "nature of the duty sought to be commanded" is "mandatory, nondiscretionary action." *In re Brusco v. Braun*, 84 N.Y.2d 674, 679 (1994). Respondents have failed to take just such an action—that is, they have failed to ensure that East Ramapo students have the opportunity to receive the sound basic education guaranteed by the Education Article. Respondents' abdication of this non-discretionary duty has deprived Petitioners' children and their East Ramapo peers of a core constitutional right. Because Respondents are obligated to satisfy their duty to ensure the provision of a sound basic education, and because they have no discretion as to whether or not they satisfy it, they can be compelled to do so through a writ of mandamus.

A. The State Has an Affirmative, Non-Discretionary Duty to Provide Students in East Ramapo with the Opportunity for a Sound Basic Education, Which It Has Delegated to Respondents.

The Education Article states that the "legislature shall provide for the maintenance and support of a system of free common schools, wherein all the

children of this state may be educated." N.Y. Const. art. XI, § 1. The New York Court of Appeals has held that the Education Article imposes on the State an affirmative, non-discretionary duty to provide every student with the opportunity to receive a sound basic education. *See Campaign for Fiscal Equity*, 86 N.Y.2d 307, 315 (1995) ("In order to satisfy the Education Article's mandate, the system in place must at least make available an 'education', a term we interpreted to connote 'a sound basic education'" (quoting *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 47, 48 (1982))). And it imposes a duty on the State to assure the "minimal acceptable facilities and services" necessary to provide a "sound basic education." *Levittown*, 57 N.Y.2d at 47, 48.

A sound basic education is "a meaningful high school education, one which prepares [students] to function productively as civic participants." *Campaign for Fiscal Equity*, 100 N.Y.2d at 908. It includes "[s]ufficient numbers of qualified teachers, principals and other personnel", "[a]ppropriate class sizes", "[a]dequate and accessible school buildings", "[s]ufficient and up-to-date books, supplies, libraries, education technology and laboratories", "[s]uitable curricula, including an expanded platform of programs to help at-risk students by giving them 'more time on task'", "[a]dequate resources for students with extraordinary needs", and "[a] safe, orderly environment." *Campaign for Fiscal Equity, Inc. v. State*, 719 N.Y.S.2d 475 (2001); *aff'd* 769 N.Y.S.2d 106, 108–09 (2003).

The Legislature has delegated operational responsibility to comply with the Education Article to Respondent Board of Regents, which is empowered to "[e]xercise legislative functions concerning the educational system of the state," and Respondent SED, which is responsible for the "general management and supervision of all public schools." N.Y. Educ. Law §§ 101, 207 (Consol. 2015). Among other things, Respondents have the power to create, dissolve, and set boundaries for local school districts, as well as the responsibility for supervising local school boards. *See id.* § 1801 ("The commissioner of education is hereby authorized . . . to lay out central school districts . . . to give instruction in elementary or elementary and high school subjects and to fix, determine and define the boundaries of said districts."); *id*. § 305 ("[The Commissioner] shall have general supervision over all schools and institutions . . . and shall advise and guide the school officers of all districts . . . .").

For each Respondent, the obligation to ensure the provision of a sound basic education is codified by statute. Respondent Regents is responsible for the general supervision of all educational activities within New York State. Under Education Law § 207,

> the regents shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except, as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trusts conferred or charged upon the university and the education department.

Id. § 207. Respondent Chancellor of the Regents is an elected officer of the Regents. *Id*. § 203.

Under Education Law § 301, Respondent Commissioner,

> shall . . . exercise the judicial functions conferred by law upon the commissioner of education and, subject to rules of the regents, to make, execute and issue in the name of the department such determinations, decisions, orders, notices and certificates as may be required for the exercise and performance of the functions, powers and duties conferred or imposed upon the department.

Id. § 301.

Respondent SED "is charged with the general management and supervision of all public schools and all of the educational work of the state, including the . . . exercise of all the functions of the education department . . . and of the commissioner of education and the performance of all their powers and duties." *Id*. § 101. Through the performance of these duties, Respondents collectively are responsible for discharging the State's obligation to provide students the opportunity for a sound basic education.

B. Respondents' Constitutional Duty Requires Them to Intervene When a Local School Board Is Failing to Provide Students with the Opportunity for a Sound Basic Education.

Local boards of education are "charged with the general control, management and responsibility of the schools." N.Y. Educ. Law § 2(14) (Consol. 2015). But while local boards have broad discretion as to how they manage resources, they must do so in a manner that ensures the opportunity for a sound

basic education to all students, and their power over education resources must be "subject to restrictive policies which reflect . . . public concerns." *Bd. of Educ. v. Areman*, 41 N.Y.2d 527, 531 (1977).

When the State delegates the administration of a constitutional mandate to a subordinate actor, it does not relieve itself of the responsibility to ensure its local construct carries out that mandate. Were that so, the State could strip citizens of their positive rights merely by passing legislation delegating its responsibility to fulfill those rights. But that cannot be—and in fact is not—the case. *See, e.g.*, *People v. Montgomery*, 24 N.Y.2d 130, 133 (1969) (in the criminal context, "the courts are the surrogates of the State's responsibility[;] . . . defendant cannot lose his right to appeal simply because the Courts have deputized a lawyer to fulfill the function and he has failed to properly carry out his duties."), *superseded by statute as stated in People v. Andrews*, 23 N.Y.3d 605 (2014).

Indeed, the Court of Appeals has addressed the precise issue before this Court. Over a decade ago, the Court of Appeals in the *Campaign for Fiscal Equity* litigation made clear that not only does the State have the responsibility to provide essential resources to districts, it also *"remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights*." *Campaign for Fiscal Equity*, 100 N.Y.2d at 922 (emphasis added). Clearly, where, as here, a local board of education—the State's

chosen unit of education governance—engages in a State-documented pattern of fiscal mismanagement and neglect that impairs the delivery of a sound basic education to district students, the State—specifically Respondents—*must* intervene on the students' behalf.

The obligation to intervene when the actions of a local board of education "sabotage" the right of students to a sound basic education lies at the very core of the State's obligation to maintain and support a "system of free common schools" under the Education Article. N.Y. Const. art. XI, § 1. Where a board of education does not fulfill its delegated duty to allocate resources in a manner that ensures the opportunity for a sound basic education, it undermines Respondents' overarching constitutional duty to ensure district resources are adequate to provide such an opportunity. *See City of New York v. State*, 86 N.Y.2d 286, 289–90 (1995) (school districts are "merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents"). Although "[n]either the Regents nor SED is responsible . . . for the day-to-day operation of the schools or for their funding," *Campaign for Fiscal Equity*, 100 N.Y.2d at 904, both have an obligation to intervene where those responsible for day-to-day operations—local boards of education—grossly mismanage them. *See* N.Y. Educ. Law § 101 ("The [education] department is charged with the general management and supervision of all public schools.").

This is particularly so where, as here, the District's documented mismanagement robs "the residents of such districts [of] the right to participate in the governance of their own schools." *Paynter*, 100 N.Y.2d at 442.

Indeed, the State has recognized that it "is ultimately the controlling partner in the education system partnership with local school districts" and "has consistently exercised control and oversight of the overall management of school districts for the delivery of educational services." *See* Brief for Defendants at 24–25, *N.Y. State United Teachers v. State*, 993 N.Y.S.2d 475 (N.Y. Sup. Ct. 2014) (No. 963-13). As in any principal-agent relationship, the principal does not dispose of its liability for a legal duty by delegating to a fiduciary. *See, e.g.*, *Cavanagh v. O'Neil*, 27 A.D. 48, 51 (1898) (When an act is the "duty of the master . . . for an omission to perform this duty, whether it arises from his own act or from the acts of those to whom he may delegate the discharge of that duty, the master is liable."). Similarly, the State is not relieved of its constitutional duty to provide a sound basic education when, after delegating administrative responsibilities to a school board, it then documents severe and ongoing delinquencies in the board's management of its resources. Although the State can—and does—delegate day-to-day administration of public schools to local school boards, it maintains the duty to ensure that those boards are properly carrying out their responsibilities, and

ultimately must take action if, through its own reports, it documents the denial of students' constitutional right to the opportunity for a sound basic education.

C. Respondents' Discretion over the Means of Providing the Opportunity for a Sound Basic Education Does Not Change the Mandatory Nature of Their Constitutional Duty.

There is an important distinction between the discretionary choices made in the administration of the education system and the mandatory constitutional obligation to ensure the provision of a sound basic education. The Constitution charges the State with providing the opportunity for a sound basic education to all students; that charge is a "governing . . . standard with a compulsory result." *N.Y. Civil Liberties Union v. State*, 4 N.Y.3d 175, 184 (2005). Respondents have no choice as to whether to provide a sound basic education. They must. And when they do not, an Article 78 petition in the nature of a writ of mandamus is the proper avenue for relief.

An Article 78 petition in the nature of a writ of mandamus "will lie against an administrative officer only to compel him to perform a legal duty, and not to direct how he shall perform that duty." *Klostermann v. Cuomo,* 61 N.Y.2d 525, 539 (1984) (citation omitted); *see also Cortes*, 54 N.Y.S.3d at 512 ("[M]andamus is available to enforce a clear legal right where a governmental body or officer has failed to perform a duty enjoined by law."). The writ "will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion,"

but there is a distinction between "*those acts the exercise of which is discretionary*" and "*those acts which are mandatory but are executed through means that are discretionary*." *Klostermann,* 61 N.Y.2d at 539 (emphasis added). This means that a government official "can be directed to act, but not how to act, in a manner as to which it has the right to exercise its judgment." *Bonanno v. Town Bd. of Babylon*, 148 A.D.2d 532, 533 (2d Dep't 1989); *see also Marcus v. Wright*, 225 A.D.2d 447, 448–49 (1st Dep't 1996) ("[C]ourts may use mandamus to require performance of acts that are mandated by statute but are exercised by means that are discretionary."). "[M]andamus properly lies," for example, when the court orders the police to "prevent demonstrators from approaching within 50 feet of the grocery stores" so long as the court "leaves the methods for accomplishing this objective to the discretion of the police." *Buong Jae Jang v. Brown*, 161 A.D.2d 49, 59 (2d Dep't 1990). Indeed, "while the courts will not interfere with the exercise by [State] officials of their broad discretion to allocate resources and devise enforcement strategies, mandamus will lie if they have abdicated their responsibilities by failing to discharge them, whatever their motive may be." *In re Jurnove v. Lawrence*, 38 A.D.3d 895, 896 (2d Dep't 2007).

The Court of Appeals has recognized that the nuanced principle that mandamus may be used to "compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so" has been

"somewhat lost from view." *Klostermann*, 61 N.Y.2d at 540. This interpretation of the proper function of the writ, however, has been established for over a century. In *Baird v. Board of Supervisors*, for example, a board of supervisors was tasked with the constitutional duty of dividing Kings County into assembly districts. Although the constitutional provision did not explicitly limit the board's discretion in carrying out this task, the court held that the duty imposed by the Article was to "divide the assembly districts so that they shall contain as nearly as may be an equal number of inhabitants." *In re Baird v. Bd. of Supervisors*, 138 N.Y. 95, 108 (1893). The board, however, had drawn districts that were grossly disproportional to population size, and registered voters in the county sued to compel the board to draw the districts "in the manner and form as required and contemplated by the Constitution." *Id*. at 96. The court held that the board members had "failed . . . to perform their duty to legally divide up the county," and that the "duty still rests upon them just the same as if they had never attempted its performance." *Id.* at 115; *see also id*. (board's action was "utterly void and of no effect"). The court distinguished the discretion inherent in the performance of the duty from the mandatory nature of the duty itself, stating that "[a]ll the citizens are interested in the performance of [the] duty. Its performance does not involve any discretion. It must be done. The manner of its performance is to a large extent discretionary. The court only interferes to compel the performance." *Id.* Thus, the court

recognized that although it did not have the power to instruct the board as to how to go about its obligation, it nonetheless could impose a writ of mandamus ordering the board to "perform their duty, and make a constitutional division of their county." *Id.* at 116.

That a court may only compel state actors to perform a clearly established legal duty and may not direct the particulars of how they "shall perform that duty when the manner of performance is in [their] discretion, is not a valid objection to the use of [the mandamus] remedy." *People ex rel. Schau v. McWilliams*, 77 N.E. 785 (1906). When "plaintiffs can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties." *Klostermann*, 61 N.Y.2d at 541. Although mandamus is confined to enforcement of a non-discretionary legal duty, it is nevertheless the appropriate and necessary remedy in this case, even if Respondents are permitted some measure of discretion in their performance of the duty.

Just as the State is permitted to delegate its responsibility to local school boards, it can also oversee those boards in whatever manner it deems appropriate. What is not discretionary is the constitutional requirement to ensure that East Ramapo students have the opportunity to receive a sound basic education. When Respondents fail in that task—whether it be by their own actions, or the actions of

their agents—Respondents have no discretion as to whether or not to address that failure: "the duty still rests upon them just the same as if they had never attempted its performance." *Baird*, 138 N.Y. at 115. Of course, the State is afforded deference in the manner in which it chooses to provide positive constitutional rights, such as a sound basic education, to its citizens. But that deference in no way negates the obligation to provide those rights. Put simply, where, as here, the Constitution compels the State to act, "[i]t must be done." *Id*.

D. Respondents Have Refused to Intervene in East Ramapo Even After Repeatedly Documenting the District's Severe and Continuing Mismanagement of Education Funding and Resources.

Respondents commissioned or received *five separate reports* in the span of less than two years detailing the myriad ways in which the East Ramapo School Board had failed to satisfy its duty to allocate resources in a way that would ensure the opportunity for a sound basic education in East Ramapo. The Board's fiscal management was qualified as "abysmal"; it clearly favored "the interests of private schools over public schools" (R-117–118); and it allocated funds based on its "views," rather than on even a simple system of accounting and impact assessment (R-192). Its lack of attention to ELL students was staggering, it created a "barrier to educational access" (R-130), and it made special education decisions that violated students' civil rights (R-202–213). And in December 2015, a team of State-appointed monitors found unequivocally that "the East Ramapo Board of

Education has persistently failed to act in the best interests of public school students." (R-258.)

Each of these reports recommended supervision or intervention in one form or another. Yet, in the face of those reports, Respondents *failed to intervene and take any affirmative action to correct and remediate the Board's mismanagement*. The reports, taken together, paint a clear picture of how the Board's budgetary and funding decisions have "sabotaged" the delivery of a sound basic education to East Ramapo students, a "constitutionally-mandated" right secured by the State. *Campaign for Fiscal Equity*, 100 N.Y.2d at 922. Worse still, they show that Respondents knew of the Board's failure for months and did nothing to remedy it. Because Respondents knew from their own reports that the Board's mismanagement and neglect extended so far as to deprive students of a constitutional right, they were obligated to intervene and protect that right. *Id*.

The record of the Board's abject neglect and gross mismanagement is overwhelming and undisputed. Faced with that record, the court can—and must—direct Respondents to intervene to remedy the ongoing constitutional violations in East Ramapo documented by their own reports, and as required by the Education Article. This directive strikes the appropriate balance of requiring intervention to remedy the constitutional deficiencies in a prompt fashion, but leaves to Respondents the specific steps or means by which to address those deficiencies.

Petitioners are not seeking judicial intervention to make policy choices or to determine specific actions Respondents must take to remedy the constitutional violations in East Ramapo. Rather, Petitioners, as a last resort, are seeking judicial relief requiring Respondents "to perform the duty enjoined upon them by law by taking any necessary and appropriate action to ensure that all students in East Ramapo have the resources necessary for a sound basic education." (R-36.)

In sum, although "it may be impossible always to prevent injustice in matters of government, . . . it is manifestly not the policy of this state to commit irresponsible power to local administrative bodies[.]" *Baird*, 138 N.Y. at 95. Thus it is appropriate for the court to order Respondents to intervene to stop the ongoing constitutional violation in East Ramapo.

CONCLUSION

Petitioners respectfully ask the Court to reverse the judgement of the court below and order Respondents to take all necessary and appropriate action to ensure that East Ramapo students are provided a constitutionally guaranteed opportunity for a sound basic education.

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Respectfully submitted,

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