SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

NEW YORKERS FOR STUDENTS' EDUCATIONAL RIGHTS (NYSER), RUBNELIA AGOSTINE, MIRIAM ARISTY-FARER, KATHRYN BARNETT, AVA CAPOTE, MILAGROS ARCIA, G. CHANGLERTH, MONA DAVIDS, ROLANDO GARITA, SARA HARRINGTON, SONJA JONES, NICOLE IORIO, HEIDI MOULLESSEAUX-KUNZMAN, GRETCHEN MULLINS-KIM, ELLEN TRACHTENBERG, HEIDI TESKA-PRINCE, ANDY WILLARD, NATASHA CAPERS, JACQUELINE COLSON, HAWA JAGANA, NICOLE JOB, HECTOR NAZARIO, CHRIS OWENS, SAM PRIOZZOLO, PATRICIA PADILLA, LYNN SANCHEZ and ROBERT JACKSON,

Plaintiffs,

-against-

THE STATE OF NEW YORK, ANDREW M. CUOMO, as Governor of the State of New York, NEW YORK STATE BOARD OF REGENTS, and JOHN B. KING, Jr., as President of the University of the State of New York, and Commissioner of Education,

Defendants.

Index No. A00750/2014

(McNamara, J.)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Defendants the State of New York, Governor Andrew M. Cuomo, the Board of Regents, and John B. King, Jr., Commissioner of Education and President of the University of the State of New York, respectfully submit this memorandum of law in opposition to Plaintiffs' motion for a preliminary injunction.

PRELIMINARY STATEMENT

In contravention of well-established separation of powers precedent, and without making the requisite showing of likelihood of success on the merits, irreparable harm, or a balance of equities in their favor, Plaintiffs seek the extraordinary relief of the forced allocation of State funds in amounts which have not been appropriated, but were contemplated by legislation enacted over seven years ago. While the purpose of a preliminary injunction is to maintain the status quo, Plaintiffs ask this Court to disrupt the status quo by enjoining the enforcement of statutes which have been in effect for up to four years. This is an effort to cause the expenditure of approximately one billion dollars in unallocated funds, in excess of the amounts appropriated by the executive and legislative branches for this year's budget. Further, this is substantially the same ultimate relief sought in the underlying action, prior to a decision on Defendants' motion to dismiss, any fact or expert discovery, or the presentation of evidence at trial.

Plaintiffs bring this action challenging New York State's funding of education despite the fact that they have not offered any proof of deficiencies in education, including inputs and outputs, nor have they shown a causal link between any claimed deficiencies and the education funding system. Given the utter lack of proof, together with the extraordinary level of funding provided by the State and the exceptionally high bar to challenging executive and legislative actions, Plaintiffs' claims cannot survive.

Plaintiffs' lawsuit is premised on the misconceived claim that the State is not meeting its constitutional obligation to provide students with the opportunity for a sound basic education solely because the state aid increases contemplated by the 2007 Budget and Reform Act have not been fully realized. In doing so, Plaintiffs rely on the flawed presumption that the formula in the 2007 Budget and Reform Act constitutes a calculation of the minimum cost for the provision of a sound basic education. That misconception, on which Plaintiffs rest their entire case, ignores the history of education financing in this State, including the Court of Appeals' decisions in the CFE litigation (Campaign for Fiscal Equity v. State, 86 N.Y.2d 307 (1995) ("CFE I"); Campaign for Fiscal Equity v. State, 100 N.Y.2d 893 (2003) ("CFE II"); and Campaign for Fiscal Equity v. State, 8 N.Y.3d 14 (2006) ("CFE III")), and the subsequent actions taken by the Legislature and Executive with respect to education financing policy and budgetary matters, issues within their exclusive domain.

Moreover, education financing is more comprehensive than Plaintiffs' misguided attempt to conflate the amounts contemplated by Foundation Aid (or speculative estimates of future amounts of Foundation Aid) with the constitutional standard of providing an opportunity for a sound basic education. As set forth below, many of Plaintiffs' arguments about State Foundation Aid and the challenged statutes ignore the larger picture of education funding, which includes additional State Aid as well as federal and local funding, and are not supported by evidence.

It is clear that total school funding throughout the State of New York has increased dramatically since CFE. Nonetheless, Plaintiffs seek to preliminarily enjoin the enforcement of three statutes – the Gap Elimination Adjustment set forth in N.Y. Education Law § 3602(17), the allowable growth amount for State aid increases set forth in N.Y. Education Law § 3602(1)(dd), and the requirements regarding voter approval of increases in local property tax levies set forth

in N.Y. Education Law § 2023-a – on the basis that they may cause education funding levels to deviate from the amounts envisioned by the 2007 Budget and Reform Act. Plaintiffs' motion must be denied for at least three independent reasons.

First, Plaintiffs have not demonstrated a likelihood of success on the merits. Recognizing that this Court cannot, under separation of powers principles, intrude into matters of the State budget, Plaintiffs concede that deference must be given to legislative actions. Remarkably, however, Plaintiffs ask this Court to order the implementation of the funding levels contemplated seven years ago, yet argue against affording deference to subsequent legislative actions. Even if this Court had the authority to order such budgetary relief, which the Court of Appeals has made clear it does not, Plaintiffs still are unlikely to succeed, because Plaintiffs' failure to offer any proof of any educational deficiencies in any district is fatal to their claims. For this reason alone, Plaintiffs will not prevail in this litigation, and cannot meet their burden here. Further, Plaintiffs' narrow focus on State Foundation Aid ignores the fact that in order to prevail on an Education Article claim, Plaintiffs must establish educational deficiencies on a district-by-district basis, and then must show that such deficiencies are caused by the education funding system, including not only State funding but also local and federal funding. Plaintiffs have utterly failed to establish these deficiencies or demonstrate causation related to the entire education funding system. In addition, Plaintiffs cannot prevail on their challenges to any of the three statutes at issue. Legislative enactments are entitled to a strong presumption of constitutionality, and Plaintiffs have not offered any proof that the challenged statutes are unconstitutional. Finally, Plaintiffs, who have styled their litigation as an attempt to enforce CFE, will not prevail in this litigation because funding for New York City schools has increased by approximately $8.5 billion from

the 2003-04 school year to the 2012-13 school year, the latest year for which the State has complete data.[1] For these reasons, Plaintiffs are not likely to succeed on the merits.

Second, in addition to the absence of any demonstration of likelihood of success on the merits, Plaintiffs have not demonstrated irreparable harm. Plaintiffs waited four years after the enactment of the statutes at issue before bringing this action. They allowed an additional four months to pass after commencing this litigation before bringing this motion for a preliminary injunction. Such delay belies any claim of irreparable harm. Moreover, Plaintiffs have not demonstrated irreparable harm caused by any of the three statutes they seek to enjoin, because they fail to offer proof of educational deficiencies resulting from the enforcement of those statutes. Accordingly, Plaintiffs are not entitled to a preliminary injunction.

Third, the balance of the equities tips sharply in favor of Defendants. In contravention of the purpose of a preliminary injunction, Plaintiffs are seeking to disrupt rather than maintain the status quo. Further, Plaintiffs are seeking nearly all of the ultimate relief in their amended complaint as preliminary relief. When a state is enjoined from effectuating statutes enacted by representatives of its people, it suffers an irreparable injury. Such extreme relief should not be granted, especially at this early stage of the litigation.

BACKGROUND

Plaintiffs, who represent only nine of the almost seven hundred school districts in the State,[2] bring this motion, and their underlying action, challenging the educational opportunities

[1] The State Education Department's Fiscal Profiles report that the New York City School District's total revenues (including non-operating funds) from State, local and federal sources amounted to approximately $14.4 billion in the 2003-04 school year. See http://www.oms.nysed.gov/faru/documents/webMasterfile0304.xls. The District's total revenues (including non-operating funds) had grown to approximately $22.9 billion by the 2012-13 school year. See http://www.oms.nysed.gov/faru/Profiles/26thMasterfileforweb.xlsx. New York City's total revenues from State, local and federal sources therefore increased by approximately $8.5 billion (not adjusted for inflation) over this period.

[2] The nine school districts in which the Plaintiffs reside are New York City, Wyoming, Middletown, Rochester,

provided to students statewide and claiming that the State has not complied with the Court of Appeals' holdings in the CFE litigation.

The CFE Litigation And The Zarb Commission

In CFE, the plaintiffs challenged the educational opportunities provided to students in New York City, and the litigation spanned thirteen years, including extensive discovery, a seven-month trial, and three Court of Appeals' decisions. The trial, which included the testimony of 72 witnesses and 4,300 exhibits, resulted in a determination that the State had violated the Education Article by failing to provide students in New York City the opportunity for a sound basic education. CFE II, 100 N.Y.2d at 902. After that finding, the Court of Appeals ordered the State to conduct a study to assess the cost of providing a sound basic education to students in New York City. CFE II, 100 N.Y.2d at 930. Within weeks after that decision, "Governor Pataki issued an executive order creating the New York State Commission on Education Reform, charged with recommending, to the Executive and the Legislature, education financing and other reforms that would ensure that all children in New York State have an opportunity to obtain a sound basic education." CFE III, 8 N.Y.3d at 21-22. The commission was chaired by Frank G. Zarb (the "Zarb Commission"). See Zarb Commission Report (Wright Aff. Ex. 4, Appendix B).[3]

Among other things, the Zarb Commission was asked to propose a "basic operating aid formula that would be designed to provide the State share of the basic cost of education….which would be consistent with the cost of a sound basic education." Id. at p. 15. The Zarb Commission enlisted Standard & Poor's ("S&P") to conduct an analysis of school districts statewide and to offer a recommendation for methods to calculate an estimated sufficient level of

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William Floyd, Spencer-Van Etten, Yonkers, Syracuse, and Hermon-Dekalb.

[3] "Wright Aff." Refers to the Affirmation of Alissa S. Wright, dated August 28, 2014, which accompanies this Memorandum of Law.

funds to provide for a sound basic education statewide. Id. at p.8. At the direction of the Zarb Commission, S&P analyzed "spending by successful school districts to help determine the cost of providing all students the opportunity to acquire a sound basic education." Id.

The Zarb Commission issued its final report on March 29, 2004. Based on the analysis conducted by S&P, the Zarb Commission endorsed "a range of $2.5 to $5.6 billion from State, local, and federal sources" as the additional funds necessary to provide the opportunity for a sound basic education statewide. Id. at p. 24.[4] Governor Pataki then submitted a State Education Reform Plan to the court, which concluded that "the S&P analysis as adopted by the Zarb Commission and by State defendants determined that $2.5 billion in additional revenues statewide (equating to $1.93 billion in New York City) was a valid determination of the cost of providing a sound basic education in New York City." CFE III, 8 N.Y.3d at 24. Governor Pataki was explicit in stating that this amount was recommended as a calculation of the funds required for a sound basic education in New York City in response to the CFE litigation, stating: "The S&P analysis, as adopted by the Zarb Commission and by State defendants, determined that a sound basic education could be provided in New York City with additional expenditures of slightly less than $2 billion annually. The State plan adopts this analysis." See State Education Reform Plan (Wright Aff. Ex. 4), p. 14. The Court of Appeals agreed that the Governor's proposal provided sufficient funding for New York City students to have an opportunity to receive a sound basic education, and specifically found "that the constitutionally required funding for the New York City School District includes additional operating funds in the amount of $1.93 billion." CFE III, 8 N.Y.3d at 31. CFE III did not make any ruling with respect to funding for the other school districts in the State. Id.

[4] The S&P analysis used four different options to identify successful school districts, which is why there was a range generated by the analysis. Zarb Commission Report (Wright Aff. Ex. 4, Appx. B), p. 8.

It was recognized, both in the CFE III decision and in the Governor's State Education Reform Plan, that the additional funding levels set a floor for funding, and it was expected, although not required, that legislation would surpass this minimum. In fact, the Court of Appeals noted that "Governor Pataki's proposal to provide $4.7 billion in additional funding [to New York City] amounted to a policy choice to exceed the constitutional minimum." Id. at 27.[5] The concurring opinion similarly stated:

> That does not mean that the State is limited to the minimum, or "floor," of what it takes to provide a sound basic education. Judging by Governor Pataki's higher budgeting and the similarly heartening indications that Governor-elect Spitzer will continue in a direction higher than the minimum, there is every indication that the amounts dedicated will be well above the constitutional floor. When it comes to educating its children, New York State will not likely content itself with the minimum. Indeed, after this suit was initiated the State provided for an additional $9 billion investment in capital improvements for the City's schools. How much more it can and should spend, however, is a matter for the political branches, which will be free to avail themselves of the valuable work performed by the distinguished panel of referees.

CFE III, 8 N.Y.3d at 33 (Rosenblatt, J., concurring).

The 2007 Budget and Reform Act and the State's Decision to Exceed the Minimum Constitutional Amounts Found By the Court in CFE

In 2007, under the newly-elected Governor Eliot Spitzer and with pre-recession revenues, the Legislature passed and the Governor signed the Budget and Reform Act, aspiring to substantial increases in funding for New York State schools. Just as Governor Pataki's multi-year funding proposal allocated more than the constitutional minimum for education funding to New York City, the Budget and Reform Act of 2007 called for significantly more than what the Court of Appeals held was needed for a sound basic education in New York City. See CFE III, 8 N.Y.3d at 33.

[5] That proposal included $2.2 billion in additional State funds, $1.5 billion in additional New York City funds, and $1 billion in additional federal funds.

A principal component of the 2007 Budget and Reform Act was the establishment of Foundation Aid, a funding method based on a formula that reflects a per-pupil amount adjusted for pupil needs and regional costs, while taking into consideration anticipated local contributions. See N.Y. Educ. L. § 3602(4)(a).

The 2007 Foundation Aid formula was not a revised calculation of the minimum cost of providing an opportunity for a sound basic education. Plaintiffs do not cite a statewide costing-out study showing that the statutory Foundation Aid formula enacted in 2007 represents the minimum amount necessary to provide students with an opportunity for a sound basic education. Instead, the minimum cost was set with respect to the New York City School District by CFE III, based on comprehensive analysis prepared by Zarb Commission and S&P, and the State chose to increase aid statewide beyond the minimum necessary for the provision of an opportunity for a sound basic education. Rather than providing only the minimum, the Foundation Aid formula provides more generous funding, both in New York City and state-wide.[6] Foundation aid is determined by a formula, which uses the same "successful schools" methodology that this Court found reasonable in CFE III. A district's Foundation Aid is determined by adjusting the "Foundation Amount," the average cost of providing general education in successful school districts, to reflect the pupil needs and regional costs of the district. See N.Y. Educ. L. § 3602(4)(a)(1).

[6] Just as Governor Pataki used the Zarb Commission's analysis to put forward a proposal including amounts higher than the constitutionally required minimum, in enacting the 2007 Budget and Reform Act, Governor Spitzer aspired to education funding amounts above the minimum necessary. See CFE III, 8 N.Y.3d at 24, 27. The Foundation Aid increases were expected to be phased in over four years, and when fully funded, Foundation Aid was to provide over $5.5 billion of additional State funding to school districts across New York State. This is in contrast to the $2.5 billion in additional funding – from all sources, not just State aid – found reasonable by the Zarb Commission. See N.Y. Educ. L. § 3602.

The Foundation Amount is measured by the instructional costs of the nearly 200 school districts in the lower-spending half of school districts statewide that have successful track records. That cost is then adjusted by a pupil needs index to reflect the increased amount of funding required to educate low-income students and English language learners in each district. See N.Y. Educ. L. § 3602(1)(o), (p), (s), & (w); see also § 3602(4)(a)(3). In addition, a regional cost factor is applied, see N.Y. Educ. L. § 3602(4)(a)(2). The Foundation Aid per pupil to each district is then calculated by subtracting the anticipated local contribution from the district's adjusted foundation cost. See N.Y. Educ. L. § 3602(4)(a). The resulting per-pupil figure is then multiplied by the district's enrollment, adjusted to provide additional weighting for students with disabilities, see Educ. L. § 3602(1)(i)(4).[7]

The 2007 Foundation Aid formula was not a revised calculation of the cost of providing an opportunity for a sound basic education. Rather, the formula sought to go beyond what was recommended by the Zarb Commission and accepted as reasonable as to funding for New York City in CFE III. Some examples are provided here, such as the 2007 Foundation Aid formula employing an extraordinary needs coefficient of 1.5 to account for students with limited English language proficiency, which exceeds the 1.2 weighting found reasonable in CFE. Compare N.Y. Educ. L. § 3602(1)(o) & (s) with CFE III, 8 N.Y.3d at 31. As another example, the 2007 formula uses two cumulative factors to account for poverty -- 1.65 for pupils receiving free and reduced price lunches plus an additional 1.65 for pupils below the poverty level in the last census count -- again well exceeding the 1.35 poverty coefficient approved in CFE. Compare N.Y. Educ. L. § 3602(1)(q) with CFE III, 8 N.Y.3d at 31. Next, the 2007 formula employs a weighting for

[7] The 2007 Budget and Reform Act also enacted rigorous accountability and efficiency measures to ensure that the increased resources will be used effectively. While not at issue on this motion, these measures are equally important to the State's efforts to improve the delivery of educational services.

disabled students of 2.41, N.Y. Educ. L. § 3602(1)(i)(4), in comparison with the 2.1 weighting in the formula approved in CFE. In addition, the State provides separate "excess cost aid" for severely disabled students who have more cost-intensive needs. N.Y. Educ. L. § 3602(5)(a).

In addition, instead of using the geographic cost of education index to account for regional cost differences, the Foundation Aid formula uses regional cost indices specific to New York State, developed by the Board of Regents after analyzing data reflecting the cost of providing educational services in various regions of the State.

Further, while Foundation Aid is a significant portion of the total funding provided to school districts, it is by no means the only funding provided to school districts. Conroy Aff. ¶¶ 2-6, 12.[8] In recent school years, Foundation Aid has represented less than 30% of the total funds appropriated by federal, State and local sources for education. Conroy Aff. ¶ 2. As part of its School Aid, New York State provides billions of dollars annually in education funding to local school districts over and above Foundation Aid. Id. In fact, in the 2013-14 school year, the State provided $6.05 billion in aids and grants above and beyond the $15.18 billion in Foundation Aid for that year.[9] Conroy Aff. ¶ 4. The $6.05 billion, representing approximately 10% of total funding, was provided to school districts to help support activities such as the purchase of textbooks and other instructional materials and computer hardware, school construction, pupil transportation, education of students with disabilities, universal pre-kindergarten, bilingual education, and career and technical education programs administered by boards of cooperative educational services. Id. In addition, federal and local sources provide tens of billions of dollars in additional support for education spending, together comprising approximately 60% of total

[8] "Conroy Aff." refers to the affidavit of Joseph G. Conroy, dated August 22, 2014.
[9] The $6.05 billion in additional aid is calculated after giving effect to the Gap Elimination Adjustment for 2013-14.

school district funding. Conroy Aff. ¶¶ 5-6, 12. Thus, while Foundation Aid is an important aspect of education funding, it must be analyzed in the context of total funding.

The Implementation Of Foundation Aid, The Great Recession, And The Substantial Increase In Education Funding From Other Sources

The State began phasing in Foundation Aid in the 2007-2008 school year. See L. 2007, ch. 57, §13; Conroy Aff. ¶ 13. Districts received $13.7 billion in Foundation Aid in 2007-2008 and $14.9 billion in 2008-2009. N.Y. Educ. L. § 3602(4)(b)(2). This resulted in total Foundation Aid increases of approximately $2.3 billion statewide in the first two years of implementation. Conroy Aff. ¶ 13.[10]

In 2009, facing severe financial circumstances due to the economic crisis afflicting this State and the entire nation, the State extended the time for implementation of Foundation Aid as contemplated in 2007.[11] See L. 2009, ch. 57, § 13; N.Y. Educ. L. § 3602(4)(b). It also provided for reductions in State education aid in the 2009-2010 (through a "Deficit Reduction Assessment") and 2010-2011 school years (through a "Gap Elimination Adjustment"), to close the gap between budgeted State expenditures and revenues available to support them, although those reductions were largely offset by federal funding. Conroy Aff. ¶¶ 14-15; see also American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (Feb. 17, 2009), as amended Pub. L. 111-8, 123 Stat. 524 (Mar. 11, 2009), §§ 14001 et seq. Due to further

[10] N.Y. State Division of the Budget, 2007-2008 Archive, http://www.budget.ny.gov/pubs/archive/fy0708archive/fy0708schoolaid/schoolaid.html (Wright Aff. Ex. 5); N.Y. State Division of the Budget, 2008-2009 Archive, http://www.budget.ny.gov/pubs/archive/fy0809archive/enacted0809/localities/schoolaid/schoolaid.html (Wright Aff. Ex. 6).

[11] The United States Congress termed the fallout from the 2008 financial crisis the "Great Recession" because it has been "the deepest and most protracted recession since the Great Depression. The financial crisis that began in the fall of 2008 had enduring effects on economic performance." http://www.jec.senate.gov/public/index.cfm?p=GreatRecession (Wright Aff. Ex. 7). New York was hit particularly hard by the Great Recession due to the economic importance of the financial services and real estate industries to employment and State revenues.

revenue constraints caused by the ongoing economic difficulties as well as the expiration of temporary supplemental federal funding, the Gap Elimination Adjustment was extended in 2011-2012. In addition, the Legislature enacted allowable growth amounts permitting additional State aid increases each year based on the growth in New York State personal income. N.Y. Educ. L. §§ 3602(1)(dd); 3602(17)(c); 3602(18). While State funding decreased during the recession, local and federal funding increased significantly. In 2009-2010, federal funding increased from $2.6 billion to $4.5 billion and increased again to $4.7 billion in 2010-2011. Conroy Aff. ¶ 12. Local funding increased from $27.0 billion in 2008-2009 to $28.7 billion in 2009-2010, $29.7 billion in 2010-2011, and $31.8 billion in 2011-2012. Conroy Aff. ¶¶ 8, 12. These increases offset the reduction in State funding and led to annual increases in overall funding during the recession.

Beginning in the 2012-2013 school year, the State implemented annual Gap Elimination Adjustment restorations and other school aid increases, increasing school aid by hundreds of millions of dollars per year in 2012-2013 and 2013-2014. N.Y. Educ. L. § 3602(17)(d)-(e).

Current Education Spending Is At An All-Time High

In continuing its commitment to education using the resources available, the State's recently passed budget includes a $1.1 billion – or 5.3% – increase in education aid for the 2014-2015 school year. Conroy Aff. ¶ 20. High-needs school districts will receive nearly 70 percent of the increase.[12] Conroy Aff. ¶ 10. In total, the 2014-2015 budget provides State funding of $22.2 billion – more than double, in absolute dollars, the $10.2 billion of State aid school districts received in the 1995-96 school year when the Court of Appeals issued its first CFE decision. Conroy Aff. ¶ 11.

[12] See "Governor Cuomo and Legislative Leaders Announce Passage of 2014-2015 Budget," http://www.budget.ny.gov/pubs/press/2014/pressRelease14_enactedBudgetReleased.html (Wright Aff. Ex. 8).

Following enactment of the 2014-2015 budget, New York's total State aid for education is at an all-time historic high. Conroy Aff. ¶¶ 11-19. Even without the full implementation of the increases contemplated in 2007, New York State's education spending of $19,552 per pupil still surpasses all other states in the nation, and is 84% above the national average of $10,608.[13] In addition, in 2012, the New York City School District had the highest spending per student ($20,226) out of the one hundred largest public elementary school systems in the country.[14] This is almost three times the amount spent per pupil in New York City in 1995-1996, the year CFE I was decided.[15] In 2012-2013, estimated total funding for public education in New York State, including funding from the State, local, and federal governments, amounted to more than $58 billion. Conroy Aff. ¶ 12.

Procedural Posture of This Action

Plaintiffs bring this action claiming that the State has violated its constitutional obligations simply because the state aid increases contemplated in 2007 have not been fully implemented. They assert that: (1) that Defendants have failed to comply with the CFE decisions (Am. Compl. ¶ 191) and (2) that students statewide have been denied the opportunity for a sound basic education in violation of the Education Article (Am. Compl. ¶¶ 193-197). Plaintiffs seek declaratory and injunctive relief nullifying the Gap Elimination Adjustment set forth in N.Y. Education Law § 3602(17), the allowable growth amount for state aid increases set forth in N.Y. Education Law § 3602(1)(dd), the requirements regarding increases in local property tax levies

[13] See Public Education Finances: 2012, Governments Division Reports (May 2014), http://www2.census.gov/govs/school/12f33pub.pdf, Table 8 (Wright Aff. Ex. 9).
[14] See http://www2.census.gov/govs/school/12f33pub.pdf, Table 18 (Wright Aff. Ex. 9).
[15] See Statistical Tables, Public Elementary-Secondary Education Finances: 1995-96, http://www2.census.gov/govs/school/96tables.pdf, Table 17 (Wright Aff. Ex. 10) (noting New York City spending of $7,428 per pupil). These amounts are in absolute dollars.

set forth in N.Y. Education Law § 2023-a, and the aid withholding provisions of L. 2012, ch. 57, Part A, § 1 and L. 2013, ch. 57, Part A, § 1.

Defendants filed a fully dispositive motion to dismiss on May 30, 2014. That motion addressed the numerous deficiencies mandating the dismissal of the entire action, including: (1) Plaintiffs' lack of standing and capacity; (2) Plaintiffs' failure to allege facts showing deficiencies in education on a district by district basis; (3) Plaintiffs' failure to allege a causal connection between educational deficiencies in any district and the total funding provided to that district; (4) Plaintiffs' disregard for the separation of powers and the absence of sufficient justification for the Court's intrusion into the State budget; (5) Plaintiffs' inability to state a claim that the State did not comply with the CFE holdings; and (6) the baselessness of Plaintiffs' request for the Court to micromanage education in an unprecedented manner in light of the Court of Appeals decisions in CFE II and CFE III that the Court has "neither the authority, nor the ability, nor the will to micromanage education financing." CFE II, 100 N.Y.2d at 925. Pursuant to a stipulation between counsel to all parties, and so-ordered by the Court on July 3, 2014, Defendants' motion to dismiss is returnable on September 15, 2014.[16]

On June 24, 2014, Plaintiffs moved for a preliminary injunction seeking to restrain Defendants from enforcing three of the four statutory provisions challenged in the underlying action.[17] Specifically, Plaintiffs seek to enjoin Defendants from enforcing: (1) the Gap Elimination Adjustment set forth in N.Y. Education Law § 3602(17); (2) the allowable growth

[16] The Memorandum of Law in Support of Defendants' Motion to Dismiss ("Defs.' Mem.") is annexed to the accompanying Affirmation of Alissa Wright ("Wright Aff.") as Exhibit 2.

[17] The fourth statute challenged by Plaintiffs in this action, but not addressed in their preliminary injunction application, is the subject of another action, which was consolidated with this action by Order dated August 12, 2014. The legality of the aid withholding provisions of 2012, ch. 57, Part A, § 1 and L. 2013, ch. 57, Part A, § 1 was challenged by two of the same Plaintiffs herein, with others, in the action Aristy-Farer v. State of N.Y., Sup Ct., N.Y. Cty., Index No. 13-100274, which is currently pending before the Supreme Court, New York County (Mendez, J.). The Court recently denied the State's motion to dismiss in that action and the matter is on appeal to the Appellate Division, First Department.

amount for state aid increases set forth in N.Y. Education Law § 3602(1)(dd); and (3) the requirements regarding increases in local property tax levies set forth in N.Y. Education Law § 2023-a. On July 8, 2014, Defendants moved by Order to Show Cause to change the venue of the preliminary injunction application, as well as the entire action, to Albany County, pursuant to CPLR 6311(1). By order dated August 8, 2014, that motion was granted to the extent that the application for a preliminary injunction was transferred to Albany County, although the Supreme Court, New York County retained jurisdiction over the action as a whole.

LEGAL STANDARD

A motion for a preliminary injunction must be denied when the moving party fails to establish: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in [its] favor." Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988). Plaintiffs fail to satisfy any of these elements, and their motion for a preliminary injunction must be denied.

The purpose of a preliminary injunction is to maintain the status quo. Putter v. City of N.Y., 27 A.D.3d 250, 253 (1st Dep't 2006); N.Y. Auto. Ins. Plan v. N.Y. Sch. Ins. Reciprocal, 241 A.D.2d 313, 314 (1st Dep't 1997). Even in the ordinary case, where the requested injunction is intended to preserve the status quo pending a trial, a preliminary injunction is a "drastic" remedy requiring the moving party to establish each of the three elements by "clear and convincing evidence." Gilliland v. Acquafredda Enters., LLC, 92 A.D.3d 19, 24 (1st Dep't 2011); 1234 Broadway LLC v. West Side SRO Law Project, Goddard Riverside Community Ctr., 86 A.D.3d 18, 23-24 (1st Dep't 2011). But the standard is even higher where, as here, the injunction would disrupt the status quo and effectively give the moving party the ultimate relief requested. In these situations, the motion must be denied unless the moving party can show that

the requested injunction is "required by imperative, urgent, or grave necessity," and even then, only "upon clearest evidence." Xerox Corp. v. Neises, 31 A.D.2d 195, 197 (1st Dep't 1968); Sithe Energies, Inc. v. 335 Madison Ave., LLC, 45 A.D.3d 469, 470 (1st Dep't 2007). Indeed, the Court of Appeals has questioned whether such injunctions are "ever permissible in advance of final judgment." Yome v. Gorman, 242 N.Y. 395, 401–02 (1926) (emphasis added); see also, e.g., Bd. of Mgrs. of Britton Condo. v. C.H.P.Y. Realty Assocs., 101 A.D.3d 917, 919 (2d Dep't 2012) (reversing grant of preliminary injunction because it "effectively altered the status quo and granted the plaintiff the exact relief which it sought in the complaint"). Further, the preliminary injunction here is not being sought against a private entity, but against a governmental entity acting in the public interest, in which case the court should be even more reluctant to grant the requested relief. See Monserrate v. N.Y. State Senate, 599 F.3d 148, 154 (2d Cir. 2010).

Finally, a challenge to a statute on its face will fail unless Plaintiffs can "establish that no set of circumstances exists under which" the statute would be valid. Moran Towing Corp. v. Urbach, 99 N.Y.2d 443, 448 (2003) ("A party mounting a facial constitutional challenge bears the substantial burden of demonstrating 'that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment'") (citations omitted).

ARGUMENT

I. PLAINTIFFS HAVE NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs' motion must be denied because they have not shown, and indeed cannot show, a likelihood of success on the merits, because all of Plaintiffs' claims fail as a matter of law and should be dismissed under CPLR 3211. "[W]hen the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success

standard." Beal v. Stern, 184 F.3d 117, 122 (2d Cir. 1999) (quotation marks and citation omitted); Matter of Chatham Towers, Inc. v. Bloomberg, 6 Misc.3d 814, 826 (Sup. Ct. N.Y. Cty. 2004). Where, as here, Plaintiffs seek a mandatory injunction to alter the status quo and command a positive act by the government, they are subject to an even higher burden of showing a clear or substantial likelihood of success on the merits. Mastrovincenzo v. City of New York, 435 F.3d 78, 89 (2d Cir. 2006); St. Paul Fire & Marine Ins. Co. v. York Claims Serv., 308 A.D.2d 347, 349 (1st Dep't 2003) (citing cases) ("A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite"). Here, Plaintiffs fail to show a likelihood of success on the merits, much less a clear or substantial likelihood of success, and their motion for a preliminary injunction must be denied.

A. Plaintiffs Do Not Have Standing or Capacity to Bring This Action

For the reasons stated in Defendants' motion to dismiss, Plaintiffs' claims fail as a matter of law. See Defs.' Mem. pp. 9-14. While Plaintiffs purport to assert their claims on a statewide basis, they do not have the capacity or standing to do so. N.Y. State Ass'n of Small City School Districts, Inc. v. State of N.Y., 42 A.D.3d 648, 650 (3d Dep't 2007). They cannot allege that they have suffered harm by virtue of the educational opportunities provided in any district outside of the nine districts in which they reside, and thus Plaintiffs' standing is limited to challenges to the educational opportunities in those nine districts.[18] See id; N.Y. State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211-15 (2004); Planck v. N.Y. State Off. of

[18] As established in Defendants' motion to dismiss, Plaintiffs cannot sustain a claim that the State did not comply with the holdings of the CFE litigation. The CFE holdings concerned the New York City School District at a specific point in time. Different plaintiffs from different districts, and New York City plaintiffs from a different time period, cannot initiate a new, separate action seeking enforcement of a declaratory judgment issued eight years ago stemming from a trial that occurred almost twenty years ago. See Defs.' Mem. (Wright Aff. Ex. 2), pp. 34-36. While the Court of Appeals' CFE decisions provide binding legal precedent for this Court to follow in analyzing Education Article claims, it does not provide a separate cause of action.

Temporary & Disability Assistance, 30 A.D.3d 725, 726-727 (3d Dep't 2006). Because Plaintiffs cannot maintain this action on a statewide basis, their claims fail as a matter of law, and their motion for a preliminary injunction must be denied.

B. Plaintiffs' Limited Focus On State Foundation Aid Mandates The Denial Of Their Motion For A Preliminary Injunction

Plaintiffs' narrow focus on the State's contribution to total education funding, particularly State Foundation Aid, falls far short of the standards for maintaining an Education Article claim. In order to state a claim, and in order to prevail on this motion and in the underlying action, Plaintiffs must show that Defendants are violating their constitutional obligation to provide students with an opportunity for a sound basic education under the Education Article of the New York State Constitution. Plaintiffs' burden is heavy. The law is clear that to state such a claim, Plaintiffs must demonstrate "gross and glaring" inadequacies in their education which rob them of the opportunity to receive a sound basic education. See, e.g., N.Y. State Ass'n of Small City School Dists., Inc., 42 A.D.3d at 651-652 (citing Paynter v. State of N.Y., 100 N.Y.2d 434, 439 (2003); Board of Educ., Levittown Union Free School Dist. ("Levittown") v. Nyquist, 57 N.Y.2d 27, 48 (1982); see also CFE I, 86 N.Y.2d at 318-19 (finding plaintiffs stated a claim where they asserted "fact-based claims" supported by specific allegations of "inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books, etc."); CFE II, 100 N.Y.2d at 932 (noting that plaintiffs prevailed because of "a unique combination of circumstances: New York schools have the most student need in the state and the highest local costs yet receive some of the lowest per-student funding and have some of the worst results. Plaintiffs in other districts who cannot demonstrate a similar combination may find tougher going in the courts"). Plaintiffs must show "first, that the State fails to provide them a sound basic education in that it provides deficient inputs--teaching, facilities and instrumentalities of

learning--which lead to deficient outputs such as test results and graduation rates; and, second, that this failure is causally connected to the funding system." Paynter, 100 N.Y.2d at 440. This must be established on a district-by-district basis. N.Y. State Ass'n of Small City School Dists., 42 A.D.3d at 651-52.

It is insufficient to solely make claims concerning the State Foundation Aid portion of the budget to the exclusion of all other sources and elements. An Education Article claim concerns the quality of educational opportunities offered, not the manner in which it is funded. The Court of Appeals has expressly rejected that a claim under the Education Article can focus exclusively on an analysis of the State's education budget. See Levittown, 57 N.Y.2d at 48-49; CFE I, 86 N.Y.2d at 319. In Levittown, the plaintiffs claimed that there were funding disparities between districts, but did not allege any facts showing that they were receiving a substandard education. Concluding that the plaintiffs' claim failed, the Court of Appeals held that an Education Article claim must focus on the quality of the education, not financing. Levittown, 57 N.Y.2d at 48; Paynter, 100 N.Y.2d at 440. In the absence of specific proof that Plaintiffs are being denied any opportunity for a sound basic education, the particular manner in which schools are financed cannot form the basis of an Education Article claim. Plaintiffs do not even offer any allegations, much less proof, of "gross and glaring" deficiencies in educational inputs or outputs in any district in the State. Nor do they attempt to show a causal connection between any purported deficiencies and the education financing system they challenge. See Defs.' Mem. pp. 15-26. Where Plaintiffs do not even allege facts sufficient to state a claim, they cannot meet their high burden of showing a likelihood of success on the merits, and their motion for a preliminary injunction must be denied.

C. The Court Cannot Order The Appropriation Of Funds As Contemplated By The 2007 Budget And Reform Act

Rather than attempt to provide evidence concerning the effects of the three statutes at issue on the educational opportunities provided to students in any district in the State, Plaintiffs have rested their entire case on the unfounded premise that any action reducing State education funding below the aspirational amounts contemplated by the 2007 Budget and Reform Act is per se a violation of the Education Article. This is inadequate. Essentially, Plaintiffs claim that the Legislature and Executive somehow calculated the exact cost of providing the opportunity for a sound basic education in the establishment of Foundation Aid, without performing a new costing out study, and then intentionally underfunded schools in subsequent enactments, in violation of the Constitution.[19] Plaintiffs do not offer any support for that contention but, in any event, that argument cannot succeed.

First, Plaintiffs' argument fails because the Court is without authority to order the State to distribute funds contemplated by past legislation but not appropriated by the Legislature. The Legislature is responsible for weighing competing concerns in allocating finite revenues, and its actions are entitled to a presumption of constitutionality. See Levittown, 57 N.Y.2d at 48;

[19] Plaintiffs may claim, as they did in their opposition to Defendants' motion to dismiss, that "to the extent Defendants argue that the Legislature did not determine the level of funding that was constitutionally required when it enacted the 2007 Budget and Reform Act, this is a factual dispute that cannot be resolved on a motion to dismiss." Pls.' Mem. (Wright Aff. Ex. 3) p. 18. Defendants disagree with this argument, but certainly if Plaintiffs claim that this creates a factual issue sufficient to merit denial of a motion to dismiss, they cannot argue in any principled way that they are entitled to the extraordinary preliminary injunction that they seek. "While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where, as here, there are issues that subvert the plaintiff's likelihood of success on the merits." See Lombard v. Station Sq. Inn Apts. Corp., 94 A.D.3d 717, 721 (2d Dep't 2012). Further, "[i]t is familiar law that [p]reliminary injunctions which in effect determine the litigation and give the same relief which is expected to be obtained by the final judgment, if granted at all, are granted with great caution and only when required by imperative, urgent, or grave necessity, and upon clearest evidence, as where the undisputed facts are such that without an injunction order a trial will be futile." Xerox Corp. v. Neises, 31 A.D.2d 195, 197 (1st Dep't 1968) (citation omitted). Here, where there is almost complete overlap between the relief sought on the motion for a preliminary injunction and in the amended complaint, and there is a lack of urgency to the restraint of statutes which have been in effect for years, if this Court determines that there is an issue of fact as to the fundamental root of Plaintiffs' claim, a preliminary injunction should not be entered.

LaValle, 98 N.Y.2d at 161. The authority to allocate fiscal resources rests squarely with the Executive and the Legislature, and this Court cannot force the State to appropriate a certain level of funding merely because a statutory formula enacted in the past aspired to such an amount.[20] Every year, the Governor and the Legislature make funding decisions that allocate limited resources to address critical public needs across all sectors. Courts cannot interfere unless Plaintiffs make a clear showing of a constitutional violation, which entails a detailed analysis of the educational opportunities provided to students on a district-by-district basis. See CFE II, 100 N.Y.2d at 932; CFE I, 86 N.Y.2d at 316-318; Paynter, 100 N.Y.2d at 440; N.Y. State Ass'n of Small City School Dists., 42 A.D.3d at 651-52. Plaintiffs concede that deference to the Legislature is essential, yet they ask this Court to defer only to the legislative action taken in enacting the 2007 Budget and Reform Act, but not to any subsequent budgetary or education financing legislation. That argument is illogical. All budgetary decisions are the prerogative of the Executive and the Legislature, not solely the budgetary decisions favored by Plaintiffs.

Second, in enacting the 2007 Budget and Reform Act, the Legislature could not preclude later repeal, amendment, or modification of the law. In crafting an annual budget, which constitutionally may appropriate funds for no more than two years, the State is never, and may never be, bound by past assumptions of future economic growth or retraction. See N.Y. Const. Art. VII, § 7 ("No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act..."). In Anderson v. Regan, 53 N.Y.2d 356 (1981), the New York Court of Appeals reiterated that

[20] Plaintiffs' counsel has acknowledged that "[s]lowing the rate of new increases does not raise the same constitutional issues." Rebell, Michael, "Slashing the City Schools Budget is Illegal, Unfair, and Unwise," N.Y. Daily News (Dec. 19, 2008).

section 7 of article VII of the New York Constitution "requires that there be a specific legislative appropriation each time that moneys in the State treasury are spent." 53 N.Y.2d at 359 (declaring that the expenditure and payment of funds received from the federal government without an appropriation violated the New York Constitution). In doing so, the Court of Appeals stated that "oversight by the people's representatives of the cost of government is an essential component of any democratic system" and that "the strictures imposed by section 7 of article VII to Federal funds is necessary to the maintenance of the delicate balance of powers that exists between the legislative and executive branches of government." Id. at 365. Similarly, in Maron v. Silver, 58 A.D.3d 102, 124-125 (3d Dep't 2008), aff'd as modified, 14 N.Y.3d 230 (2010), where state court justices sought a writ of mandamus to compel the disbursement of funds appropriated in the 2006-2007 state budget, the Third Department found that mandamus was not available to compel payment of the funds under section 7 of article VII of the New York Constitution because more than two years had passed since the appropriation act.

This is consistent with the well-established principle that a current legislature cannot bind future legislatures. See, e.g., U.S. v. Winstar Corp., 518 U.S. 839, 872 (1996) ("one legislature may not bind the legislative authority of its successors"); Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932); Manigault v. Springs, 199 U.S. 473, 487 (1905) ("a general law . . . may be repealed, amended, or disregarded by the [State] legislature which enacted it," and "is not binding upon any subsequent legislature . . ."); Conn. Mut. Life Ins. Co. v. Spratley, 172 U.S. 602, 621 (1899) ("each subsequent legislature has equal power to legislate upon the same subject"); Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. 416, 431 (1854) ("no one Legislature can, by its own act, disarm their successors . . ."); Morin v. Foster, 45 N.Y.2d 287, 293 (1978) ("Unless specifically provided by statute or charter provisions, one county legislature may not bind the hands of its

successors in areas relating to governmental matters"). The Zarb Commission, and S&P, calculated the cost of providing an opportunity for a sound basic education; none of the legislation at issue constitutes a recalculation of the minimum amount constitutionally necessary. Rather, the amounts in the 2007 Budget and Reform Act and the subsequent legislation reflect the political determination of that particular enacting Legislature and Governor as to how much, for policy purposes, they would and could provide for education. To the extent Plaintiffs argue that the 2007 legislation represented a new minimum determination by the Legislature, then subsequent Governors and Legislatures would have an equal right to make their own determination, and all would be presumed to have acted constitutionally. Plaintiffs' argument that the Legislature, without a new costing out study, determined the precise amount necessary to provide the opportunity for a sound basic education and that subsequently the Legislature (along with the Governor) is without authority to amend or alter that determination, is simply contrary to law.

Finally, and perhaps most compellingly, the law is clear that with regards to education funding, this Court is without the authority to order the State to enact or adopt a particular budget or budgetary measure, and thus cannot grant Plaintiffs the relief they seek. Under separation of powers principles and controlling case law, budgetary issues such as those challenged here are the prerogative of the elected branches, and this Court cannot intervene and substitute its judgment for that of the Legislature or the Executive. See Levittown, 57 N.Y.2d at 38-39 ("The determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous practical and political complexity, and resolution appropriately is largely left to the interplay of the interests and forces directly involved . . . in the arenas of legislative and executive activity"); Campaign

for Fiscal Equity, Inc. v. State of N.Y., 29 A.D.3d 175, 185 (1st Dep't 2006) ("without the ability or the authority to review the entire state budget, 'it is untenable that the judicial process . . . should intervene and reorder priorities, allocate the limited resources available, and in effect direct how the vast [city and state] enterprise[s] should conduct [their] affairs'") (citing Jones v. Beame, 45 N.Y.2d 402, 407 (1978)).

Therefore, even if this Court finds that Plaintiffs' claims do not fail as a matter of law, it is clear that Plaintiffs cannot obtain the extraordinary relief of having a Court order the State to pay amounts contemplated by legislation seven years ago on a motion for a preliminary injunction, and in excess of what has been appropriated in the most recent budget. The Court of Appeals in CFE III remained unwilling to order the implementation of a specific budget, even after over a decade of litigation and a seven-month trial revealing deficiencies in the educational opportunities provided to students. CFE III, 8 N.Y.3d at 27. This Court should be even more unwilling to do so when the litigation has not advanced beyond the pleading stage.

The First Department, citing the Court of Appeals, has recently reaffirmed that courts are without power to grant such drastic relief:

> There is no provision in the Constitution or statute that enables a court to impose on the legislature any dollar figure, no matter how calculated, since the judiciary, as a coequal branch of government, simply cannot constitutionally tell the legislature to appropriate or pay any amount of money for any specific purpose. . . . [A]ny mandate to pay those sums would encroach upon the budgeting powers of the Legislature and thus would violate the Separation of Powers Doctrine.

Larabee v. Governor of the State of N.Y., 2014 N.Y. App. Div. LEXIS 5169, at **17-18 (1st Dep't July 10, 2014) (citing Matter of Maron v. Silver, 14 N.Y.3d 230 (2010)). In fact, Plaintiffs' counsel has recognized that broad challenges to education issues, including financing, violate separation of powers principles, and that the Court is without authority to make determinations concerning budgetary decisions. See Pls.' Mem. in Opp. to Defs.' Motion to

Dismiss (Wright Aff. Ex. 3), p. 19 ("It is within the purview of the Legislature, not the courts, to make determinations with respect to appropriations and funding"); see also Baker, Al, "Lawsuit Challenges New York's Teacher Tenure Laws," N.Y. Times, at p. A14 (July 4, 2014), available at http://www.nytimes.com/2014/07/04/nyregion/lawsuit-contests-new-yorks-teacher-tenure-laws.html?_r=0 ("'It is basically unprecedented for a court to get into the weeds of a controversial education policy matter like this,' said Michael A. Rebell, an education lawyer and professor at Teachers College at Columbia University. 'Even if a court agrees there is a problem, they are more likely to defer to the legislative branch, which, in New York, has been trying to deal with these complex tenure issues and knows more about the workings of these policies.'").

For these reasons, and for the reasons stated in Defendants' motion to dismiss, which is incorporated herein by reference, Plaintiffs' claims should be dismissed as a matter of law pursuant to CPLR 3211, and their motion for a preliminary injunction should be denied.

D. The 2007 Budget and Reform Act was not a Recalculation of the Minimum Amount Necessary to Provide a Sound Basic Education

Plaintiffs' claims will also fail for the simple reason that the 2007 Budget and Reform Act did not establish the constitutional minimum for school funding. For this reason alone, Plaintiffs, who have styled their litigation as an attempt to implement that Act, will not prevail even if such relief were permitted.

As an initial matter, the CFE decisions did not mandate the implementation of Foundation Aid or the budget goals set forth in the 2007 Budget and Reform Act. In CFE III, the Court of Appeals agreed that Governor Pataki's proposal, which was based on the Zarb Commission's findings, provided sufficient funding for New York City students to have an opportunity to receive a sound basic education. The Court of Appeals specifically found "that the constitutionally required funding for the New York City School District includes additional

operating funds in the amount of $1.93 billion." CFE III, 8 N.Y.3d at 31. Despite this clear holding, Plaintiffs argue that the 2007 Budget and Reform Act, which was not considered in the CFE litigation, was the Legislature's determination of the funding levels necessary for providing students with an opportunity for a sound basic education. Plaintiffs make this argument in spite of the language of the Court of Appeals' decisions, and in spite of the fact that Plaintiffs do not, and cannot, cite a new statewide study, such as the Zarb Commission's, re-determining the cost of providing the constitutional minimum, to support the budgetary goals set in the Act.

Additionally, Plaintiffs ask the Court to ignore the fact that the State could, and did, exceed the funding necessary to remedy the constitutional violation found for the New York City school district in CFE. Critically, the Governor and the Court in CFE III viewed the legislative priorities of the State as separate from the determination of a sound basic education for purposes of an Education Article claim. That is, it was always understood that the funding analysis established by the Zarb Commission and recommended by the Governor, set a floor for the minimum levels of funding necessary for the New York City school district, which the State could choose to surpass. The State Education Reform Plan submitted by Governor Pataki clearly stated that it was expected that the eventual multi-year funding legislation would far surpass the constitutional minimum for New York City. Compare State Education Reform Plan (Wright Aff. Ex. 4), p. 14 (showing a resource gap for New York City of $1.9 billion) with p. 16 (proposing a five year funding increase of $4.7 billion from all sources). The Court of Appeals explicitly distinguished between this constitutional minimum and the policy choice of providing additional funds:

> [W]e observe that the state plan found that the cost of providing a sound basic education in New York City was $1.93 billion in additional annual operating funds, and that Governor Pataki's proposal to provide $ 4.7 billion in additional funding amounted to a policy choice to exceed the constitutional minimum.

CFE III, 8 N.Y.3d at 27. Indeed, the Court of Appeals modified the Appellate Division decision which directed the Governor and the Legislature to appropriate $4.7 billion, representing the high end of the Zarb Commission range for the New York City school district, stating that only $1.93 billion was required. The Court made that determination, and refused to order any specific appropriations, because the Court's only role was to determine whether the State's proposed calculation was rational, and it was not responsible for determining the best way to calculate the cost of a sound basic education. Id. Accordingly, Plaintiffs' reliance on CFE in asking this Court to force the implementation of the amounts contemplated by the 2007 Budget and Reform Act, is merely an attempt to rewrite history and a gross misinterpretation of the CFE III holding.[21]

Further, while the amounts contemplated by the 2007 Budget and Reform Act have not been fully realized, it is clear that education funding has profoundly changed since the CFE litigation, and funding from all sources exceeds the amounts established as constitutionally sufficient in CFE III. Importantly, CFE III held that the increase in operating funds was to be calculated since 2004. CFE III, 8 N.Y.3d at 31 ("we declare that the constitutionally required funding for the New York City School District includes additional operating funds in the amount of $1.93 billion, adjusted with reference to the latest version of the GCEI and inflation ***since***

[21] The "evidence" for Plaintiffs' belief that the 2007 Budget and Reform Act established a new minimum amount of constitutional funding is a series of cherry-picked and out of context quotes. See Pls.' Mem. pp. 3-4. The Act, like the proposal made by Governor Pataki, was intended to surpass the constitutional minimum established in CFE III. Governor Spitzer issued a press release when he first proposed the Budget and Reform Act stating that "[t]he Budget provides more than sufficient funds to address the school funding needs highlighted by the Campaign for Fiscal Equity Lawsuit." http://www.governor.ny.gov/archive/spitzer/press/0131074.html (Wright Aff. Ex. 11). The letter brief from this Office cited by Plaintiffs in support of their argument specifically notes that "[t]he funding formula is more generous than the one this Court approved as reasonable in the CFE litigation." Pls.' Ex. 1, p. 1. The 2007 Budget and Reform Act was the multiyear initiative that increased funding to New York City, and it addressed the CFE litigation by surpassing the constitutional minimum established there as anticipated by the Court of Appeals. CFE III, 8 N.Y.3d at 24 ("Governor Pataki made it clear that he intended New York City schools to receive additional funding that exceeded the minimum cost of a sound basic education.").

2004.") (emphasis added). In 2003-04, the New York City School District's total funding was approximately $14.4 billion. In 2012-2013, the last year for which complete data is available, education funding in New York City from all sources totaled $22.9 billion. That number is undoubtedly higher today.[22] Thus, from 2004, when the Zarb Commission issued its recommendation for $1.93 billion in additional funding to provide the opportunity for a sound basic education in New York City, to 2012-13, education funding in New York City from all sources increased by at least $8.5 billion in absolute dollars. See supra n.1. Plaintiffs do not even attempt to demonstrate that this $8.5 billion increase in total revenues was insufficient to provide New York City with the additional $1.93 billion in operating funds in 2004 dollars as required by CFE III.

While CFE's holding was limited to the New York City School District, the Zarb Commission's study undertook an analysis of the statewide system, and found that $2.5 billion in additional funding (approximately $1.9 billion for New York City, $600 million for all other school districts) was a reasonable estimate of the amount necessary statewide to provide students with an opportunity for a sound basic education. Between 2003-2004 and 2012-13, the State increased its funding by approximately $6 billion, while funding from state, local, and federal sources combined increased by more than $18 billion. Conroy Aff. ¶ 12. This is illustrated by the following chart:

[22] For example, the State's 2013-14 Enacted Budget increased New York City's annual School Aid by approximately $364 million. See 2013-14 Enacted Budget School Aid Runs, at 88, http://www.budget.ny.gov/pubs/archive/fy1314archive/enacted1314/2013-14SchoolAidRuns.pdf (Wright Aff. Ex. 25). The State's 2014-15 Enacted Budget provided an additional School Aid increase of approximately $435 million. See 2014-15 Enacted Budget School Aid Runs, at 90, http://publications.budget.ny.gov/budgetFP/2014-15SchoolAidRuns.pdf (Wright Aff. Ex. 26). Since 2012-13, the New York City School District has therefore received School Aid increases that on their own total almost $800 million. See also http://schools.nyc.gov/AboutUs/funding/overview/default.htm (Wright Ex. 12) .

School District Revenues by Source ($ in Millions)

School Year	State Aid Revenue Excl. STAR[23]	STAR Revenue[24]	Local Revenue	Federal Revenue	Total State, Local and Federal Revenue
2003-04	$14,699	$2,820	$19,922	$2,586	$40,027
2004-05	$15,665	$3,058	$21,668	$2,668	$43,060
2005-06	$16,605	$3,215	$23,520	$2,830	$46,170
2006-07	$18,038	$3,554	$24,966	$2,740	$49,297
2007-08	$19,888	$3,711	$25,967	$2,581	$52,147
2008-09	$21,781	$3,527	$26,987	$2,606	$54,902
2009-10	$20,190	$3,208	$28,653	$4,471	$56,522
2010-11	$19,932	$3,127	$29,729	$4,666	$56,960
2011-12	$19,855	$3,235	$31,756	$3,210	$58,056
2012-13	$20,324	$3,306	$32,349	$2,462	$58,441
Total Increase	**$5,625**	**$487**	**$12,427**	**($124)**	**$18,415**

See Conroy Aff. ¶ 12 (citing http://www.oms.nysed.gov/faru/Profiles/profiles_cover.html).

Plaintiffs' focus on Foundation Aid and the amounts contemplated by the 2007 Budget and Reform Act grossly mischaracterizes total education funding for districts throughout New York State. As shown in the above table, in 2012-13, the State provided over $23 billion in education funding, approximately 40% of the total education funding to districts across the State. Plaintiffs ignore the significant funding provided by the State outside of Foundation Aid, as well as the substantial amounts provided through the federal and local governments. Thus, Plaintiffs' claim cannot proceed.

[23] "State Aid Revenue" differs slightly from the estimate of School Aid in the coming school year made at the time the State adopts its budget, for two main reasons: (1) post-adoption changes in the data used to calculate School Aid, and (2) other miscellaneous aid provided to school districts, outside of School Aid, by the State Education Department and other State agencies. For example, 2012-13 School Aid was estimated to be $20.35 billion at the time of the 2012-13 Enacted Budget and $20.24 billion at the time of the 2013-14 Enacted Budget.

[24] The School Tax Relief program (STAR) was enacted in 1997 to offset rising property taxes for homeowners by exempting from school taxes a portion of the full assessed value of their primary residence. Under the program, the State reimburses school districts for the foregone revenue. STAR also provides tax relief to New York City by offering to qualified City residents a flat refundable Personal Income Tax credit of $125 for married couples filing jointly and one-half of that amount for single taxpayers, as well as a six percent City Personal Income Tax rate reduction.

Because the 2007 Budget and Reform Act was not a calculation of the cost of providing an opportunity for a sound basic education, Plaintiffs cannot meet their burden of establishing a likelihood of success on the merits.

E. Plaintiffs Cannot Sustain A Facial Challenge To The Statutes At Issue

Even if Plaintiffs' claims did not fail as a matter of law, Plaintiffs cannot prevail on their motion for a preliminary injunction seeking to enjoin the enforcement of the statutes at issue. When Plaintiffs challenge a statute on its face, their challenge will fail unless they "establish[] that no set of circumstances exists under which the [statute] would be valid, i.e., that the law is unconstitutional in all of its applications." Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 (2008) (citation omitted); Moran Towing Corp., 99 N.Y.2d at 448 ("A party mounting a facial constitutional challenge bears the substantial burden of demonstrating 'that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment'") (citations omitted). "Legislative enactments enjoy a strong presumption of constitutionality" and thus "parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt.'" LaValle v. Hayden, 98 N.Y.2d 155, 161 (2002) (internal citations omitted). Further, courts "give deference to public funding programs essential to addressing the problems of modern life, unless such programs are 'patently illegal.'" Schulz v. State, 84 N.Y.2d 231, 241 (1994) (citing cases); see also Lighthouse Shores, Inc. v. Islip, 41 N.Y.2d 7, 11-12 (1976) ("[i]t is also presumed that the legislative body has investigated and found the existence of a situation showing or indicating the need for or desirability of the [legislation], and, if any state of facts known or to be assumed, justifies the disputed measure, this court's power of inquiry ends."). "Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render

it unconstitutional." Id. "Only as a last resort will courts strike down legislative enactments on the ground of unconstitutionality." Schultz Management v. Bd. of Standards and Appeals of City of N.Y., 103 A.D.2d 687, 689 (1st Dep't 1984) (citing Sgaglione v. Levitt, 37 N.Y.2d 507, 515 (1975)); see also Matter of State of N.Y. v. Enrique T., 93 A.D.3d 158, 167 (1st Dep't 2012) ("Facial invalidation is an extraordinary remedy and generally is disfavored"). This is because "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981) (citation omitted).

Here, as relevant to this motion, Plaintiffs present a facial challenge to the constitutionality of three statutes: the Gap Elimination Adjustment (N.Y. Educ. Law § 3602(17)), the allowable growth amount for State aid increases (N.Y. Educ. Law § 3602(1)(dd)), and the requirements regarding increases in local property tax levies set forth in N.Y. Education Law § 2023-a (referred to as "the property tax cap"). Plaintiffs will be unable to succeed on their challenges to these lawfully enacted statutes, because they cannot meet their heavy burden of negating every conceivable circumstance under which the statutes may be constitutional nor can they prove their claim of unconstitutionality beyond a reasonable doubt.

1. *Plaintiffs Are Not Likely To Succeed on Their Challenge to the "Property Tax Cap"*

Plaintiffs have not established a likelihood of success on the merits of their challenge to section 2023-a of the Education Law, which they refer to as the "property tax cap." As an initial matter, the "property tax cap" does not cap local funding, nor does it reduce funding; it establishes a threshold beyond which a district must engage in certain procedures to adopt a budget that will require a tax levy that exceeds the threshold. Szuberla Aff. ¶ 3. That basic fact eviscerates the underlying premise of Plaintiffs' motion, which seeks to restrain the State from reducing foundation aid. See Notice of Motion, p. 1. Because voters have the ability to override

the threshold by a 60% majority, it does not act as a bar to districts whose voters wish to increase taxes to raise additional funds for education, and Plaintiffs cannot prevail.[25]

As demonstrated in Defendants' motion to dismiss, Plaintiffs cannot state a claim with respect to the "property tax cap," much less demonstrate a likelihood of success on the merits. Critically, the Education Law § 2023-a "property tax cap" is not applicable to four out of the nine districts where Plaintiffs reside – New York City, Rochester, Yonkers, and Syracuse – and thus they do not have standing to bring such claims. See Defs.' Mem. Parts II-III; N.Y. Educ. Law § 2023-a(2)(h); Am. Compl. ¶ 193(f); Szuberla Aff. ¶ 4, n.2.[26] With respect to the remaining districts, Plaintiffs do not claim that they have been harmed in any way by the statute.

Plaintiffs fail to show that any of the districts in which they reside would have raised their tax levies if the "property tax cap" was not in effect, or that the procedures established by the statute have caused educational deficiencies in any specific district. Instead, Plaintiffs merely offer unsupported statements that it is "unlikely" that districts will propose increases that would exceed the threshold. However, the realities of the "property tax cap" show that it does not prevent the funding of education resulting in educational deficiencies. Plaintiffs acknowledge that certain districts have voted for such increases and have not been hindered by the threshold set by the "cap." See Pls.' Mem. p. 17; Am. Compl. ¶¶ 57, 187.[27] Thus, Plaintiffs' motion falls

[25] The "property tax cap" was enacted to empower local citizens and to provide taxpayers the opportunity to curb the excessive growth of their property tax burden. See N.Y. Dep't of Taxation and Finance, Report on Property Taxes, http://www.tax.ny.gov/pit/property/learn/proptax.htm (Wright Aff. Ex. 13) (noting that between 1992 and 2009, statewide property tax levies doubled, with levies increasing 46% in the seven years prior to 2009); see also Affidavit of Charles Szuberla ("Szuberla Aff.") ¶ 2 ("The Sponsor's Statement in Support noted that 'New York property owners pay among the highest taxes in the nation ... [which has a] devastating impact … on homeowners throughout New York.… Other states have property tax caps, including Massachusetts, Illinois, California and Michigan. New Jersey was the most recent state to enact a property tax cap.'").

[26] While N.Y. Educ. Law § 2023-a does not apply to the school districts in New York City, Rochester, Syracuse or Yonkers, the tax cap pursuant to Gen. Mun. Law § 3-c does apply to the cities of Rochester, Yonkers, and Syracuse. Plaintiffs do not seek to enjoin the enforcement of Gen. Mun. L. § 3-c on this motion or in the underlying action. Neither provision applies to New York City.

[27] Plaintiffs' statistics concerning the most recent year's budget results are inaccurate. In the most recent budget

short of the necessary showing that there is "'no set of circumstances" under which the regulation could be validly applied. Moran Towing Corp., 99 N.Y.2d at 448.[28]

While Plaintiffs challenge the "property tax cap" under the Education Article, they do not make any showing that the "property tax cap" has adversely affected the educational opportunities of students in any district. Plaintiffs do not offer proof of any specific district that: (1) has deficiencies in educational inputs and outputs; (2) caused by a lack of total funding from all sources; and (3) if the property tax cap was not in effect, would have raised its tax levy to a threshold that would enable the district to eliminate the educational deficiencies.[29] Plaintiffs' speculation and conjecture are insufficient to meet their burden on this motion.

Further, it must be emphasized that supermajority votes such as the one required by the "Property Tax Cap" are without question lawful and constitutional, and the Plaintiffs knowingly do not and could not assert otherwise. In the equal protection context, the United States Supreme

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vote, for the 2014-2015 school year, the majority of the districts which proposed budgets above the threshold passed. None of the districts with proposed budgets above the threshold are represented by Plaintiffs in this action. See Statewide School District Budget Voting Results, N.Y. State Educ. Dep't, Office of Educ. Mgmt., http://www.p12.nysed.gov/mgtserv/votingresults.

[28] The statute contains several modifications and exclusions from the tax levy limit. N.Y. Educ. Law § 2023-a(2)(i)(i)-(v). Further, the statute accommodates for growth in the tax base based upon qualitative and quantitative changes to the district's real property. Education Law § 2023-a(2-a), (3)(a)(2).

[29] To the extent Plaintiffs seek to enjoin N.Y. Tax Law § 606(bbb) on this preliminary injunction, Plaintiffs' memorandum of law does not offer any rationale for the enjoinment of that statute. Further, Plaintiffs' amended complaint does not assert a cause of action or any allegations relating to that statute, and thus the enforcement of the statute cannot be enjoined on Plaintiffs' preliminary application. See Stewart v. U.S. Immigration & Naturalization Serv., 762 F.2d 193, 198 (2d Cir. 1985) ("[S]ince Stewart failed to commence an action in the district court with regard to his claim of improper suspension without pay prior to filing his motion for a preliminary injunction, the district court lacked jurisdiction over Stewart's motion for injunctive relief relating to the same conduct."); Schwartz v. U.S. Dep't of Justice, 2007 U.S. Dist. LEXIS 74608, at *8 (D.N.J. Oct. 4, 2007) ("When the movant seeks intermediate relief beyond the claims in the complaint, the court is powerless to enter a preliminary injunction.") (citation and quotation marks omitted). In any event, Plaintiffs cannot succeed on a motion to enjoin the enforcement of that statute. Plaintiffs claim that the "tax freeze credit," N.Y. Tax Law § 606(bbb), which provides a rebate to homeowners in districts that maintain tax levies below the property tax cap threshold, provides a disincentive for voters to approve tax increases above the cap. However, Plaintiffs argument again ignores the simple fact that there is no prohibition on raising taxes above the "cap" and voters maintain the ability to do so. This is illustrated by the fact that this year, voters approved an increase over the tax cap threshold in the majority of the districts where it was proposed, even though it may render them ineligible for the freeze credit. Further, Plaintiffs do not argue that Tax Law § 606(bbb) will prevent their districts, or any other districts, from obtaining sufficient funds to provide their students with an opportunity for a sound basic education.

Court has held that supermajority requirements are constitutional. See Brenner v. Sch. Dist. of Kan. City, Mo., 403 U.S. 913 (1971), affirming 315 F. Supp. 627, 633 (W.D. Mo. 1970) ("Missouri's two-third majority requirement reflects its choice of decisional rule for a limited purpose election which is calculated to require that a strong consensus of all citizens be demonstrated before school bond and school levies are to receive approval."); Gordon v. Lance, 403 U.S. 1, 5-6 (1971); see also Gray v. Darien, 927 F.2d 69, 72 (2d Cir. 1991) ("The fact that the provision makes it more difficult . . . than would be the case if only a simple majority were required is constitutionally irrelevant.").[30] The principle that supermajority voting requirements, enacted by legislatures presumed to have acted constitutionally, are lawful, is equally applicable here. Accordingly, Plaintiffs' motion for a preliminary injunction must be denied.

Moreover, Plaintiffs' claims concerning the purported disparate effect on high needs districts are not actionable, much less likely to succeed on the merits. The Education Article does not create a right of action against the State or its officials seeking equal resources, nor does it create a right of action to challenge State laws governing the nature, extent, and manner in which local school districts can fund and deliver educational services in its public schools. Under Levittown, disparities in wealth or ability to provide local funding do not violate the Education Article. 57 N.Y2d at 47-48. The "property tax cap" is consistent with precedent permitting locally individualized funding decisions in recognition of the partnership between the State and local districts in delivering education; the statute continues this partnership while also addressing the staggering increase in local property taxes.

[30] New York courts, including the Court of Appeals, have "consistently cited federal cases and applied federal analysis to resolve equal protection claims brought under the federal and state constitutions." Hernandez v. Robles, 7 N.Y.3d 338, 374-375 (2006).

2. *Plaintiffs Are Not Likely To Succeed on Their Challenge to the Allowable Growth Amount*

Plaintiffs cannot show a likelihood of success on the merits on their challenge to the allowable growth amount, codified at N.Y. Educ. Law § 3602(1)(dd). Much like Plaintiffs' amended complaint, their application for a preliminary injunction is devoid of any support demonstrating how the allowable growth amount has adversely affected the educational opportunities provided to students in any of Plaintiffs' school districts, or any district statewide. In fact, Plaintiffs concede that they are not adversely affected by the allowable growth amount, because for the past two years, the Governor and the Legislature have added appropriations in excess of the statutorily calculated personal income growth indices. See Pls.' Mem. p. 15; L. 2013, ch. 53, § 1, at pp. 160-174; L. 2014, ch. 53, § 1, at pp. 158-172; Memorandum to the Regents State Aid Subcommittee on the 2014-15 Enacted Budget State Aid, April 28, 2014, http://www.regents.nysed.gov/meetings/2014/April2014/413sad1Revision2.pdf, at p. 3 (Wright Aff. Ex. 14); Conroy Aff. ¶ 22. This reflects the reality that budget decisions are made on an annual basis.[31] Plaintiffs cannot show that they have standing, much less can prevail, on a constitutional challenge to a statute which is not currently impacting them in any adverse way. As such, Plaintiffs are essentially seeking an advisory opinion, which is impermissible and mandates the dismissal of their claims and the denial of their motion. See Cuomo v. Long Island Lighting Co., 71 N.Y.2d 349, 354 (1988) ("The courts of New York do not issue advisory opinions for the fundamental reason that in this State '[the] giving of such opinions is not the exercise of the judicial function.' The role of the judiciary is to 'give the rule or sentence,' and thus the courts may not issue judicial decisions that 'can have no immediate effect and may

[31] This also illustrates why Plaintiffs' projections are unpersuasive. Given that the State budget is determined each year, and given that demographic and economic data are constantly changing, Plaintiffs' claims of harm or future "underfunding" are purely speculative.

never resolve anything'"); N.Y. State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82 v. Cuomo, 64 N.Y.2d 233, 240, n.2 (1984) ("Where the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract. . . . . any further consideration would require this court to render an advisory opinion, a practice not in accord with the settled policy in this State.").

The impropriety of Plaintiffs' application to restrain the enforcement of the allowable growth amount is further underscored by Plaintiffs' disregard of the total funding provided to any district. As emphasized in Defendants' motion to dismiss, and discussed above, in order to sustain an Education Article claim, Plaintiffs must show deficiencies in education caused by a lack of funding. Defs.' Mem. pp. 17-26; supra pp. 18-20. In analyzing funding, Plaintiffs cannot narrowly focus on State Foundation Aid; they must show that the total funding provided to each district from all sources – State, federal, local, or otherwise – is insufficient to provide an opportunity for a sound basic education.[32] Plaintiffs, however, ignore funding from all sources except for the State, and in fact they ignore the many aspects of State aid outside of Foundation Aid. Plaintiffs do not make a showing, or even a factual allegation, that the total funding provided to any district in the State is insufficient. The allowable growth amount, as well as the other statutes at issue on this motion, cannot be evaluated in a vacuum. They must be analyzed in the context of total funding provided in order for the Court to determine whether any purported educational deficiencies are being caused by the funding system. Here, where Plaintiffs merely allege that the allowable growth amount may not be exceeded in the future,

[32] Plaintiffs' counsel recognized this when he advocated for federal funding to make up for any State reductions in education financing. Rebell, Michael, "Slashing the City Schools Budget is Illegal, Unfair, and Unwise," N.Y. Daily News (Dec. 19, 2008), available at http://www.nydailynews.com/opinion/slashing-city-schools-budget-illegal-unfair-unwise-article-1.355284.

without showing that such a hypothetical scenario will prevent the disbursement of funds necessary to provide an opportunity for a sound basic education, or that funding from other sources will be insufficient to make up for any purported shortfall, Plaintiffs fail to meet their burden of showing that the allowable growth amount cannot be constitutional in any circumstance. Therefore, their motion for a preliminary injunction must be denied.

3. *Plaintiffs Are Not Likely To Succeed on Their Challenge to the Gap Elimination Adjustment*

Plaintiffs do not demonstrate a likelihood of success on the merits on their claim to enjoin the enforcement of the Gap Elimination Adjustment. The Gap Elimination Adjustment is entitled to a presumption of constitutionality, and as Plaintiffs acknowledge, deference must be given to the Legislature, especially on issues concerning the allocation of scarce fiscal resources.

As discussed above (see supra pp. 18-21) and in Defendants' motion to dismiss (Wright Aff. Ex. 2, pp. 15-23), in order to state a claim under the Education Article, Plaintiffs must show deficiencies in educational inputs and outputs on a district-by-district basis. Once such deficiencies are established, Plaintiffs must then show that they are caused by the education funding system. Plaintiffs cannot merely focus on the budget without any proof of its concrete effects on educational opportunities in the almost 700 school districts in New York State. Despite their high burden, Plaintiffs do not make any effort to connect the Gap Elimination Adjustment to any purported educational deficiencies in any district.

Similarly, Plaintiffs' failure to present proof of the total funding provided to any district is fatal to their facial challenge to the Gap Elimination Adjustment. Even if Foundation Aid is less than what was aspired to in 2007, if federal, local, or other State funds make up the difference, then districts are receiving what Plaintiffs consider their "constitutionally mandated" amounts, and Plaintiffs do not have a viable claim. See CFE III, 8 N.Y.3d at 24, n.3. In such a scenario,

the Gap Elimination Adjustment, or any other statute reducing State Foundation Aid below the amounts contemplated in 2007, would not be unconstitutional, because districts would be receiving what Plaintiffs consider to be sufficient funds to provide students with the opportunity for a sound basic education, albeit from different sources. Further, if districts are using the funds available in a manner such that the inputs and outputs are sufficient to show that students have the opportunity for a sound basic education, then there has been no constitutional violation, and the Gap Elimination Adjustment cannot be found unconstitutional on its face. Thus, Plaintiffs cannot meet their burden of showing that there is "no set of circumstances" under which the Gap Elimination Adjustment could be constitutional, as they must in order to prevail. See Moran Towing Corp., 99 N.Y.2d at 448. Accordingly, Plaintiffs' challenge to the Gap Elimination Adjustment based upon a deviation from the Act's funding goals must fail.

Plaintiffs' attempt to support their motion with claims that the Gap Elimination Adjustment has a disproportionate effect on poorer districts is also unavailing. Plaintiffs have not asserted an equal protection claim in this action, nor could they. See Levittown, 57 N.Y.2d 27 (holding that the State's education financing system did not violate the Equal Protection clauses of the state or federal constitutions despite wide spending disparities among school districts); see also CFE II, 100 N.Y.2d at 909 ("the Education Article guarantees not equality but only a sound basic education"); Paynter, 100 N.Y.2d at 439 ("neither the Education Article nor the Equal Protection Clause requires the State to provide equal educational opportunities in every school district").

Plaintiffs have not submitted any evidence of how the Gap Elimination Adjustment has specifically affected any district in the State, much less the districts where Plaintiffs reside. They do not present proof specifying the financial impact on any district as a result of the Gap

Elimination Adjustment, or how the Gap Elimination Adjustment affects inputs or outputs in schools in those districts. Both Plaintiffs' motion and the amended complaint are silent as to whether the individual plaintiffs' districts, or any other district, received funding from other sources to make up for the Gap Elimination Adjustment reductions, although they acknowledge that federal funding made up for most of the gap in certain years, and that the gap elimination restoration (N.Y. Educ. Law § 3602(17)(d)) has also restored significant amounts of funding. Pls.' Mem. pp. 6, n.3, 14. The mere fact that the Gap Elimination Adjustment resulted in a deviation from the State's 2007 goals is inadequate to state a viable claim.

More specifically, Plaintiffs ignore the progressive nature of the gap elimination restoration. Even though the financial crisis necessitated reductions in aid to public schools, the State acted to to mitigate the impact on higher-need, lower-wealth school districts. The resulting Gap Elimination Adjustment enacted for the 2011-12 school year was calculated against districts' total formula-based School Aid excluding Building Aids and Universal Pre-Kindergarten. Yet even though high-need school districts received 67 percent of this aid base, they accounted for only 54 percent of the 2011-12 Gap Elimination Adjustment. Conroy Aff. ¶ 16. Since 2011-12, the State has restored a total of $1.52 billion of the Gap Elimination Adjustment. Conroy Aff. ¶ 18. High-need school districts have received almost two-thirds ($1.01 billion) of this cumulative restoration. Id. As a result, high-need school districts' share of the Gap Elimination Adjustment has declined from 54 percent in the 2011-12 school year to 36 percent in 2014-15. Id. As an example, the 2014-15 Enacted Budget provided 69% of its $602 million in Gap Elimination Adjustment restoration to high-need school districts. Id. As a result, many of the State's poorest school districts now have only a fraction of their original Gap Elimination Adjustment remaining. For example, as of 2014-15, the State had already restored

78 percent of the original Gap Elimination Adjustment of the "Big Four" city school districts (Buffalo, Rochester, Syracuse and Yonkers). Id.

F. Plaintiffs' Arguments Concerning Fiscal Restraints Including Their Reliance On Education Litigation In Other States Is Misplaced

Plaintiffs' argument that fiscal restraints do not excuse constitutional obligations ignores the fact that Plaintiffs have not even attempted to make a showing concerning any purported failure of the State to meet its constitutional obligation. Plaintiffs cannot establish that the State has violated its obligation to provide an opportunity for a sound basic education because such a showing would require detailed facts concerning the inputs (teaching, curricula, supplies, etc.) and outputs (test scores, graduation rates, etc.) for each and every district at issue. Only once Plaintiffs make that showing can the Court move on to analyze whether the purported deficiencies in inputs and outputs are causally connected to the funding system. Until then, Plaintiffs have not demonstrated that the State is not meeting its constitutional obligations. Plaintiffs cannot claim that Defendants are using fiscal constraints as an excuse for a constitutional violation, when no constitutional violation has been found, or even alleged.[33]

Critically, none of the cases relied upon by Plaintiffs concern a motion for a preliminary injunction. Instead, Plaintiffs rely on decisions from other states, which are not binding here, and were not evaluated under the heightened standards applicable to preliminary injunctions, but rather were issued after all sides were afforded the opportunity to exchange factual and expert discovery, engage in motion practice, and present testimony and documentary evidence at trial.

[33] Plaintiffs' reference to the State's current fiscal condition, including various tax cuts that have been enacted, demonstrates a complete misunderstanding of how our political system works. It is the prerogative of the elected branches to pass a budget each year consistent with their priorities, obligations, and fiscal realities. The separation of powers dictates that this Court cannot intrude into the elected branches' determinations concerning its allocation of resources, fiscal policies, and prioritization of issues. Further, as a practical reality, Plaintiffs cannot ask this Court to fill in an alleged present gap using funds from an expected future tax cut.

The cases cited by Plaintiffs are inapposite. In Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989), the Kentucky Supreme Court reviewed a ruling where the constitution required the state to provide an equal and efficient education. As such, the decision focuses mainly on inefficiencies and disparities between districts, two standards which are not at issue here. Further, the court issued its decision after a trial in which the plaintiffs presented evidence of the education provided to students in districts across the state, including curricula and achievement test scores, taking note of the fact that Kentucky ranked 40th in the country in the area of per pupil expenditures. Rose, 790 S.W.2d at 197. This is in stark contrast to New York, which currently spends more money per pupil than any other state in the country. See supra p. 13. Further, unlike the Kentucky case, Plaintiffs here seek relief without a trial or a presentation of evidence concerning the inputs and outputs of Plaintiffs' school districts, or any school district in the State. See also McCleary v. State, 269 P.3d 227 (Wash. 2012) (finding for plaintiffs after a trial in which evidence showed major underfunding of basic operational costs and noting that despite major changes to the education system, education was being financed by a thirty-year old statutory formula); Abbott v. Burke, 20 A.3d 1018 (N.J. 2011) (ordering New Jersey to comply with remedial orders concerning established constitutional violations after over twenty years of litigation); Campbell Cnty. Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) (issuing decision after three-week trial focusing on whether Wyoming students were receiving an equal opportunity to a quality education).[34]

[34] Plaintiffs also rely on a holding of the New Hampshire Supreme Court, yet that decision is not analogous. See Pls.' Mem. pp. 11-12 (citing Claremont School Dist. v. Governor, 794 A.2d 744 (N.H. 2002)). In New Hampshire, the court struck down a statute that permitted a district to provide less than an adequate education as measured by the minimum standards when the local tax base cannot supply sufficient funds to meet the standards. Claremont, 794 A.2d at 754. There is no such statute at issue here. Further, Plaintiffs ignore the fact that most recently, the New Hampshire Supreme Court dismissed an action claiming that the state failed to provide a constitutionally adequate education. Londonderry Sch. Dist. v. State, 958 A.2d 930 (N.H. 2008). Moreover, the quotation from Claremont relied upon by Plaintiffs dealt with the insufficiency of New Hampshire's accountability mechanisms.

Plaintiffs cite these cases from other states, yet ignore the history of Massachusetts education litigation, which is analogous.[35] Much like New York's involvement in the CFE litigation, Massachusetts was engaged in litigation concerning education adequacy in the 1990s. McDuffy v. Sec. of the Exec. Off. of Educ., 615 N.E.2d 516 (Mass. 1993). After the Massachusetts Supreme Court ruled in favor of the plaintiffs, Massachusetts enacted the Education Reform Act of 1993 ("ERA"), which restructured the education funding system by establishing a foundation budget, and established a set of standards and accountability measures. Despite progress on funding and standards, students from several districts filed a motion for further relief, claiming that substantial improvements had not been made to the quality of education in their districts. Hancock v. Comm'r of Educ., 822 N.E.2d 1134 (Mass. 2005). After a trial, the court found that the students were being denied their constitutional right to educational opportunity. The Massachusetts Supreme Court reversed, because although it shared the trial court's concern over the "sharp disparities in the educational opportunities, and the performance, of some Massachusetts public school students," the public education system reviewed at that time was different from the public education system reviewed in McDuffy. The

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New York's accountability mechanisms are not at issue on this motion for a preliminary injunction, nor should they be an issue in this case. See Defs.' Mem. (Wright Aff. Ex. 2) Part VI; CFE III, 8 N.Y.3d at 32 (striking the requirement that the State perform regular cost studies and affirming the sufficiency of the accountability mechanisms in place). Plaintiffs also cite Hurrell-Harring v. State, 15 N.Y.3d 8 (2010) and Klostermann v. Cuomo, 61 N.Y.2d 525 (1984), yet those cases considered motions to dismiss, not motions for preliminary injunctions. In those cases, the court found that Plaintiffs had sufficiently plead violations of constitutional rights, and thus their claims could proceed. Not only do Plaintiffs disregard the differences between the standards on a motion to dismiss and a motion for a preliminary injunction, but they ignore the fact that here, Plaintiffs have not plead a violation of any constitutional right, because they fail to adequately allege that they are not receiving an opportunity for a sound basic education. Therefore, those cases are inapplicable.

[35] Plaintiffs also ignore holdings of other state supreme courts. See, e.g., Neb. Coalition for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 181 (Neb. 2007) ("it is beyond our ken to determine what is adequate funding for public schools. This court is simply not the proper forum for resolving broad and complicated policy decisions or balancing competing political interests."); Okla. Educ. Ass'n v. State ex rel. Okla. Legislature, 158 P.3d 1058 (Okla. 2007) ("The plaintiffs are attempting to circumvent the legislative process by having this Court interfere with and control the Legislature's domain of making fiscal-policy decisions and of setting educational policy by imposing mandates on the Legislature and by continuing to monitor and oversee the Legislature. To do as the plaintiffs ask would require this Court to invade the Legislature's power to determine policy. This we are constitutionally prohibited from doing.").

shortcomings in education, while significant, did not constitute the egregious abandonment of the constitutional duty identified in the earlier case. While there was no dispute that "serious inadequacies in public education remain[ed]," the court observed that the state was "moving systemically to address those deficiencies and continues to make education reform a fiscal priority."

The court specifically noted the significance of the state's allocation of billions of dollars for education reform since the ERA's passage. Id. at 1139. Nonetheless, the public education funding system was not immune from the effects of diminished revenues during an economic downturn, and aid subsequently decreased after a high point in 2002. There were cuts in education aid in 2003 and 2004, including some "drastic" cuts. Id. at 1148.[36] The Massachusetts Supreme Court stated:

> The delay in full implementation of the provisions of the act does not derive from legislative or departmental inaction. Some delays have been occasioned by continued public debate, opposition to, and protracted litigation over some provisions of education reform. Some parts of the act, such as foundation budget funding and the implementation of the curriculum frameworks, have been deliberately phased in to permit schools and departments time to adjust to new standards. Still other reforms, as the judge acknowledged, have been slowed by severe revenue shortfalls, which have forced reductions in spending for public education, as well as for other vital public services. We note that, since approximately 2001, Massachusetts has wrestled with a "profound economic downturn." . . . Yet through this period the Commonwealth continued to appropriate "substantial sums" toward education reform. Because decisions about where scarce public money will do the most good are laden with value judgments, those decisions are best left to our elected representatives.

Id. at 1155-56 (citations omitted). Although the court found "much that remains to be corrected before all children in our Commonwealth are educated," it refused to issue an order requiring the state to finish its incomplete education reforms. The court stated that "[n]o one reading the

[36] The economic downturn of 2008 was significantly more severe than that of 2001. See Chau v. Lewis, 935 F. Supp. 2d 644, 659 (S.D.N.Y. 2013) ("It is now common knowledge that, from late 2007 to 2009, the United States was devastated by the worst economic recession since the Great Depression.").

judge's decision can be left with any doubt that the question is not 'if' more money is needed, but how much." Id. However, despite the fact that "serious inadequacies in public education remain[ed] . . . the Commonwealth is moving systemically to address those deficiencies and continues to make education reform a fiscal priority." Id. at 1157. The progress that the state had made since the McDuffy decision twelve years earlier was sufficient to remove the legislature from constitutional culpability.[37]

Similarly, since the Court of Appeals issued its final CFE decision in 2006, New York State has committed itself to education reform. It has transformed its education financing system, and dramatically increased educational funding, working to focus funding on the districts most in need.[38] See supra pp. 7-13. While fiscal constraints may have slowed the progress contemplated by the 2007 Budget and Reform Act, there can be no doubt that New York has committed its finite resources to education beyond what most states have accomplished. See id.

In light of the foregoing, Plaintiffs cannot establish that they have standing to proceed with their facial constitutional challenge, that they state a claim for relief, or even that if they did state a claim, this Court could award the relief they seek. Accordingly, they cannot meet their burden to show a likelihood of success on the merits, much less the enhanced standard of imperative necessary based upon the clearest evidence, and their motion for a preliminary injunction must be denied.

[37] The Massachusetts Supreme Court contrasted its decision with CFE, claiming that the CFE decisions were only appropriate due to "years of legislative failure." Where the actions of the executive and legislative branches were substantial, they did not merit further review by the court. Hancock, 822 N.E.2d at 1153-54.

[38] Unlike the 2007 Budget and Reform Act, the establishment of a foundation budget in Massachusetts was described as the State's estimate of the "minimum amount needed in each district to provide an adequate educational program." Hancock, 822 N.E.2d at 1142. Even still, the Massachusetts Supreme Court refused to find a constitutional violation where full implementation was delayed.

II. PLAINTIFFS HAVE NOT DEMONSTRATED IRREPARABLE HARM

Plaintiffs have not shown that they will suffer irreparable harm by virtue of the statutes they seek to enjoin, and thus their motion for a preliminary injunction must fail. "Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. To prevail, the movant must establish not a mere possibility that it will be irreparably harmed, but that it is likely to suffer irreparable harm if equitable relief is denied." Bank of Am., N.A. v. PSW NYC LLC, 29 Misc. 3d 1216(A) (Sup. Ct. N.Y. Cty. 2010) (citing cases); Willow Media, LLC v. City of N.Y., 78 A.D.3d 596 (1st Dep't 2010). In order to demonstrate irreparable harm, Plaintiffs must show an injury that is actual and imminent, not one that is remote or speculative. Id.; Golden v. Steam Heat, 216 A.D.2d 440, 442 (2d Dep't 1995). Plaintiffs fail to meet their burden in showing actual and imminent irreparable harm caused by the statutes at issue.

As an initial matter, Plaintiffs' delay in bringing this action and this motion belie any claim of irreparable harm and mandate denial of their motion. Plaintiffs acknowledge that the statutes at issue have been in place since 2010-2011. Pls.' Mem. p. 6. Yet Plaintiffs waited four years to bring this action, and then waited an additional four months after commencing this action to seek this preliminary injunction. Such delay undermines any claim of urgency. See, e.g., Citibank, N.A. v. Citytrust, 756 F.2d 273, 276 (2d Cir. 1985) ("Preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay [of ten weeks] in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action."); Emmet & Co. v. Catholic Health E., 2011 U.S. Dist. LEXIS 54935, at **6-7 (S.D.N.Y. May 18, 2011) (no irreparable harm where plaintiffs waited 45 days before seeking injunctive relief); Andrews v. Middle Cty. Resources Mgt., Inc., 2009 N.Y. Misc. LEXIS 5017 (Sup. Ct. N.Y. Cty. Nov. 12, 2009) ("The

Court also concludes, in part because of Plaintiff's substantial delay in filing this action, that Plaintiff has not established a danger of irreparable harm unless the injunction is granted, or a balance of the equities in her favor"); Matter of Raffe, 42 Misc. 3d 1236(A) (Surr. Ct. Nassau Cty. 2014) ("an inordinate delay in seeking injunctive relief is itself antithetical to irreparable harm in the absence of a preliminary injunction") (citing Mercury Serv. Sys., Inc. v. Schmidt, 50 A.D.2d 533 (1st Dep't 1975)).

Further, contrary to Plaintiffs' assertion, the mere allegation of a constitutional violation is insufficient to constitute irreparable harm. Burroughs v. County of Nassau, 2014 U.S. Dist. LEXIS 79224, at *16 (E.D.N.Y. Mar. 19, 2014); White v. Clark, 2012 U.S. Dist. LEXIS 165432, at *41, n.8 (N.D.N.Y Nov. 20, 2012) ("plaintiff's allegations, standing alone, are not sufficient to entitle him to preliminary injunctive relief") (citing cases); CPLR 6312(a) (requiring affidavits or other evidence on an application for a preliminary injunction). Rather, courts look behind the allegation of a constitutional violation and examine "the nature of the constitutional injury." Id.

Plaintiffs have simply failed to make any showing that students throughout New York have been denied the opportunity for a sound basic education as a result of the challenged enactments. Plaintiffs do not allege any harm suffered by students due to any shortage of resources. Plaintiffs have chosen not to put forth any factual record, whether by affidavit or otherwise, about a lack of resources in any school district. Plaintiffs rely on an unfounded proposition that all students statewide are entitled to a presumption of irreparable harm by virtue of the fact that they challenge the education financing system. No such presumption exists. Further, because an order nullifying State law in the area of appropriations and disbursements intrudes upon a core democratic and policy function of the executive and legislative branches, a

very clear demonstration that Plaintiffs will suffer irreparable harm is required—the opposite of the presumption of harm that they seek here.

The cases cited by Plaintiffs are inapposite. As an initial matter, they do not relate to a challenge pursuant to the Education Article. Further, in all of the cases cited by Plaintiffs in which the court granted a preliminary injunction, that relief was granted only after the plaintiff presented proof of irreparable harm and proof of a likelihood of success on the merits. The successful parties did not merely allege the possibility of generic harm; they offered detailed evidence that they were suffering, or would imminently suffer, a specific irreparable harm by virtue of the conduct they were seeking to enjoin.[39]

In stark contrast, Plaintiffs do not offer any proof of harm being suffered by them by virtue of the statutes they seek to enjoin. Rather, Plaintiffs make broad statements about the importance of education, without showing that Plaintiffs themselves, or any other students in their districts, are suffering specific educational harms by virtue of the statutory provisions they seek to enjoin. Instead, Plaintiffs rely solely on language from CFE concerning what aspects of education should be evaluated in assessing the adequacy of education on an Education Article challenge. Pls.' Mem. p. 21. Plaintiffs cannot merely recite these categories, or rely on findings concerning the educational opportunities provided to New York City schoolchildren over ten

[39] In Swinton v. Safir, 93 N.Y.2d 758, 765-766 (1999), an employment discrimination case involving one plaintiff not seeking a preliminary injunction, the court stated that, in some circumstances, "proof of a ***likelihood*** of the occurrence of a threatened deprivation of constitutional rights is sufficient to justify prospective or preventive remedies under 42 USC § 1983, without awaiting actual injury." (emphasis added). In Lily Pond Lane Corp. v. Technicolor, Inc., 98 Misc. 2d 853 (Sup. Ct. N.Y. Cty. 1979), unlike here, the plaintiff did not seek to enjoin the enforcement of a lawfully enacted statute, nor did it seek to disrupt the status quo. In Time Square Books v. City of Rochester, 223 A.D.2d 270 (4th Dep't 1996), the plaintiffs sought a preliminary injunction prior to the date the statute at issue went into effect, and submitted evidence of harm they would suffer if the statute was allowed to take effect, both in monetary terms and in violation of their freedom of expression. In Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996), the court affirmed the granting of a preliminary injunction releasing an inmate from a "medical keeplock" where he showed the court severe physical effects of his confinement. Here, there is no such proof of any actual harm suffered by any plaintiff. Here, Plaintiffs have not shown a likelihood of a deprivation of constitutional rights, because they have not submitted factual support showing that any students in any districts are being denied the opportunity for a sound basic education as a result of the challenged statutes.

years ago. Plaintiffs do not show that those findings are applicable today, nor do they show that similar deficiencies exist in any of the remaining districts in the State.

It is undisputed that New York's educational funding, both State and local, have greatly increased in recent years. Further, total per pupil expenditures have been increasing for years and are well above 2006 levels. See supra p. 13. Even if total funding had decreased, Plaintiffs could not prevail without showing that the State's responsibility for such decrease caused each district at issue to fail to provide an opportunity to obtain a sound basic education. Plaintiffs do not even attempt to make that showing. Notably absent from their motion papers are any claims that the funds related to the three statutes they seek to enjoin are related to specific deficiencies in educational opportunities afforded to students in any districts in this State. In fact, Plaintiffs' own language belies their claim of injury; they ineffectually state that without the funding level aspired to in 2007, "some or all of these inputs will not be provided." Pls.' Mem. p. 22. Such generic allegations, unsupported by evidence, are insufficient to meet their burden.

A. Plaintiffs Have Not Demonstrated Irreparable Harm Caused By The Continued Enforcement Of The "Property Tax Cap"

Plaintiffs have not made any showing of harm caused by the "property tax cap," much less irreparable harm sufficient to justify a preliminary injunction enjoining the continued enforcement of that statute. As demonstrated in Defendants' motion to dismiss, and discussed above, the Education Law § 2023-a "property tax cap" does not apply to the districts where Plaintiffs reside and assert allegations (albeit inadequate) concerning educational opportunities. See supra pp. 32-33; Defs.' Mem. Parts II-III. Further, there are no allegations in the amended complaint, much less proof submitted on this motion, concerning any specific harm suffered by students in any district as a result of the tax cap. See Am. Compl. ¶¶ 56, 186-188 (asserting conclusory and speculative allegations). In fact, Plaintiffs concede that the "cap" is not

prohibitive on districts' abilities to raise money through property taxes, because in fact, some districts have done so. See Am. Compl. ¶ 57; ¶ 187. Without establishing that the tax cap has prevented specific districts from receiving funding adequate to provide students with the opportunity for a sound basic education, Plaintiffs cannot prevail.

As to paragraphs 17 and 18 of Frank Mauro's affidavit, wherein he claims that "the impact of the State government's noncompliance and the workings of the property tax cap" will result in Utica and Indian River receiving less than 23.7% and 32.76% of their share of total Foundation Aid respectively, Plaintiffs have failed to provide any calculations or other support for these unsubstantiated allegations. Moreover, these assertions are utterly irrelevant to the constitutional issue at hand. First, Plaintiffs, none of whom reside in these districts, provide no evidence whatsoever that the students of these two school districts are not receiving an opportunity for a sound basic education. Second, it does not appear that Mr. Mauro's affidavit takes into account the impact of other State aid, federal and local funding. Lastly, the funding level under the Foundation Aid formula was an aspirational level to which Utica and Indian River are not statutorily or constitutionally entitled, and does not represent the floor for a calculation of a sound basic education, as discussed above. Nevertheless, the real property tax report card reflects that Indian River Central School District increased its education spending by 7.49 percent from 2013-14 to 2014-15 and Utica City School District's increased its education spending by 5.72 percent from 2013-14 to 2014-15.[40] Therefore, Plaintiffs have failed to demonstrate how these two districts were adversely affected by the property tax cap. Accordingly, Plaintiffs' motion for a preliminary injunction must be denied.

[40] See 2014-2015 Property Tax Report Card, http://www.p12.nysed.gov/mgtserv/propertytax/docs/2014-15_PTRC_revised_5_14_14_post.xlsx.

B. Plaintiffs Do Not Show Irreparable Harm Caused By The Continued Enforcement Of The Allowable Growth Amount

Plaintiffs do not make the necessary showing of irreparable harm by virtue of the allowable growth amount, codified at N.Y. Educ. Law § 3602(1)(dd). As discussed above, Plaintiffs concede that they are not currently suffering any harm by virtue of the allowable growth amount because for the past two years, the Governor and the Legislature have added appropriations in excess of the statutorily calculated personal income growth indices. See L. 2013, ch. 53, § 1, at pp. 160-174; L. 2014, ch. 53, § 1, at pp. 158-172; Memorandum to the Regents State Aid Subcommittee on the 2014-15 Enacted Budget State Aid, April 28, 2014, http://www.regents.nysed.gov/meetings/2014/April2014/413sad1Revision2.pdf, at p. 3 (Wright Aff. Ex. 14); Pls.' Mem. p. 15. For the 2013-14 and 2014-15 school years, State School Aid has increased at a rate in excess of the statutorily calculated growth in personal income. Plaintiffs offer no rationale for the immediate restraint of a statute which is not currently affecting the aid received by school districts. Plaintiffs merely offer speculation and conjecture about hypothetical future harm, which is insufficient to confer standing, much less justify this extraordinary relief.[41]

C. Plaintiffs Have Not Established Irreparable Harm Caused By The Gap Elimination Adjustment

Plaintiffs offer no evidence that they have suffered irreparable harm, or will imminently suffer irreparable harm, because of the Gap Elimination Adjustment. Rather, Plaintiffs merely

[41] Plaintiffs' reliance on the statement in the 2015 Executive Budget Financial Plan – Updated for Governor's Amendments and Forecast Revisions, N.Y. State Div. of the Budget (Feb. 2014), demonstrates how baseless Plaintiffs' claims are. This publication merely states that "[o]ver the multi-year Financial Plan, State Operating Funds spending projections assume Medicaid and School Aid will grow at their statutorily-indexed rates." https://www.budget.ny.gov/pubs/executive/eBudget1415/financialPlan/FinPlanUpdated.pdf , at p. 91. However, the State is not restricted from enacting appropriations to exceed the statutorily calculated personal income growth index in the future, as it has done for the past two years.

rely on the claim that the Gap Elimination Adjustment reduces Foundation Aid and disregard established precedent of the inadequacy of such a claim.

As discussed above, Plaintiffs have not submitted any evidence of how the Gap Elimination Adjustment is harming any student in the districts where Plaintiffs live, must less any district in the State. Plaintiffs do not present proof specifying the financial impact on specific districts as a result of the Gap Elimination Adjustment, or how the Gap Elimination Adjustment affects inputs or outputs in schools in those districts. Thus, Plaintiffs have not demonstrated irreparable harm caused by the Gap Elimination Adjustment and their motion for a preliminary injunction must be denied.

IV. THE BALANCE OF EQUITIES FAVORS OF DEFENDANTS

The purpose of a preliminary injunction is to preserve the status quo during the pendency of the action. A preliminary injunction should not be granted if it would effectively grant the movant all of the ultimate relief sought in the complaint. See Yome v. Gorman, 242 N.Y. 395, 401-402 (1926) ("Such an injunction, if ever permissible in advance of final judgment, is plainly inappropriate unless the undisputed facts are such that a trial is a futility"); Matter of Wheaton/TMW Fourth Ave., LP v. N.Y. City Dep't of Bldgs., 65 A.D.3d 1051, 1052 (2d Dep't 2009) ("the preliminary injunction, as issued, was improper since it did not maintain the status quo, but had the practical effect of granting the petitioner the ultimate relief it seeks in the underlying proceeding"); Matter of 35 N.Y. City Police Officers v. City of N.Y., 34 A.D.3d 392, 393-394 (1st Dep't 2006) ("the purpose of a provisional remedy is to maintain the status quo, pending a hearing on the merits, rather than to determine the parties' ultimate rights"). Here, Plaintiffs ask this Court to enjoin the enforcement of three statutes, which is predominantly all of

the relief ultimately sought in the amended complaint. As such, Plaintiffs' motion should not be granted.

Further, Plaintiffs ask this Court to halt the enforcement of statutory budget provisions which have been in effect for years. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." Maryland v. King, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (internal quotation marks omitted). The requested injunction would strip the State of its ability to balance its budget, prioritize the allocation of scarce resources, or allocate funds in accordance with budget realities and constituent priorities, even though Plaintiffs have not alleged that students in a single district have been harmed by any of the specific statutes. It would, in short, be inequitable as to the parties here and against the public interest.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Defendants' motion to dismiss, Defendants respectfully request that the Court deny Plaintiffs' motion for a preliminary injunction, dismiss all claims with prejudice, and grant such other and further relief as it deems just and proper.

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