

 The **Campaign** for **Educational Equity**

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**TEACHERS COLLEGE** COLUMBIA UNIVERSITY

**STUDENTS' CONSTITUTIONAL RIGHT TO A  
SOUND BASIC EDUCATION:  
NEW YORK STATE'S UNFINISHED AGENDA**

**Part 2.**

**Filling the Regulatory Gaps**

November 2016

## **STUDENTS' CONSTITUTIONAL RIGHT TO A SOUND BASIC EDUCATION: NEW YORK STATE'S UNFINISHED AGENDA**

- Part 1. A Roadmap to Constitutional Compliance Ten Years after *CFE v. State*
- Part 2. Filling the Regulatory Gaps
- Part 3. Utilizing a Constitutional Cost Methodology
- Part. 4. Ensuring Resource Accountability

### **ABOUT THE CAMPAIGN FOR EDUCATIONAL EQUITY**

The Campaign for Educational Equity is a nonprofit research and policy center at Teachers College, Columbia University that champions the right of all children to meaningful educational opportunity and works to define and secure the full range of resources, supports, and services necessary to provide this opportunity to all children. CEE pursues systems change through a dynamic, interrelated program of research, legal analysis, policy development, coalition building, curriculum development, and advocacy dedicated to developing the evidence, policy models, curricula, leadership, and collaborations necessary to advance this agenda at the federal, state, and local levels.

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# STUDENTS' CONSTITUTIONAL RIGHT TO A SOUND BASIC EDUCATION: NEW YORK STATE'S UNFINISHED AGENDA

## *Part 2. Filling the Regulatory Gaps<sup>1</sup>*

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<sup>1</sup> This is the second in a series of reports that are the culmination of two years of research by the Campaign for Educational Equity, a policy and research center at Teachers College, Columbia University, and significant input from the Safeguarding Sound Basic Education Task Force, a statewide group made up of representatives from New York's leading statewide education associations, parent organizations, school business officials, and advocacy groups (see the appendix in the overview report for membership). The series includes an overview entitled, *A Roadmap to Constitutional Compliance Ten Years after CFE v. State*, and three specific proposals: *Filling the Regulatory Gaps*, the revisions to education regulations needed for constitutional compliance; *Utilizing a Constitutional Cost Methodology*, an innovative new method for calculating education costs; and the present report, *Ensuring Resource Accountability*, the mechanisms needed to monitor and enforce the provision of constitutionally required educational resources. The Campaign for Educational Equity is grateful to the Booth Ferris Foundation and the Robert Sterling Clark Foundation for their support of this research. This report was prepared with guidance from the Safeguarding Sound Basic Education Task Force, although the views and conclusions expressed here do not necessarily reflect those of task force participants or of Teachers College.

## EXECUTIVE SUMMARY

In 2003, the New York State Court of Appeals, the state’s highest court, held in *Campaign for Fiscal Equity (CFE) v. State of New York* that the state constitution requires New York to provide all of its students “a meaningful high school education” that will prepare them to “function productively as civic participants capable of voting [or] serving on a jury” and “to obtain ‘competitive employment.’” The court defined this right in general language, but it expected the state, through its laws and regulations, to articulate in concrete terms precisely what is a “meaningful” education that conforms to constitutional requirements.

New York State has not yet revised its education statutes and regulations to respond to *CFE* rulings and to specify the essential educational programs needed to provide all students the opportunity for a sound basic education. Past research by the Campaign for Educational Equity at Teachers College uncovered gaps in the current laws and regulations that leave students’ educational rights unprotected. These gaps lead to a lack of access to basic educational resources, particularly in schools with high levels of poverty, where, especially in times of fiscal constraint, the minimum requirements become the maximum services schools provide.

To guarantee that students in schools with high levels of poverty receive adequate, appropriate, and equitable resources, the Board of Regents needs to initiate a thorough review of all of the existing regulations and spell out what level of service is necessary to meet constitutional requirements. This specificity will assist school districts in making policy decisions in difficult economic times and ensure that students’ rights are upheld at all times. The recommendations set forth in this report are intended to serve as examples for such an enterprise. We do not claim to have identified all of the gaps in the current regulations. Those we provide are illustrative of only a few of the many that need review and reconsideration.

We highlight gaps and needed revisions in five of the areas of essential resources that the courts emphasized in *CFE* (curricula, instructional materials, personnel, class sizes; and resources for students with extraordinary needs). They include the following:

- gaps in requirements for high school course offerings;
- gaps in requirements for preparation for civic participation;
- gaps in requirements for access to instructional materials;
- gaps in requirements for sufficient numbers of qualified personnel;
- gaps in requirements on class sizes; and
- gaps in requirements for resources for students with disabilities.

Regulatory reform is necessary but not sufficient for constitutional compliance and safeguarding students’ educational rights. The state must also provide schools and school districts sufficient funds to meet requirements based on an up-to-date, constitutional cost analysis, and it must monitor and enforce the provision of these resources in every school.

## INTRODUCTION

In 2003, the New York State Court of Appeals, the state’s highest court, held in *Campaign for Fiscal Equity (CFE) v. State of New York* that the state constitution requires New York State to provide all of its students “a meaningful high school education,”<sup>2</sup> one that will prepare them to “function productively as civic participants capable of voting [or] serving on a jury,”<sup>3</sup> and “to obtain ‘competitive employment.’”<sup>4</sup> The court defined this right in general language, but it expected the state, through its laws and regulations, to articulate in concrete terms precisely what is a “meaningful” education that conforms to constitutional requirements.

States like Montana,<sup>5</sup> Tennessee,<sup>6</sup> and Washington<sup>7</sup> have each enacted statutory “basic education programs” that spell out the education essentials required by their state constitutions in response to state court adequacy rulings, and other state education departments, like those in Nebraska<sup>8</sup> and Rhode Island,<sup>9</sup> have developed such programs through state regulations. In New York State, however, neither the governor, the legislature, the Board of Regents, nor the state education department (SED) has taken steps to review and reconsider the state’s statutes and regulations in response to the Court of Appeals’ *CFE* rulings and to specify the essential educational programs that are needed to provide all students the opportunity for a sound basic education.

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<sup>2</sup> *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 907 (2003) (hereafter “*CFE II*”).

<sup>3</sup> *Id.* at 905 (quoting *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 316 (1995) (hereafter “*CFE I*”).

<sup>4</sup> *See CFE II*, 100 N.Y.2d at 905 (citation omitted).

<sup>5</sup> MCA §20-9-309 (Mont. 2012).

<sup>6</sup> T.C.A. §§49-1-302(a)(4)(B), 49-3-307.

<sup>7</sup> RCWA §§ 28/A.150.220-28AA.150.275 (2012).

<sup>8</sup> Nebraska State Board of Education, *Providing Equitable Opportunities for an Essential Education for All Students in Nebraska Public School Districts* (2004, reaffirmed, 2006).

<sup>9</sup> R.I. Board of Regents for Elementary & Secondary Education, *Basic Education Program Regulations* (2009).

In the absence of any state action in this regard, the Campaign for Educational Equity at Teachers College, Columbia University (CEE), compiled all of the current judicial, legislative, and regulatory provisions that relate to constitutional compliance and published a compendium of these requirements, *Essential Resources: The Constitutional Requirements for Providing All Students in New York State the Opportunity for a Sound Basic Education*.<sup>10</sup> We also conducted an in-depth study of 33 high-need schools throughout the state—in New York City, Rochester, and six other small city, suburban, and rural school districts. Our analysis of the extent to which essential programs and services are actually being provided at these high-need schools revealed widespread violations of constitutional requirements (see *Deficient Resources: An Analysis of the Availability of Basic Educational Resources in High-Needs Schools in Eight New York State School Districts*).<sup>11</sup>

Our *Essential Resources* compilation of all of New York State’s current laws and regulations regarding sound-basic-education rights, combined with our study of the availability of these resources and findings of extensive denials of these rights in *Deficient Resources*, also revealed gaps in the current state laws and regulations where students’ educational rights were left unprotected. We found, for example, that there is no regulatory guidance regarding programs and activities that are needed to prepare students to be capable citizens, a concept at the heart of the Court of Appeals’ definition of sound basic education. There are no requirements that high

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<sup>10</sup> Campaign for Educational Equity. (2012, December). *Essential Resources: The Constitutional Requirements for Providing All Students in New York State the Opportunity for a Sound Basic Education*. Retrieved from <http://www.equitycampaign.org/publications/essential-and-deficient-resources/EssentialResources.pdf>.

<sup>11</sup> Campaign for Educational Equity. (2012, December). *Deficient Resources: An Analysis of the Availability of Basic Educational Resources in High Needs Schools in Eight New York State School Districts*. Retrieved from <http://www.equitycampaign.org/publications/essential-and-deficient-resources/DeficientResources.pdf>.

schools offer students advanced coursework, Advanced Placement or honors classes, career and technical education and arts courses. Many of the regulations, such as those regarding access to school counselors or social workers, indicate in general terms that schools are required to provide sufficient levels of service. The lack of adequate resources is experienced most acutely in schools with high levels of poverty, where, especially in times of fiscal constraint, the minimum requirements become the maximum services schools provide. To guarantee that students in schools with high levels of poverty receive adequate, appropriate, and equitable resources, the state needs to spell out with more specificity what level of service is necessary to meet constitutional requirements. This specificity will assist school districts in making policy decisions in difficult economic times and ensure that students' rights are upheld at all times.

### **REGENTS' REGULATORY REVIEW**

We recommend that the New York State Board of Regents initiate a thorough review of all of the existing regulations in order to identify all areas in which the regulations are not responding properly to constitutional requirements, and to fill these gaps. The recommendations set forth in this report are intended to serve as examples for such an enterprise. We do not claim to have identified all of the gaps in the current regulations. Those we provide are illustrative of only a few of the many that need review and reconsideration. As part of the Regents' review, a process should also be established for public input.

In addition, this review process should eliminate out-of-date provisions in the current regulations. Existing regulations include dozens of pages that have been superseded and should be eliminated. For example, the current regulations contain many long paragraphs of diploma requirements for “[s]tudents first entering grade nine in 1985 and thereafter, but prior to the

2001-2002 school year”<sup>12</sup> and other years long past. Eliminating this clutter will allow school districts and the public at large to focus on and understand current obligations and constitutional requirements.

It is important that the regulations clearly emphasize the basic educational opportunities to which all students are entitled, and that these requirements are set forth in a transparent, user-friendly form. Clear, compact, and comprehensive regulations will substantially aid constitutional compliance and assist school districts in making appropriate education-policy decisions, especially in times of fiscal constraint. Regulatory reform will also provide appropriate information for parents and students, helping them understand, and become advocates for, their rights.

Why are we proposing additional state regulations at a time when the state is not providing schools and school districts sufficient funds to meet current state mandates, and when the state is not enforcing the laws and regulations that are on the books? Regulatory reform is one of a number of state actions necessary for constitutional compliance and safeguarding students’ educational rights.<sup>13</sup> Our call for these regulatory reforms is based on the premise that schools and school districts be provided sufficient funds based on an up-to-date, constitutional cost analysis to comply with current programmatic regulations and with any new regulations

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<sup>12</sup> 8 NYCRR § 100.5 (a)(2).

<sup>13</sup> As we spell out in detail in part 1 of this series, *A Roadmap to Constitutional Compliance Ten Years after CFE v. State*, to guarantee all students the opportunity for a sound basic education, state policymakers, the Regents, and the state education department must take the following actions:

1. Define the essential elements of “the opportunity for a sound basic education”;
2. Conduct regular cost studies using a fair, up-to-date methodology that is based on the constitutional resource requirements;
3. Reduce barriers to effective spending for essential educational resources to maximize cost effectiveness while safeguarding students’ constitutional rights;
4. Revise New York State school-funding formulas and district-funding-distribution rules to guarantee all schools sufficient resources; and
5. Create state and local accountability mechanisms to monitor the provision the essential resources of a sound basic education.



required for constitutional compliance in ensuring all students the opportunity for a sound basic education.

The governor and the state legislature have the ultimate constitutional responsibility for ensuring that sufficient funds are available to provide all students in the state the opportunity for a sound basic education and must provide state funding to a level sufficient to allow all school districts to comply with constitutional requirements and with the state laws and regulations that implement them. This also means that the legislature must ensure on an on-going basis that all new statutory and regulatory mandates are fully funded.

The present report on regulatory reform is being issued in conjunction with a report on a new “constitutional cost methodology” that will more accurately determine the amount of funds that schools and school districts need in order to provide all of their students a meaningful opportunity for a sound basic education, and an additional report describing the mechanisms necessary for monitoring and enforcing the provision of these resources in every school.

### **ILLUSTRATIVE REGULATORY GAPS AND NECESSARY REVISIONS**

In this section, we identify examples of the specific kinds of gaps in the current New York State laws and regulations that need to be filled to remedy constitutional deficiencies and ensure alignment with the *CFE* decision. The examples we highlight relate to five of the seven areas of essential resources that the New York State courts emphasized in the *CFE* litigation.<sup>14</sup>

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<sup>14</sup> The seven areas are

1. sufficient numbers of qualified teachers, principals and other personnel;
2. sufficient and up-to-date books, supplies, libraries, educational technology and laboratories;
3. appropriate class sizes;
4. adequate and accessible school buildings;
5. suitable, up-to-date curricula, including an expanded platform of programs to help at-risk students by giving them “more time on task”;
6. adequate resources for students with extraordinary needs; and

## Gaps in Requirements for High School Course Offerings

New York students' right to the opportunity for sound basic education entails access to suitable, up-to-date curricula. Currently, however, New York State requires that high schools only provide students with access to the coursework necessary to graduate with a basic Regents diploma. In some high schools around the state, the courses minimally needed for this diploma are the only classes available to students.

**Science.** In science, to earn a Regents diploma, students must complete three units (i.e., three years), at least one of which must be in the life sciences and at least one in the physical sciences.<sup>15</sup> Many high schools, especially in New York City and other urban districts, can and do satisfy this regulation by providing students only with basic courses in biology and earth science. High schools are not required to provide students with the opportunity to take basic chemistry or physics classes or more advanced or Advanced Placement (AP) science courses. Not surprisingly, resource-constrained high schools are less likely to offer those classes. A survey conducted in 2008, even before the school budget cuts of the recent recession, found that 55% (164 of 298) of New York City high schools surveyed did not offer physics as a subject; this meant that approximately 23% of the city's public high school student population, disproportionately students living in poverty and students of color, did not have access to any physics course in high school.<sup>16</sup>

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7. a safe, orderly environment.

<sup>15</sup> 8 NYCRR §100.5(a)(3)(iii)

<sup>16</sup> Angela M. Kelly and Keith Sheppard, *Newton in the Big Apple: Access to High School Physics in New York City*, 46 *THE PHYSICS TEACHER* 280 (May 2008). The vast majority of large high schools offered physics as a course, while fewer than half of mid-sized schools, and only a quarter of the small schools did. See also Center for New York City Affairs, The New School, *Creating College Ready Communities: Preparing NYC's Precarious New Generation of College Students* 19 (2013) (only 28 of 342 New York City high schools analyzed had students taking exams for algebra II, chemistry, and physics. Most schools offered only one or two of these courses and 46 appeared to offer none); NYC Independent

Most four-year colleges expect students to take 3-4 years of science in high school, “at least one of each of biology, chemistry and physics.”<sup>17</sup> The State University of New York at New Paltz, for example, strongly recommends a college preparatory program including “3-4 years of science (3 years of laboratory science required).”<sup>18</sup> The New York City Department of Education suggests that, to achieve college and career readiness, students should take at least *three* of the following courses: Living Environment, Chemistry, Physics, or AP Science.<sup>19</sup>

Accordingly, we recommend that the commissioner’s regulations be revised to require that all public high schools offer courses or ensure “reasonable access” to at least basic Regents courses in biology, chemistry, and physics for all students. Some high schools that lack the resources to provide chemistry or physics on site could provide opportunities for students to take such courses at another school or a nearby college. In practice, such arrangements typically allow only a few extraordinarily motivated students to take courses that are standard options at most schools. However, if such options are broadly accessible to all students eligible to take such

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Budget Office, *Availability and Distribution of Selected Program Resources in New York City High Schools*, p. 10 (10% of the high schools studied did not offer chemistry, and 32% did not offer physics).

By way of contrast, many New York State high schools offer a rich science curriculum. For example, the White Plains, NY, high-school course catalog reads as follows, “White Plains High School offers a wide range of courses in science designed to meet the needs and interests of our diverse student body. In the four New York State Core Curricular areas, Living Environment: Biology; Physical Setting: Earth Science; Chemistry; and Physics, we offer courses at both the Regents level and the Honors level.... In addition to our Core Curriculum courses, we offer four Advanced Placement courses in science: Biology, Chemistry, Environmental Science and Physics C (calculus-based physics)... We also offer an extremely popular Forensic Science elective course. In addition... White Plains High School is very pleased to be able to offer a three-year sequence in Science Research in the High School. In this sequence, students select a topic for research, secure a mentor, design and implement a scientific study, and analyze and present their findings.”

(<http://www.whiteplainspublicschools.org/cms/lib5/NY01000029/Centricity/Domain/178/Course%20Catalog%202015-2016%20021315.pdf>)

<sup>17</sup> National Association for College Admission Counseling, *Guidance for High School Students*, available at <https://www.nacacnet.org/globalassets/documents/publications/guideforfamilies.pdf>. See also, ACT, *Recommended College Prep Courses* (2014), available at <http://actstudent.org/college/courses.html>. (“Three years of science, including rigorous courses in Biology, Chemistry, and Physics.”)

<sup>18</sup> State University of New York, New Paltz. *Admissions: Freshmen Requirements*, available at [www.newpaltz.edu/admissions/freshmen.html](http://www.newpaltz.edu/admissions/freshmen.html).

<sup>19</sup> See, <http://schools.nyc.gov/nr/rdonlyres/215ff06b-dca3-442b-89df-18e674dc867e/0/acpolicygened.pdf>.

courses, and all necessary transportation is provided, the “reasonable access” requirement would be met. “Reasonable access” might also include “blended-learning” courses that combine a digital or distance-learning component with in-person instruction, provided that all of the requirements for online/blended-learning courses, set forth in the commissioner’s regulations, including supervision by certified teachers, are met in a meaningful manner.<sup>20</sup>

**Mathematics.** Similarly, while New York State currently requires students to take three years of mathematics in order to graduate from high school,<sup>21</sup> high schools can meet this curriculum requirement without offering courses that are standard in most high schools, including algebra 2, pre-calculus, and calculus.<sup>22</sup> While New York students can graduate without these courses, lack of access to them will preclude a student from receiving a Regents diploma with advanced designation, for which passage of exams in integrated algebra, geometry, and algebra 2 is required, and compromises his or her record for admission to many colleges.<sup>23</sup> In this area, we recommend that current regulations be amended to require every high school to offer students reasonable access to courses in algebra 2, pre-calculus, and calculus.

**Languages other than English.** New York high schools are only required to provide one high-school year of study in a language other than English,<sup>24</sup> which is the requirement for a basic Regents diploma,<sup>25</sup> although two additional units are required for an advanced Regents

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<sup>20</sup> 8 N.Y.C.R.R. §100.5[d][10][i][a] .

<sup>21</sup> 8 N.Y.C.R.R. §100.5(a)(3)(iv).

<sup>22</sup> Center for New York City Affairs, The New School, *Creating College Ready Communities: Preparing NYC’s Precarious New Generation of College Students* 19 (2013). (Only 28 of 342 New York City high schools analyzed had students taking exams for algebra II, chemistry, and physics. Most schools offered only one or two of these courses and 46 appeared to offer none.)

<sup>23</sup> The majority of colleges require at least four of the following six classes, taken in order: pre-algebra, algebra, geometry, algebra 2 and/or trigonometry, pre-calculus, calculus. National Association for College Admission Counseling, *Guidance for High School Students*, available at <https://www.nacacnet.org/globalassets/documents/publications/guideforfamilies.pdf>.

<sup>24</sup> Students are also required to complete two units of study in a language other than English by grade 9. 8 NYCRR §100.2(d)(1)-(2).

<sup>25</sup> The commissioner’s regulations currently specify that “Each public school district shall offer students

diploma.<sup>26</sup> Nor are schools required to offer students a choice of world languages. As a result, some under-resourced high schools provide only a single year of language, and many schools offer only one language, generally basic Spanish.<sup>27</sup> These very minimal regulations mean, among other things, that the many bilingual students who come from Spanish-speaking homes have no other world-language choices and cannot even advance their Spanish-language skills by taking an advanced Spanish-language or literature course. This also precludes their students from acquiring the three years of high-school language study needed to earn an advanced Regents diploma, and the 2-4 years of study expected for admission to many colleges and universities.<sup>28</sup> To close these gaps, we recommend that every high school be required to offer or provide reasonable access to at least a three-year sequence of language study and that high schools with a student population in excess of 300 be required to offer or provide reasonable access to instruction in at least two world languages.<sup>29</sup>

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attending its schools the opportunity to meet all the requirements for and receive a Regents high school diploma,” 8 NYCRR §100.2(e), implying that school districts do not also need to provide students reasonable access to courses needed for an advanced Regents diploma. This limitation is inconsistent with the constitutional requirement that all students have meaningful, “college and career ready” high school education. Because students of color disproportionately attend schools that do not have access to courses needed for an advanced Regents diploma, this provision also may violate constitutional equal protection requirements.

<sup>26</sup> 8 NYCRR §100.2(d)-(2); 100.5(b)(7)(iv)(g); 100.5 (b)(7)(v)(c).

<sup>27</sup> For comparison, the Farmingdale, NY, High School Curriculum Guide for 2014-15 lists the following offerings in languages other than English: Spanish I-V; Italian II-V; French II-V; and American Sign Language I-III

(<http://www.farmingdaleschools.org/cms/lib02/NY01001906/Centricity/domain/8/curriculum%20guide/Farmingdale%20HS%20Curriculum%20Guide%202016%202017.pdf>).

<sup>28</sup> See, e.g., ACT, *Recommended College Prep Courses* (2014), available at [www.actstudent.org/collegeolcourses.html](http://www.actstudent.org/collegeolcourses.html).

CUNY states that “If you are considering attending CUNY, you should pursue a college preparatory curriculum that *at a minimum* includes ... two years of a single foreign language.” The City University of New York. Undergraduate Admissions. *9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Graders*.

<http://cuny.edu/admissions/undergraduate/9th-10th-11-th-graders.html>.

<sup>29</sup> See, e.g., 22 Pa. Code § 4.25(a) (requiring instruction in at least two world languages, at least one of which must be offered in a minimum four-year sequence.); Iowa, I.C.A. § 256.11(5)(f) (requiring four years of sequential language study).

**The arts.** New York State requires high schools to offer students only a single year of high-school study in the arts, the requirement to graduate with a Regents diploma. The commissioner’s regulations also require school districts to offer students the opportunity to complete a three- or five-course sequence in the arts (that is, in music, dance, theater, or visual arts), beginning in 9<sup>th</sup> grade.<sup>30</sup> However, some high schools provide only the single year of required arts instruction. In some school districts, arts sequences are available only in certain high schools and, as a result, many students do not have reasonable access to them.<sup>31</sup> Such arts opportunities are important for helping many students develop the creativity, problem-solving, communication, and self-expression skills that are essential for preparation for civic participation, college, and future employment.

Current high-school arts requirements do not provide sufficient arts-education course offerings to allow all students to meet the requirements for a Regents diploma through a multiple-pathways arts examination,<sup>32</sup> nor do they allow all students to meet the requirements for an advanced Regents diploma through an arts endorsement. Accordingly, we recommend that school districts be required to provide all students reasonable access to the opportunity to complete a three- or five-course sequence in music, dance, theater, or visual arts.<sup>33</sup>

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<sup>30</sup> 8 NYCRR §100.2(h)(1).

<sup>31</sup> See, New York City Department of Education, *Arts in Schools Report, 2013-2014*, p. 25. (The proportions of responding schools serving high school grades that reported offering at least one arts sequence of six or more credits ranged from 3% in dance to 47% in visual arts in the 2013-14 school year.) Office of the New York City Comptroller, *A Plan to Boost Arts Education in New York City Schools*, p. 9 (2014), available at [http://comptroller.nyc.gov/wp-content/uploads/documents/State\\_of\\_the\\_Arts.pdf](http://comptroller.nyc.gov/wp-content/uploads/documents/State_of_the_Arts.pdf).

A more recent analysis undertaken for the Safeguarding Sound Basic Education Task Force by the Center for Arts Education in Feb. 2015 found that 214 of 390 New York City high schools analyzed, or 55%, offer at least one arts sequence in one of the specified arts areas. While all of the city’s community school districts offer at least one sequence, the range is quite wide with several CSDs offering only one sequence, and one CSD offering 30.

<sup>32</sup> See, 8 NYCRR §100.2(mm)

<sup>33</sup> See, e.g. Rhode Island Board of Regents for Elementary and Secondary Education, Basic Education Program Regulations, §G-13-1.3.5 (2009). (“A program of study shall exist for all secondary students to

**Honors and Advanced Placement courses.** Most secondary schools in New York State offer their students a range of advanced, honors, International Baccalaureate (IB), and/or Advanced Placement (AP) courses that allow students access to a four-year sequence of courses in most subjects, provide challenging courses throughout high school, and enable students to demonstrate the academic rigor needed for admission to competitive colleges. Many under-resourced urban, suburban, and rural schools do not, however, provide their students these opportunities. All eligible students should have access to these course offerings. We recommend that regulations be revised to require school districts to provide all qualified students reasonable access to advanced, honors, IB, and/or AP courses in the core academic subjects: English language arts, mathematics, science, and social studies.<sup>34</sup>

### **Gaps in Requirements for Preparation for Civic Participation**

The New York Court of Appeals has emphasized repeatedly that one of the two primary purposes of public education is to prepare students to “function productively as civic participants.”<sup>35</sup> However, current regulations are insufficient to ensure that all New York students are adequately prepared for civic participation. For example, although a one-semester “participation in government” course is included in New York State’s high school graduation requirements,<sup>36</sup> there are no specific requirements regarding access to the type of experiential curricular and extra- or co-curricular activities that are necessary to provide students the

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enable them to demonstrate proficiency in at least one art form. Additionally, secondary school students shall be provided with the opportunity to do multiple levels of coursework in visual arts and design in both two and three dimensions and in at least one performing arts discipline.”)

<sup>34</sup> See, e.g. North Carolina, G.S.A. § 115C-174.26 (e). (“Local boards of education shall ensure that all high school students have access to advanced courses in language arts, mathematics, science, and social studies”); Indiana, IC 20-36-3-5(b), providing that “Each school corporation shall provide the College Board’s science and math advanced placement courses in secondary schools for students who qualify to take the advanced placement courses.”)

<sup>35</sup> See, e.g., *CFE II*, 100 N.Y.2d 893, 908 (2003).

<sup>36</sup> 8 NYCRR §100.5(a)(6).

knowledge, skills, attitudes, and experiences they need to be capable voters, to serve on juries, and to exercise their first-amendment free-speech rights. As a consequence, many students lack adequate access to these critical activities. In addition, under pressure to boost student test scores in reading and math to meet NCLB requirements, many schools in recent years reduced the amount of instructional time devoted to social studies.<sup>37</sup>

To remedy these constitutional deficiencies, the commissioner's current regulations should be revised. Additional regulations should ensure, at a minimum, that

1. Students receive sufficient instruction in social studies in all grades.
2. All students have regular opportunities to practice civic participation through, to name a few examples, student councils; civic action on community issues and with community groups; field trips to courts, town/city councils, and candidate forums; and other civic experiences.<sup>38</sup>
3. All students are required to participate in meaningful service-learning and civic-literacy projects between grades 7 and 12, and all schools are required to provide students with access to such opportunities.<sup>39</sup>

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<sup>37</sup>Center on Education Policy (2007). *Choices, Changes, and Challenges Curriculum and Instruction in the NCLB Era*. Washington, DC: Author; U.S. Department of Education. (2007). *Changes in Instructional Hours in Four Subjects by Public School Teachers of Grades 1 Through 4*. (NCES 2007–305). Washington, DC: National Center for Education Statistics. Retrieved from <http://nces.ed.gov/pubs2007/2007305.pdf>.

<sup>38</sup> See, e.g., North Carolina, N.C.G.S.A. § 115C-81(g1) (requiring the state board of education to modify the high-school social-studies curriculum to include instruction in civics and citizenship education; and stating that the legislature “strongly encourages” such civics and citizenship education in high school to include elected student councils, instruction in current events and [opportunities for] students [to] write to a local, state, or federal elected official about an issue that is important to them; and that the middle school curriculum include:

- a. A tour of representative local-government facilities such as the local jail, the courthouse, or a town hall, to help students understand the way their community is governed;
- b. That students choose and analyze a community problem and offer public-policy recommendations on the problem to local officials; and
- c. Information about getting involved in community groups.

<sup>39</sup> See, e.g., Georgia, 17 G.C.A. § 4124(b) (requiring completion of 75 hours of service learning between



4. All middle schools and high schools provide students a range of regular opportunities to participate in experiential curricular and extracurricular activities that foster the social experiences and the attitudes, values, and dispositions needed to function productively as civic participants, including, but not limited to, sports, performing and visual arts, student government, speech and debate, and school newspaper.<sup>40</sup>

### **Gaps in Requirements for Access to Instructional Materials**

The *CFE* court held that students are entitled to sufficient and appropriate instrumentalities of learning, including books, supplies, libraries, laboratories, and technology. In many New York schools, however, students lack sufficient access to books, computers, lab equipment, calculators, and other instructional materials. In some schools, students are not allowed to take textbooks home to study or complete homework. Basic supplies like chalk, paper, and pencils are lacking in many schools, and parents and/or teachers must supply these items.<sup>41</sup> No current statutes or regulations proscribe standards or requirements in these areas, although the *CFE* court made clear that all of these items are constitutionally required.<sup>42</sup> We therefore recommend that the commissioner’s regulations specifically provide that

1. All students must be provided appropriate and current books and other necessary instructional supplies in suitable condition and access to necessary technology and online materials.

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9<sup>th</sup> and 12<sup>th</sup> grades.) For examples of service learning opportunities, see, e.g., <http://schools.nyc.gov/community/sis/servicelearning/default.htm>; <http://www.marylandpublicschools.org/programs/Documents/Service-Learning/MDSLGuidelines.pdf>

<sup>40</sup> Cf. Maine Stat. Ann. Title 20-A, § 15680 (D) (requiring specific annual per pupil allocation for “cocurricular and extracurricular activities”).

<sup>41</sup> Campaign for Educational Equity, *Deficient Resources: An Analysis of the Availability of Basic Educational Resources in High-Needs Schools in Eight New York State School Districts* (December, 2012)

<sup>42</sup> See, e.g., *CFE v. State of New York*, 86 N.Y. 2d 307, 317 (1994), *CFE v. State of New York*, 187 Misc.2d 1, 57 (S. Ct, N.Y. Co, 2001).

2. Where textbooks or other required books are issued (either digitally or in hard copy), every student must have his or her own copy of the correct edition of the book, which he or she shall be permitted to take home each day for home study for the entire school year or for the portion of the year when the book is used.<sup>43</sup>

Many schools also do not have enough funding for supplies and routinely rely on parents and teachers to pay for them.<sup>44</sup> The state education department has, in the past, taken a position that parents and caregivers must bear the financial burden of purchasing “consumables,” such as paper and pens, for their own children.<sup>45</sup> Insisting that parents purchase supplies for general classroom or school use, however, is inequitable; while some parents may be able to afford such a contribution, others cannot. In any event, it is unconstitutional because schools are responsible for paying the “actual cost” of providing students the opportunity for a sound basic education and that “actual cost” clearly includes basic classroom supplies. For these reasons, the

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<sup>43</sup>See, e.g., Ala. Code 1975 § 16-36-70:

(b) All students in the public schools shall be provided with adequate and current textbooks and other necessary instructional supplies for use in their education. Textbooks and other supporting materials shall be appropriate for their course work and shall be in suitable condition. Where textbooks are issued pursuant to Section 16-36-69, every student shall have his or her own copy of the issued textbook of the correct edition, which he or she shall be permitted to take home each day for home study for the entire school year or for the portion of the year when the book is issued.

\* \* \*

(e) Instructional supplies, including library books and media resources, science equipment, classroom furniture, audiovisual equipment, maps and globes, chalkboards, art and music supplies, and other educational materials shall be provided in all schools in adequate form and quantity.

*See also*, Ann. Cal. Educ. Code §35186(f)(1) (“For there to be sufficient textbooks and instructional materials, each pupil, including English learners, must have a textbook or instructional materials, or both, to use in class and to take home...”); Tenn. Code Ann § 49-6-2211 (“Every student shall be permitted to take any textbook specifically issued to the student home for the purpose of studying the textbook.”)

<sup>44</sup> See, e.g., Anna Phillips, *Pay to the Order of Public School X... Schoolbook*, (May 19, 2012), available at [www.wnyc.org/story/302200-pay-to-the-order-of-public-school-x](http://www.wnyc.org/story/302200-pay-to-the-order-of-public-school-x).

<sup>45</sup> See [www.p12.nysed.gov/mgtserv/free\\_appropriate/calculators.html](http://www.p12.nysed.gov/mgtserv/free_appropriate/calculators.html).

regulations should specify, and the foundation-funding formula should assure, an adequate minimum annual dollar allocation per classroom for basic supplies.

### **Gaps in Requirements for Sufficient Numbers of Qualified Personnel**

The opportunity for a sound basic education requires not only that all students have access to qualified teachers, principals, and other school personnel but also that there are sufficient numbers of educators and other school staff to meet students' needs appropriately. In many areas, current regulations do not provide sufficient specificity to ensure that every school is equipped with an adequate number of school personnel. Students in schools with high levels of poverty are more likely to lack access to school counselors, school social workers, and school health professionals, for example, though they may have greater need of these services in order to succeed in school.<sup>46</sup>

**School counselors.** The commissioner's regulations require a guidance program sufficient at all school levels to manage program planning, attendance, academic and behavioral problems, intervention services, parental awareness and involvement, and, at the secondary level, to undertake annual reviews of each student's educational progress and to develop individual college and career planning.<sup>47</sup> In the absence of regulations on the ratio of school counselors to students that is needed to meet these extensive program requirements, many districts and schools lack enough school counselors to provide the requisite level of services, and, during times of fiscal constraint, school counselors are often considered expendable.<sup>48</sup> A survey by the Urban Youth Collaborative found that 66% of NYC high school students in large schools and 50% of students in small schools on large campuses said they were never, rarely, or only sometimes able

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<sup>46</sup> See *Deficient Resources*, n. 11 above, at pp.20-24.

<sup>47</sup> 8 NYCRR §§100.2 (j); (ee); (ii), 100.1 (g).

<sup>48</sup> See *Deficient Resources*, n. 11 above, at pp.20-22.

to get help at school when they had questions about college.<sup>49</sup>

The American School Counselor Association recommends a counselor-to-student ratio of 1:250, and 1:200 in schools with intensive needs.<sup>50</sup> Ratio requirements for school counselors to students in other states include 1:300 for secondary schools in New Hampshire<sup>51</sup> and 1:500 in elementary schools and 1:350 in secondary schools in Virginia.<sup>52</sup>

Because of the intensive need for guidance services, as recognized in the commissioner's regulations, we recommend for New York State a ratio of one school counselor to every 300 students in elementary schools, 1:300 in secondary schools in general, and 1:200 in all schools with intensive needs. To ensure preparation for college, we also believe that high schools should, in addition, provide college counselors in a ratio of 1:100 seniors, who should begin working with students in the ninth grade.<sup>53</sup>

**School social workers and psychologists.** The commissioner's regulations require that schools employ school psychologists and social workers to help students who exhibit attendance, academic, behavioral or adjustment problems, to support academic intervention services, and to provide a safe and orderly climate for learning.<sup>54</sup> However, there are no requirements for, or guidance about, the number of such professionals that must be available to help students

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<sup>49</sup> Results of this survey were reported in, John Garvey, *Are New York City's Public Schools Preparing Students for Success in College?*, p. 22) (Annenberg Institute for School Reform, Brown University, 2009) available at [http://annenberginstitute.org/sites/default/files/product/200/files/Garvey\\_Report.pdf](http://annenberginstitute.org/sites/default/files/product/200/files/Garvey_Report.pdf).

<sup>50</sup> American School Counseling Association, Student to Counselor Ratio, 2010-2011, available at [http://www.counseling.org/PublicPolicy/PDF/2010-2011\\_Student\\_to\\_Counselor\\_Ratio.pdf](http://www.counseling.org/PublicPolicy/PDF/2010-2011_Student_to_Counselor_Ratio.pdf).

<sup>51</sup> N.H. Code Admin. R. Ed 306.17.

<sup>52</sup> VA Code Ann. §22.1-253 13:2(H)(4).

<sup>53</sup> See, e.g., New York City Comptroller, *The Power of Guidance: Giving High Schools Students the College Counseling They Need*, p. 6 (2012) available at [https://comptroller.nyc.gov/wp-content/uploads/documents/Power\\_of\\_Guidance\\_Oct\\_PDF.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/Power_of_Guidance_Oct_PDF.pdf) (recommending 1:100 guidance counselor ratio); Urban Youth Collaborative, *Get Us to College: Proven Strategies for Helping NYC Students Navigate the College Process*. New York, NY, p. 22 (2013), available at <http://www.urbandyouthcollaborative.org/wp-content/uploads/2013/10/get-us-to-college.pdf> (advocating a 1:100 ratio in high schools).

<sup>54</sup> 8 NYCRR §§ 100.2(j)(1)(ii)(c) & (ee).

struggling academically, emotionally, or behaviorally. As a result, the overwhelming majority of high-need schools lack sufficient personnel in these areas to provide the required services.<sup>55</sup>

Because of the greater involvement of social workers and psychologists in federally mandated procedures and services for students with disabilities, identifying an appropriate ratio of social workers and social psychologists to students is difficult. Schools with large numbers of students with disabilities need sufficient numbers of these clinicians to serve on committees on special education, and to participate in reviews, provide mandated counseling, and otherwise respond to the needs spelled out in students' individualized education programs (IEPs). In addition, schools require sufficient social workers and psychologists to meet the needs of general-education students. In schools that serve large numbers of students dealing with the stresses and needs associated with poverty, greater numbers of these professionals will be necessary to ensure the opportunity for a sound basic education.

The National Association of School Social Workers recommends one social worker for every 250 students.<sup>56</sup> (It is not clear whether this ratio includes personnel needed for both general education and special education services, and it also is not clear whether the ratio assumes the presence of school counselors and/or psychologists in the school.) The recommendations of the National Association of School Psychologists are more specific: they call for a general ratio of 1:1,000, and 1:500-700 when psychologists are providing "comprehensive and preventive services (i.e., evaluations, consultation, individual/group counseling, crisis response, behavioral interventions, etc.)."<sup>57</sup>

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<sup>55</sup>See *Deficient Resources*, n. 11 above, at pp.22-23.

<sup>56</sup> NASW Standards for Social Work Service, p.18 (2012), available at <http://naswdc.org/practice/standards/naswschoolsocialworkstandards.pdf>.

<sup>57</sup> National Association of School Psychologists, *Model for Comprehensive and Integrated School Psychological Services*, p.10 (2010), available at <http://www.nasponline.org/standards-and-certification/nasp-practice-model/nasp-practice-model-implementation-guide/section-i-nasp-practice->

Few states break out required ratios of social workers and psychologists to students. Of those that do, Indiana has the clearest guidelines: they explicitly recommend a “student assistance services” ratio of 1:700, assuming that sufficient school counselors are on hand to meet the needs of schools’ guidance programs.<sup>58</sup>

Based on the extensive need for mental-health services in many New York schools (and assuming that there will be a full complement of school counselors in each school), we recommend a ratio of 1:500 for school social workers and 1:700 for school psychologists, and 1:400 and 1:500, respectively, for schools with intensive needs (e.g., schools serving large numbers of students living in poverty and English language learners). These ratios do not include the additional numbers of social workers and psychologists needed to meet the needs of students with disabilities.

**School nurses and other health professionals.** New York State law requires that every school have a sufficient number of nurses or other health professionals to undertake medical examinations and screenings and to guide and instruct students, parents, and teachers on health issues.<sup>59</sup> However, it does not set a specific requirement for such staffing. The lack of minimum staffing ratios poses a problem in many schools. In our *Deficient Resources* study, 19 of 33 schools reported insufficient numbers of nurses or other healthcare professionals to meet students’ basic health needs; for example, one large New York City high school had only one nurse to meet the manifold health needs of 2000 students.<sup>60</sup>

Proscribed or recommended nurse-to-student ratios in other states include 1:500 in

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model-overview/nasp-practice-model-overview.

<sup>58</sup> Ind. Admin. Code tit. 511, r. 4-1.5-2.

<sup>59</sup> See, e.g., N.Y. Educ. Law §§ 901, 902.

<sup>60</sup> See *Deficient Resources*, n. 11 above, at p. 24.

Vermont<sup>61</sup> and 1:750 in Arkansas (or 1:400 in schools with high concentrations of students with disabilities).<sup>62</sup> For New York State, we recommend a ratio of 1:500, and 1:400 in schools with intensive needs.

### **Gaps in Requirements on Class Sizes**

The Court of Appeals has indicated that classes of 20 students in grades K-3, 21-23 in grades 4-6, and 21-23 in middle and high school are appropriate and that larger class sizes may lead to unsatisfactory outcomes for students. Recent data from the New York City Department of Education indicates that the average class size across all grades in the city as of October 2016 was 26.2. Over 300,000 New York City students, many of them performing far below grade level, are in classes with over 30 students, including 43,279 students in grades K-3. These class sizes are clearly in excess of the ranges that the Court of Appeals considered appropriate in *CFE*.<sup>63</sup>

New York State currently has no regulations regarding class sizes, except for certain special education and inclusion classes. Teacher contracts in New York City and some other U.S. cities do set class-size limits established to contain teachers' workloads; these are generally higher than those recommended from the perspective of student learning needs.<sup>64</sup> Florida's constitution limits class sizes from prekindergarten through grade 3 to 18 students, from grades 4

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<sup>61</sup> VT ADC 7-1-2:2121. Vermont's actual ratio as of 2014, appears to have been 1:396. *See*, Alison Di Nisco, School nurse shortages grow as budgets shrink, [District Administration \(Jan., 2014\)](http://www.districtadministration.com/article/school-nurse-shortages-grow-budgets-shrink), available at <http://www.districtadministration.com/article/school-nurse-shortages-grow-budgets-shrink>.

<sup>62</sup> A.C.A. § 6-18-706(a)-(c).

<sup>63</sup> New York City Department of Education, 2016-17 New York City Class Size (Preliminary) (November 2016). Retrieved from <http://schools.nyc.gov/AboutUs/schools/data/classsize/classsize.htm>; see also [www.classsizematters.org](http://www.classsizematters.org).

<sup>64</sup> New York City's contract with the United Federation of Teachers (UFT) limits classes to no more than 25 students for kindergarten; in elementary schools, 32; in middle schools, 33 students in non-Title I schools, 30 in Title I schools, and 34 in high schools. To improve teaching and learning, the UFT has called for an average 20 students per class in grades K-3 and 24 students in grades 9-12 (see <http://www.uft.org/new-teachers/class-size>).

through 8 to 22 students and from grades 9 through 12 to 25 students.<sup>65</sup> Montana limits K-2 classes to 20,<sup>66</sup> and Georgia permits a maximum class size of 21 for K-3.<sup>67</sup> Washington's allocation formula assumes a maximum class size of 17 for K-3 classes for schools with the highest percentages of students living in poverty.<sup>68</sup>

Based on the Court of Appeals' decision and the precedents in other states, we recommend that the commissioner's regulations be amended to require the following maximum class sizes:

- Kindergarten-grade 3: 20, with a maximum size of 17 in schools with large numbers of students living in poverty, English language learners, and students with disabilities;
- Grades 4-6: 22; and
- Middle and high school: 25.

### **Gaps in Requirements for Resources for Students with Disabilities**

The commissioner's regulations provide different requirements for resources for students with disabilities in New York City and for similarly situated students in the rest of the state. Thus, the regulations state that caseloads for related-services providers "shall not exceed five students per teacher or specialist, *except that, in the city school district of the city of New York, the commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of five students per teacher or specialist.*"<sup>69</sup>

Similarly, for resource room programs, the regulations state:

The total number of students with a disability assigned to a resource room teacher shall not exceed 20 students or, *for the city school district of the city of New York, the*

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<sup>65</sup> Fla. Const. Art. 9 § 1.

<sup>66</sup> Mont. Admin. R. 10.55.712.

<sup>67</sup> Ga. Comp. R. & Regs. 160-5-1-.08 App A.

<sup>68</sup> RCWA 28A.150.260.

<sup>69</sup> 8 NYCRR § 200.6 (e)(3) (emphasis added).



*commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of 20 students per teacher; except that the total number of students with a disability assigned to a resource room teacher who serves students enrolled in grades seven through twelve or a multi-level middle school program operating on a period basis shall not exceed 25 students or, for the city school district of the city of New York, the commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of 25 students per teacher.*<sup>70</sup>

An additional provision permits larger class sizes for *all* self-contained special classes in New York City:

The board of education of a city school district with a population of 125,000 or more inhabitants may, except as otherwise provided in clause (a) of this subparagraph, establish maximum class sizes not to exceed one and two tenths times the applicable maximum class size as specified in paragraph (4) of this subdivision rounded up to the nearest whole number for students with disabilities whose chronological age ranges are equivalent to those students in middle and secondary schools, provided that the board of education shall notify parents and shall file a notice stating the board's intention to increase such class sizes and a certification that the board will conduct a study of attendance problems at the secondary level and will implement a corrective action plan to increase the rate of attendance of students in such classes to at least the rate for students attending regular education classes in secondary schools of the district in accordance with Education Law, section 4402(6).

(a) In the city school district having a population of one million or more, special classes that have a maximum class size of 15 students may be increased by no more than one student.<sup>71</sup>

These regulations clearly violate constitutional sound-basic-education and equal-protection requirements.<sup>72</sup> We recommend that all of the language that permits larger groupings for students with disabilities in New York City be stricken.

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<sup>70</sup> 8 NYCRR § 200.6 (f)(5) (emphasis added).

<sup>71</sup> 8 NYCRR § 200.6 (h)(6)(iii).

<sup>72</sup> All of these regulations are authorized by N.Y. Educ. Law § 4403(3).

## CONCLUSION

In *CFE v. State*, the court held that New York State must provide all students “the opportunity for a sound basic education,” defined as “a meaningful high school education” that will prepare students to “function productively as civic participants” and “obtain ‘competitive employment.’” As a foundational step to comply with this decision, New York State must define in concrete terms the “meaningful” education that conforms to constitutional requirements and articulate students’ rights through its laws and regulations. It must clearly identify and communicate the essential resources, services, and supports that, at a minimum, must be available in all schools and to all students to provide the opportunity for a sound basic education. Where necessary, statutes and regulations must be revised to conform to constitutional requirements.

This report provides some illustrative examples of specific gaps in the current New York State laws and regulations that need to be filled to remedy these constitutional deficiencies and provide all students with appropriate resources, services, and supports. This work is critical because we know that, in low-wealth schools and districts, the minimum requirements often become the maximum resources schools provide.

To fill these gaps, identify remaining gaps, and ensure that New York’s education laws and regulations align with the state constitution and uphold students’ rights, we have recommended the following:

1. The New York State Board of Regents should initiate and oversee a process of regulatory review and revision.
2. As part of this process, the state education department and/or outside consultants should undertake a thorough review of all existing regulations to

- a. identify and revise all areas in which the regulations are not responding properly to constitutional requirements;
  - b. identify and eliminate provisions in the current regulations impose burdensome mandates on schools and districts and do not contribute to students' right to a sound basic education;
  - c. eliminate existing regulations that are out of date or have been superseded.
3. The Regents should establish a process for public engagement and input for this regulatory review process.

Of course, revising the commissioner's regulations is necessary but not sufficient to ensure constitutional compliance. The state must also ensure that schools and school districts receive sufficient funds to provide their students with essential resources, services and supports, and it must implement a system for monitoring, enforcing, and ensuring accountability for sustaining constitutional compliance in the future. These issues are discussed in parts 3 and 4 in this series: *Utilizing a Constitutional Cost Methodology and Ensuring Resource Accountability*.