SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NEW YORKERS FOR STUDENTS' EDUCATIONAL RIGHTS ("NYSER"), by its President, JAY WORONA, RUBNELIA AGOSTINO, MIRIAM ARISTY-FARER, KATHRYN BARNETT, AVA CAPOTE, MILAGROS ARCIA. G. CHANGLERTH, MONA DAVIDS, JANET DURAN, ROLANDO GARITA, SARA HARRINGTON, SONJA JONES, NICOLE IORIO, HEIDI MOUILLESSEAUX-KUNZMAN, GRETCHEN MULLINS-KIM, ANNETTE RENAUD, ELLEN TRACHTENBERG, HEIDI TESKA-PRINCE, ANDY WILLARD, NATASHA CAPERS, JACQUELINE COLSON, NICOLE JOB, CHRIS OWENS, SAM PRIOZZOLO, PATRICIA PADILLA, LYNN SANCHEZ, and ROBERT JACKSON,

Plaintiffs,

-and-

THE CITY OF YONKERS,

Intervenor-Plaintiff,

vs.

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.

Consolidated Index No. 100274/2013 (formerly 650450/2014)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

New York Constitution

Federal Laws

State Laws

Miscellaneous Authorities

Defendants The State of New York; Andrew M. Cuomo, as Governor of the State of New York; the New York State Board of Regents; and the President of the University of the State of New York and Commissioner of Education[1] (collectively "Defendants") respectfully submit this memorandum of law in opposition to Plaintiffs' motion for partial summary judgment and in support of Defendants' cross-motion for partial summary judgment dismissing Plaintiffs' First, Second, and Third Causes of Action and dismissing all challenges to the educational opportunities in school districts where no individual plaintiff resides, and dismissing all claims brought by the Intervenor-Plaintiff, the City of Yonkers ("Yonkers").

PRELIMINARY STATEMENT

As the Court of Appeals has made clear, Plaintiffs cannot prevail on an Education Article challenge unless they provide proof of severe educational deficiencies, on a district-by-district basis, caused by the education funding system. Those are factual issues that cannot be resolved on a motion for summary judgment. Despite this obstacle, Plaintiffs here seek to hopscotch over those requirements. They seek judgment in their favor without providing a single piece of proof that the educational opportunities provided to students in any district are constitutionally infirm. Plaintiffs' attempt must fail.

There has been one judicially endorsed assessment of the cost of providing an opportunity for a sound basic education under the Education Article of the New York State Constitution (Article XI, § 1), and current education funding for the one district to which that

[1] Plaintiffs named John B. King, Jr. as a defendant in this action in his official capacity as President of the University of the State of New York and Commissioner of Education. However, Mr. King resigned from that position, effective January 2, 2015, and Plaintiffs have not moved to substitute his successor pursuant to CPLR § 1019. Notwithstanding that substitution has not yet occurred and without prejudice to Defendants' position that the President of the University of the State of New York and Commissioner of Education is not a necessary or proper party to this action, nevertheless for the limited purpose of these motions, Defendants submit this memorandum of law on behalf of the President of the University of the State of New York and Commissioner of Education pursuant to CPLR § 1023.

assessment pertained vastly exceeds that assessment. In CFE,[2] the Court of Appeals ruled that a reasonable estimate of the amount necessary to provide an opportunity for a sound basic education to students in the New York City School District was $1.93 billion in additional operating funds.[3] That is the only number that has ever been endorsed by the judiciary as any kind of a constitutional floor, and it was based on a comprehensive cost study approved as reasonable by the Court of Appeals. Since that study, New York City's annual education budget has increased by over $9 billion, far surpassing the constitutional minimum. Therefore, the State has complied with CFE and, accordingly, Defendants are entitled to judgment dismissing Plaintiff's First and Second Causes of Action and Plaintiff's motion for partial summary judgment must be denied.

Plaintiffs also claim that they are entitled to judgment facially invalidating State statutes, and allocating unappropriated State funds, based upon their argument that the 2007 Budget and Reform Act, legislation enacted over eight years ago, constituted a precise calculation of the cost of providing the opportunity for a sound basic education state-wide such that any deviation from the aspirational amounts set forth in that legislation by subsequent Legislatures is per se unconstitutional. In sum, Plaintiffs seek judgment 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 legislation have not been fully realized and because certain statutes may cause funding to deviate from those goals. Plaintiffs base this extraordinary claim primarily upon some cherry-picked, misleading

[2] "CFE" refers to Campaign For Fiscal Equity, Inc. v. State, which resulted in three Court of Appeals decisions: 86 N.Y.2d 307 (1995) ("CFE I"); 100 N.Y.2d 893 (2003) ("CFE II"); and 8 N.Y.3d 14 (2006) ("CFE III").

[3] The Court of Appeals endorsed the $1.93 billion estimate, subject to two one-time-only adjustments agreed to by the State. CFE III, 8 N.Y.3d at 27; CFE v. State, 29 A.D. 3d 175, 184 (1st Dep't 2006). First, the $1.93 billion estimate was to be adjusted to take into account a later version of the Geographic Cost of Education Index. See CFE III, 8 N.Y.3d at 23, 25, 27. Second, the $1.93 billion estimate was to be adjusted for inflation to reflect 2004-2005 dollars. See id. at 27; 29 A.D.3d at 184.

quotes from various documents. As set forth below, Plaintiffs' motion for summary judgment on this claim must be denied.

In sum, this Court should not allow Plaintiffs to avoid the Court of Appeals' stringent requirements for establishing an Education Article violation. Plaintiffs cannot bypass these necessary elements and obtain judgment as a matter of law before developing the facts necessary to prove their claim. As such, Plaintiffs' motion for partial summary judgment must be denied. Additionally, Defendants' cross-motion for partial summary judgment must be granted dismissing Plaintiffs' First, Second, and Third Causes of Action and declaring that the State has complied with CFE and the 2007 legislation was not a constitutional determination of the cost of providing the opportunity for a sound basic education statewide and impervious to subsequent legislation.

BACKGROUND

The CFE Litigation And The Zarb Commission

In CFE, the plaintiffs challenged the educational opportunities provided to students in New York City. The court did not consider the educational opportunities available in any other district in the State. The CFE 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 Wright Aff. Ex. 7.[4]

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 funds to provide for a sound basic education statewide. Id. at p.8.

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"[5] as the additional funds necessary to provide the opportunity for a sound basic education statewide. Id. at p. 24.[6] 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:

[4] "Wright Aff." refers to the Affirmation of Alissa S. Wright, dated July 31, 2015.
[5] 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, p. 8.
[6] The Zarb Commission's estimates were purely advisory as to the school districts outside New York City. CFE's claims and findings concerned New York City only, and neither the Governor's direction to the Zarb Commission to study funding statewide, nor the Commission's statewide study, constitutes a remedy (or an estimated cost of a remedy) for any constitutional violation except with respect to New York City.

"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. 7), 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." See CFE III, 8 N.Y.3d at 31; see also supra p. 2, n.3. CFE III did not make a ruling with respect to any other school district in the State. Id.

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.[7] 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.

[7] 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.

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

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

In 2007, under newly-elected Governor Eliot Spitzer and with pre-recession revenues, the Legislature passed and the Governor signed legislation aspiring to substantial increases in funding for New York State schools. Just as Governor Pataki's funding proposal allocated more than the constitutional minimum for education funding to New York City, the 2007 legislation 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.

A principal component of the 2007 legislation was the codification 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).

Foundation Aid

The 2007 Foundation Aid formula was not a revised calculation of the minimum cost of providing an opportunity for a sound basic education. In fact, Foundation Aid is not a specified amount. Instead, Foundation aid is a method of calculating certain funding. Shippee Aff. ¶ 3.[8] Further, rather than providing only the minimum, the Foundation Aid formula used in the 2007 legislation provides more generous funding, both in New York City (the only district at issue in CFE) and state-wide.[9] Foundation aid is determined by a formula, which uses a "successful

[8] "Shippee Aff." refers to the Affidavit of Charles Shippee, dated July 29, 2015.

[9] Just as Governor Pataki used the Zarb Commission's analysis to put forward a proposal including amounts higher than the constitutionally required minimum, the 2007 legislation proposed education funding amounts above the minimum necessary. See CFE III, 8 N.Y.3d at 24, 27; Wright Aff. Ex. 9 (2007 press release from Governor Spitzer stating "[t]he Budget provides ***more than sufficient*** funds to address the school funding needs highlighted by the Campaign for Fiscal Equity Lawsuit" and "the goal will no longer be adequacy but excellence."). 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

schools" methodology similar to what the Court of Appeals 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, per pupil, to reflect the pupil needs and regional costs of the district, as well as the local fiscal capacity of the district. See N.Y. Educ. L. § 3602(4)(a); Shippee Aff. ¶ 5. The Foundation Amount is measured by the general education instructional costs of the school districts in the lower-spending half of school districts statewide that have successful track records. Shippee Aff. ¶ 6. That cost is then adjusted for inflation and further adjusted by a "pupil needs index," a multiplier which increases the foundation base amount to reflect the increased amount of funding required to educate low-income students and English language learners in each district, as well as factors in geographic sparsity. Shippee Aff. ¶ 10; N.Y. Educ. L. § 3602(1)(o), (p), (s), & (w); § 3602(4)(a)(3). In addition, a regional cost factor is applied. See id.; 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 Shippee Aff. ¶ 11; 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. Id.; N.Y. Educ. L. § 3602(1)(i)(4).[10]

The State's Election to Increase Amounts Distributed Through Foundation Aid

The 2007 Foundation Aid formula goes beyond what was recommended by the Zarb Commission and accepted as reasonable as to funding for New York City in CFE III. For example, the multipliers used in the 2007 formula to increase per pupil funding for students with

billion in additional funding – from all sources, not just State aid – found reasonable by the Zarb Commission. See N.Y. Educ. L. § 3602.

[10] The 2007 legislation also enacted rigorous accountability and efficiency measures to ensure that the increased resources will be used effectively. Plaintiffs fail to address these measures, which are critical to the State's efforts to improve the delivery of educational services.

certain needs were higher than those used by Zarb and S&P. Specifically, the 2007 formula employs 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 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 "public high cost excess cost aid" for severely disabled students who have more cost-intensive needs, N.Y. Educ. L. § 3602(5), and private excess cost aid for the costs of public school students with disabilities placed in private schools and other separate settings, N.Y. Educ. L. § 4405(3).[11] Thus, the Foundation Aid formula and the amounts set forth in the 2007 legislation exceeded the formulas and amounts approved in CFE.

The Drastic Increase in Other Types of Education Funding

While Foundation Aid is a significant portion of the total funding provided to school districts, in recent school years, it has represented less than 30% of the total funds appropriated by federal, State and local sources for education. Conroy Aff. ¶ 2.[12] As part of its School Aid, New York State provides billions of dollars annually in education funding to school districts over and above Foundation Aid. Id. In fact, in the 2014-15 school year, the State provided

[11] 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.
[12] "Conroy Aff." refers to the Affidavit of Joseph G. Conroy, dated July 30, 2015.

approximately $6.8 billion in aids and grants above and beyond the Foundation Aid for that year.[13] Conroy Aff. ¶ 3. The $6.8 billion 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.[14] Conroy Aff. ¶ 12. In addition, federal and local sources provide tens of billions of dollars in support for education spending, together comprising nearly 60% of total school district funding. Conroy Aff. ¶ 10. 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 the Foundation Aid amounts set out in the 2007 legislation in the 2007-08 school year. See L. 2007, ch. 57, §13; Conroy Aff. ¶ 16. Districts received $13.7 billion in Foundation Aid in 2007-08 and $14.9 billion in 2008-09. 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. ¶ 16.[15]

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

[13] The $6.8 billion in additional aid is calculated after giving effect to the Gap Elimination Adjustment for 2014-15.
[14] This aid and grants, as well as the federal and local funding which make up the majority of educational funding, support "inputs" identified as necessary to provide a sound basic education. See CFE II, 100 N.Y.2d at 909-914.
[15] N.Y. State Division of the Budget, 2007-2008 Archive, http://www.budget.ny.gov/pubs/archive/fy0708archive/fy0708schoolaid/schoolaid.html (Wright Aff. Ex. 12); 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. 13).

contemplated in 2007.[16] See L. 2009, ch. 57, § 13; N.Y. Educ. L. § 3602(4)(b). It also provided for reductions in State aid, determined by formulas, in the 2009-10 (through a "Deficit Reduction Assessment") and 2010-11 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. ¶ 18, n.13; 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 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 2011-12. 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 2009-10, federal funding increased from $2.6 billion to $4.5 billion and increased further to $4.7 billion in 2010-11. Conroy Aff. ¶ 15. Local funding increased from $27 billion in 2008-09 to $28.7 billion in 2009-10, $29.7 billion in 2010-11, and $31.8 billion in 2011-12. Conroy Aff. ¶¶ 11, 15. These increases largely offset the reduction in State funding and led to annual increases in overall funding during the recession.

Beginning in the 2012-13 school year, the State implemented annual Gap Elimination Adjustment restorations (which restores the funding lost due to the Gap Elimination Adjustment)

[16] The fallout from the 2008 financial crisis has been termed the "Great Recession." When President Obama took office in January 2009, the economy was losing about 800,000 jobs per month, home prices were collapsing, lending was at a virtual standstill and the U.S. banking system was in peril. In the final three months of 2008, the economy shrank at a staggering 8.2 percent annual rate. http://www.jec.senate.gov/public/index.cfm?p=GreatRecession (Wright Aff. Ex. 14). 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.

and other school aid increases, increasing school aid by hundreds of millions of dollars per year in 2012-13, 2013-14, 2014-15, and 2015-16. N.Y. Educ. L. § 3602(17)(d)-(e).

New York State's Compliance with the CFE Decision and Current All-Time High Education Spending Levels

In continuing its commitment to education using the resources available, the State's recently passed budget includes a 6.1% increase in School Aid, amounting to approximately $1.4 billion in additional funds, for the 2015-16 school year. Conroy Aff. ¶ 13. In total, the 2015-16 State budget provides School Aid of $23.5 billion – more than double, in absolute dollars, the $10.2 billion of State School Aid districts received in the 1995-96 school year when the Court of Appeals issued its first CFE decision. Conroy Aff. ¶¶ 13-14.

Following enactment of the 2015-16 budget, New York's total School Aid is at an all-time historic high. Conroy Aff. ¶ 22. Even without the full implementation of the increases contemplated in 2007, New York State's education spending of $19,818 per pupil still surpasses all other states in the nation, and is 85% above the national average of $10,700.[17] In addition, in 2013, the New York City School District had the second highest spending per student ($20,331) out of the one hundred largest public elementary school systems in the country.[18] This is almost three times the amount spent per pupil in New York City in 1995-1996, the year CFE I was decided.[19] When evaluating operating funds, New York City saw an increase of over $9 billion from 2002-03 to 2013-14, significantly more than the $1.93 billion figure deemed the constitutional minimum in CFE III.

[17] See http://www2.census.gov/govs/school/13f33pub.pdf, Table 8 (Wright Aff. Ex. 15)
[18] See http://www2.census.gov/govs/school/13f33pub.pdf, Table 18 (Wright Aff. Ex. 15).
[19] See Statistical Tables, Public Elementary-Secondary Education Finances: 1995-96, http://www2.census.gov/govs/school/96tables.pdf, Table 17 (Wright Aff. Ex. 16) (noting New York City spending of $7,428 per pupil). These amounts are in absolute dollars.

Statewide, between 2002-03 and 2013-14, New York State increased its funding by over $7.7 billion, while funding from state, local, and federal sources combined increased by over $22 billion, with estimated total funding for public education amounting to over $60 billion. Conroy Aff. ¶¶ 3, 15. This is illustrated by the following chart:

School District Revenues by Source ($ in Millions)[20]

School Year	State Aid Revenue Incl. STAR Revenue[21]	Local Revenue	Federal Revenue	Total State, Local and Federal Revenue
2002-03	$17,178	$18,029	$2,142	$37,348
2003-04	$17,519	$19,922	$2,586	$40,027
2004-05	$18,724	$21,668	$2,668	$43,060
2005-06	$19,820	$23,520	$2,830	$46,170
2006-07	$21,591	$24,966	$2,740	$49,297
2007-08	$23,599	$25,967	$2,581	$52,147
2008-09	$25,308	$26,987	$2,606	$54,902
2009-10	$23,398	$28,653	$4,471	$56,522
2010-11	$23,058	$29,729	$4,666	$56,960
2011-12	$23,090	$31,756	$3,210	$58,056
2012-13	$23,630	$32,349	$2,462	$58,441
2013-14	$24,890	$32,774	$2,524	$60,188
Total Increase	**$7,712**	**$14,745**	**$382**	**$22,839**

See Conroy Aff. ¶ 15 (citing http://www.oms.nysed.gov/faru/Profiles/profiles_cover.html).

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 Defendants have failed to comply with the CFE decisions (Am.

[20] http://www.oms.nysed.gov/faru/Profiles/profiles_cover.html.

[21] "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, 2013-14 State aid revenue totaled $21.54 billion excluding STAR ($3.35 billion), while 2013-14 School Aid was estimated to be $21.23 billion at the time of the 2013-14 Enacted Budget and $21.11 billion at the time of the 2014-15Enacted Budget.

Compl. ¶ 191) and 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 various duly enacted statutes simply because they could cause funding to deviate from the amounts aspired to in 2007.

Defendants filed a motion to dismiss on May 30, 2014, which was denied by the Court on November 17, 2014. A Notice of Appeal to the Appellate Division, First Department, was filed on December 15, 2014.[22]

On June 24, 2014, Plaintiffs moved for a preliminary injunction seeking to restrain Defendants from enforcing the majority of the statutory provisions challenged in the underlying action. 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 this Court retained jurisdiction over the action as a whole. After Defendants filed their opposition papers, Plaintiffs withdrew their application, without explanation, by letter dated October 27, 2014.

On May 2, 2014, Plaintiffs moved to consolidate this action with Aristy-Farer v. State of N.Y., which challenges reform legislation providing that to qualify for an increase in State aid, school districts must have adopted a plan for conducting annual professional performance reviews ("APPRs") of teachers and principals. This Court had previously denied Defendants' motion to dismiss the Aristy-Farer action, and the decision is on appeal to the Appellate Division, First Department. The Court granted the motion to consolidate on August 12, 2014.

[22] By separate motion, Defendants are moving for a stay of this action pending decisions by the Appellate Division, First Department, on the pending appeals.

By motion dated June 26, 2014, the City of Yonkers moved to intervene as a Plaintiff in this action. That motion was granted on November 17, 2014, and the decision is on appeal to the Appellate Division, First Department.

Defendants filed answers to the complaints brought by NYSER, Aristy-Farer, and the City of Yonkers on February 2, 2015. The parties have not exchanged any discovery.

On May 29, 2015, Plaintiffs moved for partial summary judgment,[23] requesting declaratory judgment, prior to discovery, that the State has failed to comply with the Education Article and declaring void and unconstitutional any statute that has the potential to reduce Foundation Aid below the amounts contemplated by 2007 legislation. Specifically, Plaintiffs ask this Court to invalidate the following statutes:

1. The Gap Elimination Adjustment (Educ. L. § 3602(17)), which provides for a reduction in a district's aid, determined by a formula taking into account whether a district is considered "high-need," in order to close the gap between budgeted State expenditures and revenues available to support them;

2. The Allowable Growth Amount (Educ. L. §§ 3602(1)(dd); 3602(18)), which permits additional State aid increases each year based on personal income growth;

3. The Property "Tax Cap" (Educ. L. § 2023-a), which establishes a levy threshold beyond which a school district must engage in certain procedures (including obtaining the approval of at least 60% of the district's voters) to adopt a budget, and the Property Freeze Tax Credit (N.Y. Tax Law § 606(bbb), which provides an incentive to districts to adopt a budget below the levy threshold,[24] and;

4. The legislation requiring school districts' implementation of APPR systems to qualify for certain aid increases (L. 2012, ch. 57, Part A, § 1 & L. 2013, ch. 57, Part A, § 1).[25]

Plaintiffs also move for the Court to "[o]rder the state no later than the 2016-2017 school year to either (a) fully implement the foundation funding formula set forth in Educ. Law §

[23] The City of Yonkers joined that motion by filing a Notice of Motion on July 6, 2015.
[24] Plaintiffs repeatedly conflate the property "tax cap" and the "property freeze tax credit," making it unclear which statute they seek to invalidate on this motion. Defendants address the constitutionality of both statutes below.
[25] It is unclear whether Plaintiffs move for summary judgment on their challenge to the APPR legislation. While the conclusion to Plaintiffs' memorandum of law does not include it in their list of legislation they seek to invalidate (Pls.' Mem. p. 28), given that Plaintiffs briefly discuss the APPR provisions elsewhere in their papers, Defendants address its constitutionality below.

3602.4, or (b) develop and implement an alternative state education finance system that meets constitutional requirements for providing all students throughout the state the opportunity for a sound basic education." Pls.' Mem. p. 28. Plaintiffs are not entitled to such relief, and their motion must be denied.

Defendants have cross-moved for partial summary judgment. Defendants are entitled to judgment as a matter of law on Plaintiffs' First and Second Causes of Action, in which Plaintiffs attempt to have this Court "enforce" CFE and force the implementation of the amounts aspired to by the 2007 legislation, because the State has complied with the declaratory judgment issued in CFE III, and Plaintiffs cannot maintain any claim based on non-compliance with that holding, or based upon the Legislature's subsequent policy and budgetary decisions concerning education funding. Defendants are also entitled to summary judgment dismissing Plaintiffs' Third Cause of Action, which seeks relief that this Court is unable to grant, and on any challenge to educational opportunities provided in school districts in which no individual plaintiff resides, and on all claims brought by Intervenor-Plaintiff, the City of Yonkers.

STANDARD OF REVIEW

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). "Summary judgment is . . . to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action." Id.

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. Matter of 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. THE STATE HAS COMPLIED WITH CFE AND AS SUCH THE COURT MUST DENY PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANT DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT DISMISSING THE FIRST AND SECOND CAUSES OF ACTION.

Defendants have complied with the Court of Appeals' judgment in CFE III. As such, Plaintiffs' motion for partial summary judgment must be denied and Defendants are entitled to summary judgment dismissing Plaintiffs' First and Second Causes of Action.

In CFE III, the Court of Appeals declared "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.[26] As such, the $1.93 billion figure endorsed by the Court of Appeals, which represented a reasonable assessment of additional funding needed for New York City public schools to comply with the Education Article, is the only figure of any constitutional significance under CFE. Education funding for New York City has far exceeded that amount, and thus the State has complied with the CFE III judgment.

In particular, the baseline level of operating funds used by the State in CFE III to estimate how much additional funding would be necessary for the City School District to provide a sound basic education was $12.62 billion. Wright Aff. Ex. 8, ¶ 1, n.3. This baseline represented an estimate of the City School District's 2002-03 school year's operating spending, adjusted for inflation through January 2004. Wright Aff. Ex. 7, p. 23. In 2013-14, the last year for which

[26] Plaintiffs' statement that the CFE III order "set an interim position of constitutional compliance" is without any factual or legal support. In fact, Plaintiffs rely on the dissent, rather than the majority opinion and holding in asserting that misconceived argument. Pls.' Mem. at p. 18.

complete data is available, total education funding in New York City from all sources totaled $23.74 billion.[27] That number is undoubtedly higher today.[28]

More specifically, once spending for transportation, debt service, and capital projects is excluded, New York City's 2013-14 operating expenses totaled approximately $21.71 billion, an increase of $9.09 billion over the $12.62 billion baseline. Conroy Aff. ¶ 26.[29] That increase is over four times the size of the $1.93 billion figure endorsed by the Court of Appeals in CFE III; indeed, it is substantially higher than the $4.7 billion figure the Court concluded would "exceed the constitutional minimum." 8 N.Y.3d at 27. Plaintiffs' claim that the State has not complied with CFE cannot be squared with this data, and consequently, Defendants are entitled to summary judgment dismissing Plaintiffs' First and Second Causes of Action, and Plaintiffs' motion must be denied.

II. PLAINTIFFS' MOTION FAILS BECAUSE THE 2007 LEGISLATION WAS NOT A CALCULATION OF THE MINIMUM AMOUNT NECESSARY TO PROVIDE A SOUND BASIC EDUCATION.

As demonstrated above, there has been only one determination of the actual cost of providing an opportunity for a sound basic education under the Education Article and that was done in the CFE litigation. See supra pp. 2-5, 16-17. Despite the clear holding of CFE III, and the State's compliance therewith, Plaintiffs argue that the 2007 legislation, which was not considered in the CFE litigation, was the Legislature's determination of the funding levels

[27] SED, FARU, http://www.oms.nysed.gov/faru/Profiles/profiles_cover.html, *Master File for 2013-14* (cell K323).
[28] For example, 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 p. 73, http://www.budget.ny.gov/pubs/archive/fy1415archive/enacted1415/2014-15SchoolAidRuns.pdf (Wright Aff. Ex. 17). For the 2015-16 school year, New York City is estimated to receive a further increase of over $505 million from the State. See 2015-16 State Aid Projections, at p. 73, https://www.budget.ny.gov/budgetFP/2015-16SchoolAidRuns.pdf , p. 73 (Wright Aff. Ex. 18). Since 2013-14, the New York City School District has therefore received School Aid increases that on their own total $940 million. See also http://schools.nyc.gov/AboutUs/funding/overview/default.htm (Wright Ex. 19) (noting the total New York City School District budget of $27.6 billion).
[29] When compared with the fiscal profiles, and defining operating expenses as total expenditures less transportation, debt service, and General Fund transfers for capital projects, the New York City's actual operating expenses in 2002-03 were $12.68 billion, and increased $9.03 billion to $21.71 billion. Conroy Aff. ¶ 26.

necessary for providing students with an opportunity for a sound basic education. This argument fails as a matter of law, and Plaintiffs' motion must be denied.

A. The 2007 Legislation Was Not a "Constitutional Compliance Plan" But Instead Reflected a Legislative Policy Choice to Increase Funding in the City, and Statewide, Beyond What Was Required By the CFE Decision.

Plaintiffs' motion for partial summary judgment based on their argument that the 2007 legislation was a "constitutional compliance plan" ignores the plain language of CFE. 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 of Appeals in CFE III viewed the legislative priorities of the State as separate from the determination of the cost of a sound basic education for purposes of an Education Article claim. That is, the Court and the parties recognized 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. 7), p. 14 (showing a resource gap for New York City of $1.9 billion) with pp. 14, 16 (proposing a five year funding increase of $4.7 billion from all sources). The Court of Appeals explicitly distinguished between the constitutional minimum it required for New York City 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 the adjusted $1.93 billion figure it adopted 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 legislation, which exceeded the figure adopted by the Court of Appeals for New York City, is merely an attempt to rewrite history and a gross misinterpretation of the CFE III holding. That is especially so insofar as Plaintiffs argue that the 2007 legislation Act supposedly established a constitutional floor for any school district outside of New York City – the only school district addressed by the CFE litigation.

B. The 2007 Legislation Was Not Based On a Comprehensive Cost Study Calculating the Cost of Providing a Sound Basic Education.

As discussed above, it was expected that the State would enact legislation providing more generous funding than what was endorsed for New York City by CFE. Indeed, Foundation Aid, as enacted in 2007, aspired to fund education at significantly higher levels than what was calculated by the Zarb Commission and S&P. See supra pp. 6-8. Plaintiffs move for summary judgment on the basis that the 2007 legislation was a calculation of the cost of providing students with an opportunity for a sound basic education, yet Plaintiffs do not, and cannot, cite a new statewide study, such as the Zarb Commission's, tied to the minimum constitutional standard, to

support the budgetary goals set in 2007. In fact, no such study has been performed since CFE. Shippee Aff. ¶ 15. The only studies that have been performed since CFE are updates to the successful schools studies, which are not comprehensive cost studies designed to measure the cost of providing an opportunity for a sound basic education. See Shippee Aff. ¶¶ 7, 14; see also CFE II, 100 N.Y.2d at 907 ("many of the more detailed standards established by the Board of Regents and Commissioner of Education 'exceed notions of a minimally adequate or sound basic education,' so that proof that schools do not comply with such standards 'may not, standing alone, establish a violation of the Education Article."). Without a comprehensive cost study, Plaintiffs cannot support their claim that the 2007 Act's numbers were inextricably linked to the constitutional minimum, and their motion must be denied.

C. Plaintiffs' Self-Serving Selection of Distorted Quotes Do Not Establish An Education Article Violation.

The "evidence" for Plaintiffs' belief that the 2007 legislation established a new minimum amount of constitutional funding is a series of cherry-picked and out of context quotes. See Pls.' Mem. pp. 6-8. The 2007 legislation, 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 legislation stating that "[t]he Budget provides ***more than sufficient*** funds to address the school funding needs highlighted by the Campaign for Fiscal Equity Lawsuit" and "the goal will no longer be adequacy but excellence." Wright Aff. Ex. 9 (emphasis added). Likewise, a letter brief from this Office cited by Plaintiffs (submitted in a different case) specifically notes that "[t]he funding formula is ***more generous*** than the one this Court approved as reasonable in the CFE litigation." Pls.' Ex. 20, p. 1 (emphasis added).

Plaintiffs' reference to the statements of the Regents, the Governor, and three legislators as "confirm[ation] of the State's intentions" is similarly misguided. The statements of a small

number of individuals are hardly conclusive evidence in interpreting the constitutionality of the statutes at issue in this case and on this motion. As the U.S. Supreme Court has stated:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

U.S. v. O'Brien, 391 U.S. 367, 383-384 (1968). "It is neither compatible with [the] judicial responsibility of assuring reasoned, consistent, and effective application of the statutes . . . nor conducive to a genuine effectuation of [legislative] intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members . . . actually had in mind." Blanchard v. Bergeron, 489 U.S. 87, 99-100 (1989) (Scalia, J., concurring); see also Conroy v. Aniskoff, 507 U.S. 511, 518-519 (1993) (Scalia, J., concurring) ("We are governed by laws, not by the intentions of legislators."); Wells v. State, 130 Misc. 2d 113, 115-116 (Sup. Ct. Steuben Cty. 1985), aff'd Wells v. State, 134 A.D.2d 874 (4th Dep't 1987).[30]

Even if certain legislators or other individuals asserted their belief or intention that the amounts in the 2007 legislation represented a new constitutional minimum, such statements, or the mere enactment of legislation, cannot constitute a constitutional determination. See, e.g., City

[30] This is not an issue of statutory interpretation where legislative history is instructive. There is nothing on the face of any of the statutes at issue here that is ambiguous, and thus the intent of the legislators, and the opinion of other individuals, is inconsequential. See Matter of Yong-Myun Rho v. Ambach, 74 N.Y.2d 318, 322 (1989) ("[Courts] may only look behind the words of a statute when the law itself is doubtful or ambiguous") (citing Finger Lakes Racing Assn. v. N.Y. State Racing & Wagering Bd., 45 N.Y.2d 471, 479-80 (1978)).

of Boerne v. Flores, 521 U.S. 507, 516, 536 (1997) (holding that while the legislature is responsible for determining what legislation is necessary to secure constitutional guarantees, and those determinations are entitled to deference, it is the courts' role to determine the constitutionality of laws) (citing Marbury v. Madison, 5 U.S. 137 (1803)). Only the court and factfinder are empowered to make such determinations after evaluating the educational opportunities available to schoolchildren. Here, where binding case law sets forth stringent requirements concerning the evidence necessary to show an Education Article violation, no judgment can be made without such proof.

Most critically, the quotes relied upon by Plaintiffs do not state that the amounts aspired to in the 2007 legislation were a revised calculation of the cost of providing students statewide with an opportunity for a sound basic education, or that any less would be insufficient.[31] The mere fact that the 2007 legislation may have been enacted in response to CFE does not rationally lead to the conclusion that the amounts aspired to in that legislation set a new constitutional floor. The 2007 legislation was a multiyear initiative to increase funding, and it addressed the CFE litigation by surpassing the constitutional minimum established there as to New York City, as was anticipated by the Court of Appeals. See 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."). Again, in their attempt to evade the onerous requirements for establishing entitlement to judgment on their Education Article claim, Plaintiffs leap over the requirement of showing that districts are denying students the opportunity for a sounds basic education. Instead, Plaintiffs ask this Court to find that one particular Legislature,

[31] Two of the three Regents statements relied upon by Plaintiffs were not asserted in connection with the 2007 legislation, but rather were issued during the pendency of the CFE Litigation. The third statement was issued years after the passage of the 2007 legislation, and thus is entitled to little, if any, weight. See Bread PAC v. Fed. Election Comm'n, 455 U.S. 577, 582 n.3 (1982).

without performing any new comprehensive cost study, and in the absence of any judicial imprimatur, determined the precise minimal cost of a constitutionally sufficient education such that subsequent Legislatures are not free to make different funding decisions. That cannot be the basis for summary judgment.

In sum, Plaintiffs' motion fails for the simple reason that the 2007 legislation did not establish the constitutional minimum for school funding. For this reason alone, Plaintiffs, who attempt to have this Court invalidate any statute that could cause funding levels to deviate from the amounts aspired to in that Act, cannot prevail, and their motion must be denied.

III. PLAINTIFFS' LIMITED FOCUS ON STATE FOUNDATION AID MANDATES THE DENIAL OF THEIR MOTION.

A. Plaintiffs Fail to Provide Any Evidence of Educational Deficiencies.

The law is clear that to prevail on an Education Article claim, Plaintiffs must provide proof of "gross and glaring" inadequacies which deny them the opportunity to receive a sound basic education. See, e.g., State Ass'n of Small City School Districts, Inc. v. State of N.Y., 42 A.D.3d 648, 651-52 (3d Dept. 2007) (citing Paynter v. State of N.Y., 100 N.Y.2d 434, 439 (2003); Bd. of Educ., Levittown Union Free School Dist. ("Levittown") v. Nyquist, 57 N.Y.2d 27, 48 (1982); see also CFE II, 100 N.Y.2d at 932. 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. Plaintiffs here seek judgment on their Education Article claim without providing any evidence of deficient inputs or outputs and

without differentiating among the educational opportunities provided in the nearly 700 districts in the State.[32] Plaintiffs cannot do so.

It is insufficient for Plaintiffs to rely solely on arguments concerning the 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. See Levittown, 57 N.Y.2d at 48-49 (rejecting claim where plaintiffs claimed that there were funding disparities between districts, but did not allege any facts showing that they were receiving a substandard education); see also 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. Whether such deficiencies exist is an issue of fact, precluding summary judgment. Plaintiffs simply cannot begin their Education Article claim by looking at funding in a vacuum.

B. Education Funding Has Increased Dramatically Since CFE.

Plaintiffs' motion rests entirely on arguments concerning one component of education aid. In analyzing funding, however, 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.[33] Plaintiffs fail to do so, and thus their motion must be denied.

[32] Plaintiffs' position that there is a statewide violation of the Education Article implies that there is not one district in the entire State that provides its students with an opportunity for a sound basic education. That implausible notion cannot be accepted by this Court. To the extent that even a single school district provides an opportunity for a sound basic education under the current funding statutes, Plaintiffs' facial challenge fails as a matter of law. See McGowan v. Burstein, 71 N.Y.2d 729, 733 (1988) (to prevail, a plaintiff must demonstrate that the challenged statute "in any degree and in every conceivable application would be unconstitutional"); see also infra pp. 30-31.

[33] 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.

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 2002-03 and 2013-14, the State increased its funding by over $7.7 billion, while funding from state, local, and federal sources combined increased by more than $22 billion. Conroy Aff. ¶¶ 5, 15.

Plaintiffs' narrow focus on Foundation Aid and the amounts contemplated by the 2007 legislation grossly mischaracterizes total education funding for districts throughout New York State. As shown in the table above (supra p. 12), in 2013-14, the State provided over $24 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' motion must be denied.

IV. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THE COURT CANNOT ORDER THE APPROPRIATION OF FUNDS AS CONTEMPLATED BY LEGISLATION ENACTED IN 2007.

Rather than attempt to submit evidence concerning the educational opportunities provided to students in any district in the State, Plaintiffs have rested their motion on the unfounded premise that any action reducing State education funding below the aspirational amounts contemplated by the 2007 legislation 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, comprehensive, cost study, and

then intentionally underfunded schools in subsequent enactments, in violation of the Constitution.[34] Plaintiffs do not offer any support for that contention but, in any event, that argument cannot succeed for the following reasons.[35]

First, 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; LaValle v. Hayden, 98 N.Y.2d 155, 161 (2002). 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.[36] 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

[34] Plaintiffs claim a cost study was performed, yet they only refer to the study done by the Board of Regents ***prior to*** the CFE III decision. See Pls.' Mem. p. 8. That study was used by the Zarb Commission and Governor Pataki in submitting the proposal to the court, and was used by the Court of Appeals in its endorsement of the $1.93 billion figure which has been met. In addition, "many of the more detailed standards established by the Board of Regents and Commissioner of Education 'exceed notions of a minimally adequate or sound basic education,' so that proof that schools do not comply with such standards 'may not, standing alone, establish a violation of the Education Article.'" CFE II, 100 N.Y.2d at 907.

[35] In opposing Defendants' motion to dismiss, Plaintiffs stated: "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.' MTD Mem. p. 18. Plaintiffs now abandon that tactic and claim that there are no issues of fact precluding summary judgment. Plaintiffs cannot argue that the question of whether the amounts aspired to in the 2007 legislation constituted the Legislature's calculation of the minimum amounts required by the constitution is a factual issue precluding dismissal under CPLR § 3211, and then claim the exact opposite when it suits them on their motion pursuant to CPLR § 3212. See Nestor v. Britt, 270 A.D.2d 192, 193 (1st Dep't 2000) ("Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding.") (citing Maas v. Cornell Univ., 253 A.D.2d 1 (3d Dep't 1999), aff'd 94 N.Y.2d 87 (1999)).

[36] 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).

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 2007, 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 legislation, 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 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. 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), the Third Department found that mandamus was not available to compel payment of funds appropriated in the 2006-07 State budget, 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); 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). 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 similar calculation of the minimum amount constitutionally necessary. Rather, the amounts in the 2007 legislation and subsequent legislation reflect the political determination of that particular enacting Legislature and Governor as to how much funding, 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. See LaValle, 98 N.Y.2d at 161. Indeed, just as the Legislature enacted budget legislation distributing funds via statutory formula in 2007, they have done so in every year since then. To the extent funding amounts differ from those contemplated in 2007, there was a State law enacted by the Legislature and the Governor directing such an allocation. Plaintiffs' argument that the Legislature, without a new cost 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 this Court is without 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)).[37] Just last year, the First Department, citing the Court of Appeals, 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., 121 A.D.3d 162, 170 (1st Dep't 2014) (citing Maron, 14 N.Y.3d 230).

Therefore, it is clear that Plaintiffs cannot obtain the extraordinary relief of having this Court order the State to pay amounts contemplated by legislation eight years ago and in excess of

[37] 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.' MTD Mem. 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, [Plaintiffs' lawyer]. . . 'Even if a court agrees there is a problem, they are more likely to defer to the legislative branch, which, in New York . . . knows more about the workings of these policies.'").

what has been appropriated in the most recent budget and authorized by current State law. 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 educational opportunities. CFE III, 8 N.Y.3d at 27. This Court should be even more unwilling to do so when the parties have not had the opportunity to engage in discovery and present evidence and expert testimony at trial. Therefore, Plaintiffs' motion must be denied.

V. PLAINTIFFS' MOTION FAILS BECAUSE THEY HAVE NOT DEMONSTRATED THAT ANY OF THE CHALLENGED STATUTES ARE FACIALLY UNCONSTITUTIONAL.

Plaintiffs seek to have this Court invalidate duly enacted statutes merely because they may cause education funding to deviate from the amounts contemplated in 2007. Yet Plaintiffs ignore the fact that the Court's authority is limited to analyzing the education financing system as a whole, and only if Plaintiffs prove that it causes severe educational deficiencies. The Court is without authority to micromanage the system by choosing which statutory provisions should be a part of the education financing scheme. For these reasons, Plaintiffs' motion must be denied.

Even if Plaintiffs could assert Education Article challenges to specific statutes, Plaintiffs have not met their burden of establishing that any of the challenged statutes are unconstitutional on their face. A facial challenge to a statute will fail unless Plaintiffs "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, 98 N.Y.2d at 161 (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). "Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional." LaValle, 98 N.Y.2d at 161. "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), aff'd, 64 N.Y.2d 1057 (1985); 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").

Plaintiffs have not established that the statutes challenged in this action are facially invalid, because they have not, and 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.[38]

A. To The Extent Plaintiffs Move For Summary Judgment on Their Challenge To The "Property Tax Cap" Their Motion Fails.

To the extent they attempt to do so, Plaintiffs have not established that section 2023-a of the Education Law, which they refer to as the "property tax cap," is facially invalid.

As an initial matter, a challenge to the property tax cap has already been rejected by the Supreme Court, Albany County in N.Y. State United Teachers ("NYSUT") v. State of N.Y. In

[38] Nor have they shown that the challenged statutes cause constitutionally insufficient educational opportunities.

two Decisions and Orders, dated September 23, 2014 and March 16, 2015,[39] the Albany Supreme Court rejected the claims that the "cap" or "freeze credit" violated the Education Article, or any other constitutional clause at issue, and dismissed the action. NYSUT, 46 Misc. 3d 250 (Sup. Ct. Albany Cty. 2014); Wright Aff. Ex. 10. The court stated:

> Rather, the claim is one-step removed from a true Education Article claim in that petitioners are arguing that the State has created a statute which makes it harder for a district to raise funds above a certain threshold. ***Since the decision to raise funds lies with the voters, the State itself is not withholding any resources that deprive students of a sound basic education***. A complaint so framed cannot withstand a motion to dismiss.

Id. (emphasis added).[40]

The Albany Supreme Court's holding is correct. 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. ¶¶ 3-4.[41] That basic fact eviscerates the underlying premise of Plaintiffs' motion, which seeks to have this Court invalidate any statute that reduces foundation aid. 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 any challenge must be dismissed.[42]

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[39] Plaintiffs in that action initially challenged the tax cap and were permitted to add a constitutional challenge to Education Law 2023-b, the Property Tax Freeze Credit Law. Section 2023-b was adopted as part of the 2014-15 New York State Budget, and provides for a tax credit, as provided by Tax Law § 606(bbb).

[40] The Court of Appeals for the Tenth Circuit recently dismissed a challenge to a similar statute in Kansas. See Petrella v. Brownback, 787 F.3d 1242, 1249 (10th Cir. 2015) (affirming denial of plaintiff's motion for a preliminary injunction and summary judgment on challenge to a cap on local property taxes to fund education and stating "[s]tripped to its pith, plaintiffs' position is that the U.S. Constitution requires the state of Kansas to grant its political subdivisions unlimited taxing and budget authority. We discern no support for their novel and expansive claims.").

[41] "Szuberla Aff." refers to the Affidavit of Charles Szuberla in Opposition to [the NYSER] Plaintiffs' Motion for a Preliminary Injunction, dated August 25, 2014.

[42] 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. 20) (noting that between 1992 and 2009, statewide property tax levies doubled, with levies increasing 46% in the seven years prior to 2009); see also

Further, 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 district.[43] Instead, Plaintiffs merely offer unsupported, speculative statements that it is "unlikely" that districts will propose increases that would exceed the threshold. However, Plaintiffs acknowledge that certain districts have voted for such increases and have not been hindered by the threshold set by the "cap." See Am. Compl. ¶¶ 57, 187.[44] Thus, Plaintiffs fall far 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.[45]

Further, supermajority votes such as the one required by the "property tax cap" are unquestionably lawful. 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."), cert. denied, 502

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.'").

[43] 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. N.Y. Educ. Law § 2023-a(2)(h); Am. Compl. ¶ 193(f); Szuberla Aff. ¶ 4, n.2.

[44] In the most recent budget vote, for the 2015-16 school year, the majority of the districts which proposed budgets above the threshold passed. Only one district with a proposed budget above the threshold is represented by Plaintiffs in this action (Spencer-Van Etten School District). That budget passed with 79.4% of the vote. See Statewide School District Budget Voting Results, N.Y. State Educ. Dep't, Office of Educ. Mgmt., http://www.p12.nysed.gov/mgtserv/votingresults.

[45] 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).

U.S. 856 (1991).[46] The principle that supermajority voting requirements, enacted by legislatures presumed to have acted constitutionally, are lawful, is equally applicable here.

Moreover, Plaintiffs' claims concerning the purported disparate effect on high needs districts are not actionable, much less entitled to judgment as a matter of law. The Education Article does not create a right of action seeking equal resources. See Levittown, 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. Here, on a motion for summary judgment, Plaintiffs cannot prevail in invalidating the statute and their motion must be denied.

B. Plaintiffs Are Not Entitled to Judgment Invalidating the Property Tax Freeze Credit.

The "Property Tax Freeze Credit" (N.Y. Tax Law § 606(bbb)) is a tax relief program that reimburses qualifying homeowners for increases in local property taxes on the condition that the tax levy increase is below the threshold set by Education Law § 2023-a. Plaintiffs move for summary judgment seeking a declaration that "the Property Tax Freeze Credit" is unconstitutional, yet Plaintiffs' amended complaint does not assert a cause of action, or even a single allegation, relating to that statute. As such, Plaintiffs cannot prevail on their motion to have that statute declared unconstitutional. See Pludeman v Northern Leasing Sys., Inc., 106 A.D.3d 612, 616 (1st Dep't 2013) (affirming denial of motion for partial summary judgment because "the general rule is that a party may not obtain summary judgment on an unpleaded cause of action") (citing Weinstock v. Handler, 254 AD2d 165, 166 (1st Dep't 1998)); Fusca v.

[46] 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).

A & S Constr., LLC, 84 A.D.3d 1155, 1157 (2d Dep't 2011) ("the Supreme Court properly denied that branch of the plaintiff's motion which was for summary judgment on the issue of liability pursuant to Labor Law § 240(1), since he did not assert a cause of action in the complaint based on a violation of that statute").

Even if Plaintiffs' pleadings included a challenge to Tax Law § 606(bbb), Plaintiffs' claim would fail as a matter of law. As noted above, the Supreme Court in NYSUT rejected the argument that the tax freeze credit violates the Education Article. See supra pp. 31-32. Plaintiffs argue, without citing any evidence, that the statute "incentivize[s] voters to suppress education funding with no consideration for impacts on the actual cost of a sound basic education." Pls.' Mem. p. 13. Plaintiffs' unsupported 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.[47] Further, Plaintiffs do not provide any evidence that Tax Law § 606(bbb) has prevented their districts, or any other districts, from obtaining sufficient funds to provide their students with an opportunity for a sound basic education. As such, they have not met their burden of establishing that they are entitled to judgment as a matter of law.

C. Plaintiffs Have Not Demonstrated That the Allowable Growth Amount Is Facially Invalid.

Plaintiffs have not met their burden in establishing the unconstitutionality of the allowable growth amount (N.Y. Educ. Law § 3602(1)(dd)). Plaintiffs' motion is devoid of any evidence 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.

[47] See http://www.p12.nysed.gov/mgtserv/votingresults.

In fact, Plaintiffs concede that they are not adversely affected by the statute, because for the past three years, the Governor and the Legislature have added appropriations in excess of the statutorily calculated personal income growth indices. See Pls.' Mem. p. 12; L. 2013, ch. 53, § 1, at pp. 160-174; L. 2014, ch. 53, § 1, at pp. 158-172; L. 2015, ch. 61§ 1, at pp. 7-17, Pls. Ex. 33; Conroy Aff. ¶ 24. This reflects the reality that budget decisions are made on an annual basis, and that all State statutes (including those purporting to direct future appropriations, such as the Allowable Growth Amount, and the 2007 legislation) can be amended by a future Legislature.[48] Plaintiffs have not established, nor can they establish, the facial invalidity of a statute that 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 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."); see also Cuomo v. Long Island Lighting Co., 71 N.Y.2d 349, 354 (1988).

The impropriety of Plaintiffs' motion for a declaratory judgment concerning the allowable growth amount is further underscored by Plaintiffs' disregard of the total funding provided to any district. 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 argue that

[48] 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 the State's future plans to "invoke" the amount are purely speculative.

the executive and legislative branches may choose not to exceed the allowable growth amount in the future, 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 establishing that the allowable growth amount cannot be constitutional in any circumstance. Therefore, their motion for summary judgment must be denied.

D. Plaintiffs Have Not Proven That The Gap Elimination Adjustment Is Unconstitutional on its Face.

Plaintiffs have not demonstrated that the Gap Elimination Adjustment is unconstitutional on its face. 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.

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 under Plaintiffs' misguided notion that Foundation Aid is a constitutional minimum, if federal, local, or other State funds make up the difference such that total funding amounts exceed the amounts contemplated in 2007, 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. 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 solely upon a deviation from the 2007 Act's funding goals fails as a matter of law.

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 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. Plaintiffs' motion papers 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 amounts, 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. Rebell Aff. ¶ 68; Am. Compl. ¶¶ 47, 51. The mere fact that the Gap Elimination Adjustment resulted in a deviation from the 2007 legislation is inadequate to prove the statute's invalidity.[49]

More specifically, Plaintiffs ignore the progressive nature of the gap elimination restoration.[50] Even though the financial crisis necessitated reductions in aid to public schools, the State acted to mitigate the impact on higher-need, lower-wealth school districts. The

[49] Again, the education financing system must be evaluated as a whole. If districts are using the total funds available in a manner such that inputs and outputs are sufficient to show that students have the opportunity for a sound basic education, there is no constitutional violation, and the statutes at issue are not unconstitutional.

[50] Without any evidentiary support, Plaintiffs falsely characterizes the gap elimination as an even-handed across-the-board cut (Pls.' Mem. p. 20), but Plaintiffs later acknowledge that the gap elimination adjustment "accommodates" high needs districts (Pls.' Mem. p. 20, n.11).

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. ¶ 19. Since 2011-12, the State has restored a total of $2.12 billion of the Gap Elimination Adjustment. Conroy Aff. ¶ 21. High-need school districts have received over 60% ($1.3 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 23 percent in 2015-16. 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 2015-16, the State already restored 94 percent of the original Gap Elimination Adjustment of the "Big Four" city school districts (Buffalo, Rochester, Syracuse and Yonkers). Id. Thus, Plaintiffs have not met their burden of establishing the unconstitutionality of the Gap Elimination Adjustment.

E. Plaintiffs Have Not Met Their Burden of Showing That They Are Entitled To Judgment Invalidating the Aid Conditions Related to APPR Implementation.

In 2012, the New York Legislature enacted legislation conditioning increases in State aid on school districts' implementation of APPR systems. While nearly all of the State's 700 school districts complied with the legislation's timing requirements, the New York City School District did not, and as a result did not qualify for a State aid increase during the 2012-13 school year.[51] Cechnicki Aff. ¶ 14.[52]

Plaintiffs, who do not dispute the importance of teacher and principal evaluation systems, challenge this one-time denial of an increase in funding. Plaintiffs claim that the decision to

[51] In the Aristy-Farer action, Plaintiffs claimed that this legislation violated the Education Article. The sufficiency of that pleading is on appeal to the First Department. See supra p. 13.

[52] "Cechnicki Aff" refers to the Affidavit of Brian Cechnicki in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Defendants' Motion for Partial Summary Judgment, dated July 28, 2015.

withhold that increase denied New York City students the opportunity to receive a sound basic education. Yet Plaintiffs do not offer proof of any reduction in services caused by the lack of increase, let alone a constitutional deficiency. Further, Plaintiffs' challenge is disingenuous in light of their request that the Court order the State to implement accountability measures. Indeed, it was the judgment of the policy-making branches that in the long term, ensuring teacher and principal effectiveness was so critical that it should be linked to an increase in aid. This incentive was also critical to avert a threat of losing hundreds of millions of dollars in federal Race to the Top money. See King Aff. ¶¶ 8-18.[53] In light of that, and in view of the fact that New York City adopted an evaluation system the next year and received its expected state aid increase, Plaintiffs have not met their burden that the legislation violates the Education Article.

VI. PLAINTIFFS' ARGUMENTS CONCERNING FISCAL RESTRAINTS AND THEIR RELIANCE ON EDUCATION LITIGATION IN OTHER STATES ARE MISPLACED.

Plaintiffs' argument that fiscal restraints do not excuse constitutional obligations (Pls.' Mem. pp. 21-24) 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 have not established 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

[53] "King Aff." refers to the Affidavit of John B. King, Jr. in Support of Defendants' Opposition to [the Aristy-Farer] Plaintiffs' Motion for a Preliminary Injunction, dated February 12, 2013.

constitutional obligations. Plaintiffs cannot claim that Defendants are using fiscal constraints as an excuse for a constitutional violation, when no constitutional violation has been shown.[54]

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 under a constitution requiring an equal and efficient education. As such, the decision focuses mainly on inefficiencies and disparities between districts, 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 in districts across the state, 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. 11. Further, unlike the Rose case, Plaintiffs here seek relief without a presentation of evidence concerning inputs and outputs. See also McCleary v. State, 269 P.3d 227 (Wash. 2012) (finding for plaintiffs after a trial where evidence showed significant underfunding 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,

[54] For this reason, Plaintiffs' reliance on Claremont School Dist. v. Governor, 794 A.2d 744 (N.H. 2002) is misguided. See Pls.' Mem. p. 21. 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. Instead, Plaintiffs challenge statutes relating to funding without any showing that the districts affected by such statutes fail to provide a minimally adequate education. Further, Plaintiffs ignore the fact that since then, 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).

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).[55]

Plaintiffs cite these cases from other states, yet ignore the history of Massachusetts education litigation, which is analogous.[56] Much like New York's 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.

[55] The New York cases cited by Plaintiffs are inapposite. Plaintiffs also rely on Hussein v. State, 19 N.Y.3d 899, 908 (2012) which affirmed the denial of a motion to dismiss on ripeness grounds. It was not a summary judgment motion and merely addressed whether Plaintiffs claims were ripe and proceed to discovery. Plaintiffs also rely on Sgaglione v. Levitt, 37 N.Y.2d 507 (1975), in which the Court of Appeals determined that a legislative mandate directing the investment of reserve funds in low investment grade municipal paper usurped the discretion of the Comptroller (as sole trustee of the pension fund) and resulted in the impairment of the integrity of the pension fund. However, Sgaglione is distinguishable, because in that case, the statute at issue directly violated the language of a constitutional provision. Here, nothing in the language of the statutes at issue runs afoul of the State's obligation to provide for the maintenance and support of a system of free common schools under the Education Article. Instead, the State's decision to implement the statutes at issue fits comfortably within its authority and obligations under the Education Article. Similarly, in Flushing Nat'l Bank v. Municipal Assistance Corp., 40 N.Y.2d 731, 732-733 (1976), the court found that a statute intended to postpone repayment of New York City's short-term notes for a period of three years violated the State Constitution's full faith and credit clause. Given that the State Constitution (N.Y. Const. art. VIII, § 2) "prohibits the city from contracting any indebtedness unless it pledges its 'faith and credit' for the payment of the principal of the indebtedness," legislation depriving short-term noteholders of judicial remedies for at least three years rendered the pledge of faith and credit meaningless. Unlike Sgaglione and Flushing, here the statutes at issue do not directly contradict any constitutional mandate. No specific dollar amount, or consistency in the amount of funding, is guaranteed by the Education Article, nor does it prohibit legislation concerning property tax elections, tax rebates, growth amounts, or evaluation systems.

[56] Plaintiffs also ignore holdings of other state supreme courts rejecting education funding challenges. 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.").

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. Id. at 1138. The 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." Id. at 1139.

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, including some "drastic" cuts. Id. at 1148.[57] 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

[57] 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), aff'd 771 F.3d 118 (2d Cir. 2014) ("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.").

> 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 judge's report 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.[58]

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, well beyond what was required by CFE, working to focus funding on the districts most in need.[59] See supra pp. 6-12. New York continues be the highest spending State in terms of education funding, and there can be no doubt that New York has committed its finite resources to education beyond what most states have accomplished. See id.

VII. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING THE THIRD CAUSE OF ACTION SHOULD BE GRANTED BECAUSE PLAINTIFFS IMPROPERLY ASK THIS COURT TO IMPLEMENT ACCOUNTABILITY MEASURES.

[58] 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.

[59] Unlike New York's 2007 legislation, 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.

A. This Court Cannot Order The Remedy Sought By Plaintiffs.

Plaintiffs' desire for the State to perform further cost studies, or implement accountability measures, is not a basis for judgment, especially where the Court of Appeals has already ruled that such actions are not required. In CFE III, the Court of Appeals upheld the First Department's decision which "struck [the] Supreme Court's call for state costing-out studies every four years and its requirement that the New York City Department of Education prepare a comprehensive 'sound basic education' plan, to ensure accountability." CFE III, 8 N.Y.3d at 32. The Court of Appeals held that there were adequate accountability mechanisms in place, and that a new, costly layer of bureaucracy was not constitutionally required. Id.

Plaintiffs' motion is merely an attempt to lobby this Court to micromanage education in a way that the Court of Appeals long ago eschewed. See N.Y. Civ. Liberties Union v. State of N.Y., 4 N.Y.3d 175, 180-183 (2005) (rejecting plaintiffs' request for an injunction requiring the State and Education Commissioner to determine the causes of failure in schools and rectify them because "defendants have a procedure in place for accomplishing the very relief plaintiffs seek--that is, trying to improve deficient schools" and courts cannot compel such discretionary actions). "The role of the courts is not . . . to determine the best way to calculate the cost of a sound basic education . . . but to determine whether the State's proposed calculation of that cost is rational." CFE III, 8 N.Y.3d at 27. Critically, the CFE court did not even look at the financing system until after the plaintiffs had met their burden of proving educational deficiencies.

Here, Plaintiffs do not offer proof of educational deficiencies, and further, they do not take issue with the methodology currently used to determine and allocate school aid. While Plaintiffs challenge the amounts received by districts, they fundamentally accept the principles

underlying foundation aid.[60] As such, there is no basis for this Court to order the State to develop or implement an alternative education finance system.

Plaintiffs cite Lake View Sch. Dist. No. 25 v. Huckabee, 220 S.W.3d 645 (Ark. 2005), yet that case is based on distinguishable facts and its holding is in direct contravention of controlling precedent in this State. See Lake View Sch. Dist. No. 25, 220 S.W.3d at 652 (finding in favor of plaintiffs where the General Assembly violated an act providing that the General Assembly had a "continuing duty to assess what constitutes an adequate education."); cf. CFE III, 8 N.Y.3d at 32 (affirming decision striking down request for State costing-out studies every four years). The fact that Arkansas, or any other state, requires a regular assessment of education opportunities and costs, is inconsequential. By virtue of the Court of Appeals' holding in CFE III, and the decisions of the elected branches, that is not a requirement in New York State.

B. The State Provides Educational Guidance.

While the State does not have a constitutional obligation to do so, it already provides substantial educational and fiscal guidance to school districts. For example, the Commissioner of Education prescribes the minimum subjects required to be provided to students. Schwartz Aff. ¶ 2 (citing statute and regulations).[61] School districts may not receive any State aid apportionment unless they maintain an approved course of study that conforms to the requirements of the Education Law, the rules of the Board of Regents, and the Commissioner's regulations. Id. (citing regulation). Local boards of education prescribe the courses of study by which students are graded. Schwartz Aff. ¶ 3 (citing statutes). This is consistent with local control over educational content. See id.; see also Martinez v. Bynum, 461 U.S. 321, 329 (1983)

[60] Plaintiffs routinely misrepresent CFE II by stating that it requires the State to fund education based on the actual cost of providing an opportunity for a sound basic education. However, that was not the holding of CFE II, which merely stated that funding should be aligned with student need. CFE II, 100 N.Y.2d at 929. There can be no dispute that funding today, which includes significant financing based on a formula linked to student need, complies.
[61] "Schwartz Aff." refers to the Affidavit of Ira Schwartz, dated July 29, 2015.

("[n]o single tradition in public education is more deeply rooted than local control over the operation of schools . . .").

While local school boards maintain significant control over curriculum and the course of study, the State has adopted numerous accountability measures to oversee district compliance with the State's standards, identify and support low-performing schools,[62] and aid schools in replicating the best practices of the State's high performing and high progressing schools and districts. See Schwartz Aff. ¶ 6. Supports and services are driven by numerous federal statutes as well. See Schwartz Aff. ¶ 4.

Beyond accountability, the State also provides significant guidance to school districts. For instance, upon request, the State Education Department ("SED") reviews budget documents for fiscally stressed schools and school districts to assist them in identifying opportunities for savings or additional revenues that could be used to close budget gaps while minimizing any effect on school district programs. Coughlin Aff. ¶ 5.[63] SED also provides technical assistance on specific financial and management issues for stressed districts such as maximizing revenues from State aid grants, pupil transportation, accounting, auditing, purchasing, budgeting and assessing risk and establishing internal controls. Coughlin Aff. ¶ 6.

Further, SED provides a wide range of technical assistance and informational outreach on best practices in allocating existing resources to improve student performance. Coughlin Aff. ¶ 8. SED also assists districts in assessing shared services through BOCES, so that districts can receive services such as career and technical education services, special education services, alternative education, technology and shared business expenses so that students can have access to specialized, high quality services at a lower net price to districts. Coughlin Aff. ¶ 9.

[62] The Affidavit of Robert Lowry, submitted by Plaintiffs, acknowledges that the State monitors low-performing schools. See ¶ 6.
[63] "Coughlin Aff." refers to the affidavit of Christina Coughlin, dated July 28, 2015.

Thus, while there is no constitutional duty to provide the services demanded in the Third Cause of Action, even assuming, arguendo, that such a duty exists, Plaintiffs have not proven that the services provided are so insufficient as to constitute a constitutional violation, they are not entitled to judgment on any portion of that claim, and it should be dismissed.

VIII. THE COURT SHOULD GRANT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING CLAIMS BROUGHT BY PLAINTIFFS, INCLUDING INTERVENOR-PLAINTIFF THE CITY OF YONKERS, WHICH LACK CAPACITY AND STANDING.

A. Plaintiffs Do Not Have Capacity To Bring This Action on a Statewide Basis.

This action is brought by NYSER, an unincorporated association consisting of individuals and organizations, together with parents of schoolchildren in nine districts in New York State, who are themselves members of NYSER. The majority of NYSER's members do not have capacity to sue. See City of N.Y. v. State of N.Y., 86 N.Y.2d 286, 291 (1995); N.Y. State Ass'n of Small City School Districts, Inc., 42 A.D.3d at 650 (dismissing claims by school districts and school board members for lack of capacity and standing). In particular, it is well established that municipalities, such as the City of Yonkers, do not have capacity to assert constitutional challenges against the State, such as those asserted in this action. See City of N.Y., 86 N.Y.2d at 291. In City of N.Y., the Court of Appeals expressly held that a municipality cannot sue the State challenging the constitutionality of the State's educational funding system. Id. In fact, an earlier attempt by the Yonkers School Board and its members to assert similar claims challenging education funding under the Education Article and other constitutional provisions was rejected by the Westchester County Supreme Court due to lack of capacity to bring such claims. See Citizens for Yonkers v. State of N.Y., Index No. 08850/05 (Sup. Ct. Westchester Cty. Oct. 25, 2005) (Lefkowitz, J.), p. 1 (citing City of N.Y., 86 N.Y.2d at 290-91) (Wright Aff. Ex. 11).

The only exceptions to the prohibition on local governmental challenges to State legislation are: "(1) an express statutory authorization to bring such a suit (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys; (3) where the State statute impinges upon 'Home Rule' powers of a municipality constitutionally guaranteed under article IX of the State Constitution; and (4) where 'the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription.'" City of N.Y., 86 N.Y.2d at 291-92 (citations omitted). None of those exceptions apply here.

While Yonkers previously argued that the second exception was applicable because the challenged legislation affects its proprietary interest in a specific fund of moneys, that argument has been rejected by the Court of Appeals. As in City of N.Y., the City of Yonkers' claim is "merely to a greater portion of the general State funds which the Legislature chooses to appropriate for public education. Accordingly, they lack a proprietary interest in a fund or property to which their claims relate and cannot ground capacity to sue on that basis." Id. at 295.

B. Plaintiffs Do Not Have Standing To Assert This Action on a Statewide Basis.

Plaintiffs cannot show 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. See 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 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 concerning any district outside of where they reside fail as a matter of law.

IX. PLAINTIFFS' MOTION MUST BE DENIED AS PREMATURE.

Plaintiffs move for judgment on claims relating to educational opportunities statewide without providing any evidence of inputs or outputs in any district in the State. This is contrary to the requirements set forth by the Court of Appeals. See supra pp. 23-24. Instead, Plaintiffs rely on two non-attorney affidavits and exhibits in support of their motion. However, Defendants have not yet had the opportunity to exchange discovery, engage experts, or depose Plaintiffs' two affiants and question them about the basis of their knowledge and the underpinnings of their analysis. Therefore, it would be premature for the Court to grant Plaintiffs' motion. See McGlynn v. Palace Co., 262 A.D.2d 116, 117 (1st Dep't 1999) ("it was error to grant summary judgment prior to affording defendants an opportunity to depose plaintiff").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' (including Intervenor-Plaintiff's) motion for partial summary judgment, grant Defendants' motion for partial summary judgment dismissing Plaintiffs' First, Second, and Third Causes of Action, dismissing all challenges to the educational opportunities in the districts where no individual plaintiff resides, dismissing all claims brought by Intervenor-Plaintiff City of Yonkers, and grant such other and further relief as it deems just and proper.

Dated: New York, New York
July 31, 2015

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