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)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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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 reply memorandum of law in further support of Defendants' cross-motion for partial summary judgment.

PRELIMINARY STATEMENT

The Court of Appeals has endorsed only one figure as the minimum amount necessary to meet the State's constitutional obligations under the Education Article for the New York City School District, and education funding today exceeds that amount. That simple fact mandates the dismissal of the majority of Plaintiffs' claims.

Plaintiffs' position is that the educational opportunities actually provided to schoolchildren in this State are irrelevant, and the Court has no obligation to evaluate them. Their position is premised on Plaintiffs' unsupported belief that although the Court of Appeals endorsed an estimate of approximately $1.93 billion as a rational calculation of the increase in operating funding necessary to meet the constitutional minimum in New York City, that ruling was superseded by the enactment of legislation in 2007, which, as the Court of Appeals anticipated, aspired to go well above the $1.93 billion figure, and to increase funding statewide. In Plaintiffs' view, once the 2007 legislation was enacted, the Court of Appeals' ruling was rendered meaningless, and the elected branches were stripped of their authority to modify the education budget. That position is illogical and contrary to binding precedent.

[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 this motion, 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.

On these baseless notions, Plaintiffs move for partial summary judgment seeking to have this Court order the State to direct the Legislature to implement the budgetary goals from 2007, or else conduct a cost study to implement different funding formulae. They ask this Court to do so without a shred of evidence that the educational opportunities provided in any district in the State are deficient. Defendants oppose that motion and cross-move for summary judgment seeking the dismissal of the following causes of action asserted in Plaintiffs' amended complaint: (1) the First Cause of Action, which claims that the State has failed to comply with the Court of Appeals' CFE decisions;[2] (2) the Second Cause of Action, which claims that the State's decision to implement various statutes altering the 2007 education financing mechanisms constitutes a violation of the Education Article; and (3) the Third Cause of Action, which claims that the State has violated the Education Article by failing to provide guidance to school districts about necessary courses of study, services, supports, resources, and efficiency methods, and by failing to implement accountability measures and perform a cost study. As argued in Defendants' cross-motion papers, those claims fail as a matter of law for the following reasons.

First, Defendants submitted uncontroverted proof that the New York City School District's operational funding has increased by well over the $1.93 billion figure endorsed as reasonable for that district by the Court of Appeals in CFE III. Plaintiffs do not submit any evidence in opposition, and thus the First Cause of Action must be dismissed.

Second, although legislative enactments are entitled to the presumption of constitutionality, the mere enactment of legislation cannot constitute a constitutional determination of funding sufficient for the opportunity for a sound basic education. It is the courts' role to make constitutional determinations, not the legislature's, and the only judicial

[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").

determination of the sufficiency of educational funding here was that made by the Court of Appeals in CFE with respect to New York City. As set forth herein, the State has complied with the CFE judgment. Accordingly, the 2007 legislation was not a calculation of the minimum amount necessary to provide a sound basic education statewide. Instead, it reflected a legislative policy choice to increase funding to New York City, and statewide, beyond what was required by CFE. Plaintiffs' unsupported argument that "all of the legislators realized" that the violations found in CFE as to New York City impacted students statewide, and the 2007 legislation represented the minimum amount necessary for constitutional compliance is thus unavailing. Accordingly, Plaintiffs' Second Cause of Action must be dismissed.

Third, Plaintiffs cannot evade the requirements set forth by the Court of Appeals for establishing an Education Article claim. The Education Article is concerned with educational opportunity, not dollar amounts. Thus, controlling precedent concerning Education Article claims requires that Plaintiffs make a detailed showing of deficient inputs and outputs on a district-by-district basis, and prove a causal connection between those deficiencies and the education financing system. Plaintiffs attempt to avoid their burden and rely exclusively on arguments concerning the purpose of the 2007 legislation, yet the constitutionality of the 2007 legislation is not at issue. This is an Education Article claim. To prevail, Plaintiffs must abide by controlling precedent and put forth proof of educational deficiencies, district-by-district, causally connected to the funding system. For this reason, all causes of action except for the Fourth Cause of Action, must be dismissed.

Fourth, in evaluating the adequacy of funding once educational deficiencies are shown, the Court must consider funding as a whole, regardless of source. Plaintiffs try to avoid this commonsense principle, and argue that this Court should only consider Foundation Aid, a

narrow subset of State aid. Plaintiffs ask this Court to evaluate funding streams in a vacuum, and ignore the impact of the billions of dollars that are allocated for education from other State sources, as well as federal and local contributions. This is contrary to logic and law. Plaintiffs' position also further undermines their claims seeking the invalidation of various statutes impacting aid other than Foundation Aid, such as the property "tax cap."

Fifth, Plaintiffs concede that the State has no duty to provide the educational services, guidance, and accountability measures they request in the Third Cause of Action. Therefore, that cause of action must be dismissed.

Sixth, Plaintiffs, including Intervenor-Plaintiff the City of Yonkers ("Yonkers"), have not met their burden of demonstrating that they have standing and capacity to bring this action. The Court of Appeals has made clear that municipalities such as Yonkers do not have capacity to challenge the constitutionality of State legislation. Further, Plaintiffs do not offer any substantive opposition to Defendants' argument that challenges concerning districts where no individual plaintiff resides fail as a matter of law. Thus, all such claims must be dismissed.

ARGUMENT

I. THE STATE HAS COMPLIED WITH CFE III AND THE FIRST CAUSE OF ACTION MUST BE DISMISSED.

In their cross-motion for summary judgment on the First Cause of Action, Defendants introduced admissible evidence conclusively demonstrating that increases in education funding for the New York City School District have exceeded the $1.93 billion figure endorsed by the Court of Appeals in CFE III. Defs.' Mem. pp. 16-17; Wright Exs. 18-19; Conroy Aff. ¶ 26. In opposition, Plaintiffs simply fail to offer any evidence refuting Defendants' proof, and thus their First Cause of Action, which alleges non-compliance with CFE, must be dismissed.

The Court of Appeals has "repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Zuckerman v. New York, 49 N.Y.2d 557, 562 (1980) (citing cases). Nonetheless, in opposition, Plaintiffs rely on baseless arguments and allegations in their amended complaint, as opposed to the submission of any evidentiary proof in admissible form. See Pls.' Mem. p. 48. This is insufficient to defeat Defendants' cross-motion.

Plaintiffs cannot avoid the dismissal of their First Cause of Action merely by opining that there is "a disputed issue of fact" as to how to calculate operating funds. As an initial matter, the meaning and interpretation of a court's opinion is a matter of law, not a question of fact. Further, it is clear that "operating funds," as that term was used in CFE III, did not include "capital, debt or transportation costs." 8 N.Y.3d at 23. Indeed, the Zarb Commission's calculations, endorsed by the Court of Appeals, defined operating expenses in that way. Wright Aff. Ex. 7, at p. R1055.[3] The affidavit of Joseph G. Conroy, submitted with Defendants' opposition and cross-motion papers, uses this definition, and calculates operating expenses as total expenditures less transportation, debt service, and General Fund transfers for capital projects, consistent with the definition used in CFE. Conroy Aff. ¶ 26. Plaintiffs do not offer a single argument, much less any evidence, that these definitions are inaccurate, or that any calculation of operating funds could yield a funding increase of less than the $1.93 billion figure endorsed by the Court of Appeals.

[3] "Wright Aff." refers to the Affirmation of Alissa S. Wright, dated July 31, 2015, submitted with the Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Defendants' Motion for Partial Summary Judgment.

As demonstrated in Defendants' moving papers, operating funds had a specific meaning in CFE, and Plaintiffs and Defendants agreed in that litigation that $12.62 billion represented the baseline operating funds from which to calculate any increase. Defs.' Mem. pp. 16-17. Now, Plaintiffs argue that certain categories of funding have increased, altering the reach and scope of CFE. Plaintiffs are asking this Court to accept a distorted version of the CFE decision that is convenient to them at this moment, yet defies the actual holding of the Court of Appeals, based on the record before it.

In the absence of any evidence to combat the State's showing that it complied with CFE, Plaintiffs rely upon meritless, and at times contradictory, arguments to save their claim. They allege that "most of the recent increase in funding for New York City has been allocated to pay for huge increases in expenses in areas such as mandatory pension and health costs, and contractual payments to private schools . . . special education that were not anticipated in the cost analyses that informed the Court of Appeals CFE III decision and the Reform Act." Pls.' Mem. p. 48 (citing amended complaint). This assertion fails for a number of reasons.

As an initial matter, that is an allegation, not proof. Second, such costs are undeniably operating costs, as defined by the Zarb Commission and endorsed by the Court of Appeals in CFE III. See Amicus Curiae Brief of the City of New York (Aug. 31, 2006) (Affirmation of Alissa S. Wright, dated September 30, 2015, Ex. 25), p. 13, nn.5-6. Indeed, Plaintiffs' own amended complaint refers to employee health and pension costs as operating expenses. Am. Compl. ¶ 74. Thus, they cannot now attempt to amend the definition of "operating expenses" used by the Zarb Commission, in CFE, and in their own pleading in an attempt to save their cause of action. Third, Plaintiffs' allegations do not refute the fundamental fact that funding for

the City's operating expenses has increased well over $1.93 billion.[4] They offer no proof of any definition of operating funds that yields an insufficient funding increase. Fourth, given that Plaintiffs assert a cause of action based on alleged non-compliance with CFE, changed circumstances, and facts not considered by that court, are irrelevant to a determination of whether the State complied with that holding.[5] In fact, that argument highlights the meritless nature of Plaintiffs' attempt to end-run Education Article precedent requiring a showing of deficiencies in inputs and outputs, and a causal connection to the education financing system. Because circumstances change with respect to funding, student need, and numerous other factors, this Court cannot make a finding of liability under the Education Article without evaluating the actual educational opportunities provided to students.

Plaintiffs state, in a footnote, that the $1.93 billion figure was to be calculated as of April 1, 2007. Pls.' Mem. p. 48, n.21 ("The Court of Appeals accepted the Appellate Division's proposal that the minimum $1.93 billion figure be calculated as of April 1, 2007."). Yet the Court of Appeals did not accept any such proposal, and indeed, the Appellate Division did not make such a proposal. The premise of Plaintiffs' reliance on the Appellate Division order is seriously flawed in light of the Court of Appeals decision. The Court of Appeals modified the Appellate Division order by declaring that "the constitutionally required funding for the New York City School District includes, as demonstrated by this record, additional operating funds in the amount of $1.93 billion, adjusted with reference to the latest version of the GCEI and inflation since 2004." CFE III, 8 N.Y.3d at 27. Thus, this Court must rely on the Court of

[4] The same is true for Plaintiffs' complaint that New York City's operating expenses include costs for providing educational services, including special education, at "non-DOE" schools. Plaintiffs do not offer any evidence that the Court of Appeals did not intend for such costs to be considered "operating" costs. Nor do Plaintiffs offer any legitimate rationale why such costs should not be considered operating costs.

[5] Plaintiffs' statement that these increased expenses were not considered by the legislature in enacting the 2007 legislation is curious considering that Plaintiffs seem to rest their entire case on their position that the 2007 funding goals are the paramount figures for constitutional funding levels.

Appeals' declaration, as opposed to the Appellate Division's order. Critically, neither the Court of Appeals nor the Appellate Division ever set April 1, 2007 as the date as the baseline date from which the increase was to be calculated.[6] Logically, Plaintiffs' interpretation of the 2006 Appellate Division's and Court of Appeals' decisions would not set the subsequent 2007-08 education budget as the baseline, which was never evaluated by the court or the Zarb Commission, but would, at most, set the starting date for the phase-in of the increase. It would not change the baseline figure, which, as demonstrated in Defendants' moving papers, was $12.62 billion, as agreed to by the parties. Defs.' Mem. pp. 16-17.

Still, even if Plaintiffs were correct in their unsupported argument that the increase was to be calculated from 2007, which they are not, New York City's operating expenses increased over $3.94 billion – more than twice $1.93 billion – from the 2007-08 school year to the 2013-14 school year. Conroy Aff. ¶ 26. Therefore, Defendants have complied with CFE III even under Plaintiffs' erroneous interpretation of that decision.

Further, Plaintiffs' improperly suggest that the $1.93 billion figure must be adjusted for inflation and cost of living to the present date. Pls.' Mem. p. 48. They base their argument on the CFE III declaration that "the constitutionally required funding for the New York City School District includes, as demonstrated by this record, additional operating funds in the amount of $1.93 billion, adjusted with reference to the latest version of the GCEI and inflation since 2004." CFE III, 8 N.Y.3d at 27. However, based on the record before the Court of Appeals, those adjustments were clearly one-time adjustments, not adjustments to be made continually over time. While the CFE court was adjudicating whether it should defer to the $1.93 billion estimate proposed by the State or the $5.63 billion estimate proposed by the Judicial Referees, the parties

[6] The Appellate Division decision refers to the fiscal year beginning on April 1, 2006. Campaign for Fiscal Equity, Inc. v. State of N.Y., 29 A.D.3d 175, 191 (1st Dep't 2006). Neither that decision nor the Court of Appeals' decision refers to the fiscal year beginning on April 1, 2007.

agreed on one point: that the most recent GCEI (Geographic Cost of Education Index) should be used and that the increased funding estimate should be expressed in 2004-05 dollars. See 29 A.D.3d at 184 ("The Referees accepted the use of the Geographic Cost of Education Index to convert statewide costs to New York City costs, but recommended the use of a more updated version and the calculation of costs in 2004-2005 dollars, rather than January 2004 dollars, to account for inflation. Defendants do not contest that modification."). The Referees calculated that those adjustments amounted for $0.37 billion. Wright Aff. Ex. 8, p. 5853, ¶ 43.

The Court of Appeals endorsed the $1.93 billion figure, subject to the adjustments agreed upon by the State (the use of the latest GCEI and inflation to 2004-05 dollars). The $1.93 figure, combined with the $0.37 billion GCEI and inflationary adjustments applied by the Referees, totals $2.3 billion. The Court of Appeals did not require any further adjustment. Again, Plaintiffs do not present any evidence that New York City did not receive these funds. Nor do Plaintiffs even argue, nevertheless show, that if another such adjustment were required, which it is not, that any such adjustment would raise the required number above the increase in operational funding that New York City has actually received since CFE III.

Finally, Plaintiffs argue that "[t]here is no magic number" pegged to the constitutional minimum. Pls.' Mem. p. 25. This directly contradicts the fundamental premise of Plaintiffs' position that the State must provide Foundation Aid in the amounts contemplated in 2007, and that any deviation from those numbers amounts to a constitutional violation. It also refutes the clear holding of CFE III, the only Court of Appeals ruling to ever attribute a figure to the constitutional minimum. Therefore, because funding has increased beyond the levels declared constitutional in CFE III, and Plaintiffs offer no serious opposition on this point, Plaintiffs' First Cause of Action must be dismissed.

II. THE 2007 LEGISLATION WAS NOT A CALCULATION OF THE CONSTITUTIONAL MINIMUM, MANDATING THE DISMISSAL OF PLAINTIFFS' FIRST AND SECOND CAUSES OF ACTION.

Plaintiffs' Second Cause of Action asserts a claim that the State has violated the Education Article purely because the funding levels contemplated in 2007 have not been reached and seeks to invalidate any statute that could affect those funding levels.[7] However, that claim fails as a matter of law, because the 2007 legislation was not a constitutional determination of the minimum funding necessary to provide an opportunity for a sound basic education in all of the State's districts, nor could it have been.

As demonstrated in Defendants' cross-motion papers, in CFE III, the Court of Appeals declared that the State's proposed $1.93 billion increase in funding to New York City was rational and constitutionally compliant, yet the court expected that the State would enact legislation providing more generous funding, and would exceed the constitutional minimum. CFE III, 8 N.Y.3d at 27 ("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 . . . Governor Pataki's proposal to provide $ 4.7 billion in additional funding amounted to ***a policy choice to exceed the constitutional minimum***.") (emphasis added). Indeed, the concurring opinion in CFE III states:

> 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. . . . 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] To the extent the First Cause of Action also asserts that the State has violated CFE by implementing the Gap Elimination Adjustment, allowable growth amount, and provisions conditioning aid increases on APPR implementation (Am. Compl. ¶ 191), these arguments also support the dismissal of that claim.

CFE III, 8 N.Y.3d at 32-33 (Rosenblatt, J., concurring). Thus the Court of Appeals anticipated that the 2007 budget would increase education funding above the $1.93 billion figure for New York City, and explicitly noted that such increases would "exceed the constitutional minimum." That is exactly what the State did in enacting the 2007 legislation.

Plaintiffs outrageously contend that the Zarb Commission's recommendations were superseded by the 2007 legislation, rendering it irrelevant that the 2007 legislation went beyond what was recommended by the Zarb Commission and accepted as reasonable as to funding for New York City by the Court of Appeals in CFE III. Pls.' Mem. p. 10, n.6, pp. 29-32, 35. Plaintiffs state that "the Court of Appeals directed the state legislature to *consider* the $1.93 billion figure put forward by Governor Pataki" (Pls.' Mem. p. 29 (emphasis by Plaintiffs)), even though the Court of Appeals did not use the word "consider," but instead issued a declaratory judgment that the $1.93 billion figure was reasonable as to New York City and that a choice to fund education above that constitutional floor would be a policy choice, not a re-determination of the constitutional minimum. See supra pp. 10-11. Plaintiffs' absurd position would have this Court ignore the Court of Appeals, render the thirteen-year CFE litigation meaningless, and hold that the legislature can make its own constitutional determinations concerning funding that differ from the Court of Appeals' determination, merely by enacting legislation. Such flawed logic cannot overcome Defendants' cross-motion.

As an initial matter, if the legislature makes the absolute determination of the constitutional sufficiency of funding, then how can Plaintiffs' challenge any of the education funding laws? Even putting aside this logical inconsistency, the law is clear: the legislature "may not legislatively supersede . . . decisions interpreting and applying the Constitution" and

the 2007 legislature's actions did not constitute a constitutional determination. See Dickerson v. United States, 530 U.S. 428, 437 (2000).

As acknowledged by Plaintiffs, after the CFE II ruling, the State undertook a comprehensive cost study. Pls.' Mem. p. 3; Defs.' Mem. pp. 3-5. Yet Plaintiffs fail to comprehend that it was precisely that cost study that was endorsed by the Court of Appeals with respect to New York City, which they now ask this Court to ignore. Plaintiffs do not offer proof of any other cost study tied to the constitutional standard.

Plaintiffs' rely on two Regents' documents to support their argument that the 2007 legislation was based on a cost study that calculated the cost of providing an opportunity for a sound basic education statewide, thus superseding the CFE III decision. Pls.' Mem. pp. 9-10 (citing Regents Proposal on State Aid to School Districts for 2007-08 (Nov. 2006) (Rebell Aff. Ex. 13); Regents Amicus Brief (Rebell Aff. Ex. 12)). However, both the Regents' proposal and the Regents' amicus brief ***predate*** the CFE III decision. In fact, in endorsing the State's plan, the Court of Appeals rejected the Supreme Court's decision to have a panel of referees make recommendations as between compliance proposals, including the Regents'. CFE III, 8 N.Y.3d at 30. It is illogical for Plaintiffs to assert that the Regents' documents carry more weight than the subsequently issued Court of Appeals' endorsement of the Zarb Commission's $1.93 billion figure as the constitutional minimum for New York City.[8]

Further, Plaintiffs ask this Court to adopt the 2007 legislation's aspirational amounts as the constitutionally-mandated minimum amounts. When faced with Defendants' proof that there

[8] Plaintiffs request that this Court ignore the cost study endorsed as reasonable by the Court of Appeals, and instead adopt the Regents 2007-08 proposal. In support of this unreasonable position, Plaintiffs cite cases for proposition that courts defer to governmental agencies charged with administering statutes and regulations. Pls.' Mem. p. 26, n.10. Yet those cases had nothing to do with the ***constitutionality*** of statutes or regulations. Rather, they concerned the administration of statutes and regulations. Here, there is no dispute over an agency's administration of a statute or regulation, nor is there any confusion about the functionality of any statute currently in effect. Therefore, they are inapposite. Further, if deference to legislative determinations were appropriate in this context, it would undercut Plaintiffs' claims, not support them.

was no underlying comprehensive cost study to support their contention, Plaintiffs rely on the 2004 and 2006 Regents' studies, which were not adopted by the Court of Appeals, and are not identical to the Foundation Aid formulae as contemplated in 2007. It is nonsensical for Plaintiffs to adopt the position that the 2007 formula represented a constitutional mandate based on a study that advocated for a different formula, and that was not adopted by the Court of Appeals. See Pls.' Mem. p. 28 (recognizing that the Court of Appeals endorsed a formulae yielding a lower funding figure than that advocated by the Regents, yet arguing, without any factual or legal support, that the "State's decision-makers" determined that higher figures were constitutionally necessary).

Most critically, and ignored by Plaintiffs, is the well-settled principle that only the judiciary can make constitutional determinations. Defs.' Mem. pp. 21-23. The mere enactment of legislation is not a constitutional determination; such determinations are within the sole purview of the courts. City of Boerne v. Flores, 521 U.S. 507, 516, 536 (1997). The Regents' documents and the statements by legislators do not and cannot support Plaintiffs' position that the 2007 legislation represented a constitutional determination of the amounts necessary to provide students statewide with an opportunity for a sound basic education.[9]

Plaintiffs do not address this indisputable, bedrock principle of our democracy that forecloses many of their claims. Instead, they assert the extraneous argument that this Court has the power to interpret the intentions of the legislature in enacting the 2007 legislation. Pls.' Mem. pp. 20-22, 26. Yet a determination concerning the constitutionality of certain legislation does not equate to a determination that the legislation is constitutionally required. Plaintiffs

[9] Plaintiffs make the bold statement that "all of the State policymakers realized that students were being denied the opportunity to obtain a sound basic education based on fundamental defects in the framework of the system, impacting not just students in New York City, but students throughout the State." Pls.' Mem. p. 3. Plaintiffs offer no support for that assertion.

seem to have a fundamental misunderstanding about the issues in this litigation and the role of the judiciary. This case is not about the constitutionality of the 2007 legislation, and this Court does not have the power to review the constitutionality of past legislation that has since been amended. Rather, the issue in this case, and what this Court has the power to review, is the constitutionality of the ***current*** education financing framework under the Education Article. The purpose behind legislation enacted eight years ago, which has since been amended, is inconsequential. See Flanders Assoc. v. Town of Southampton, 198 A.D.2d 328 (2d Dep't 1993) (affirming dismissal of challenge to moratorium on development as moot following enactment of local law exempting the plaintiff's property).[10]

Plaintiffs cite Hussein v. State of N.Y., 19 N.Y.3d 899 (2012) (Ciparick, J., concurring), for the proposition that "[t]his is clearly not a case where the Court is being asked to cast the Legislature and the Executive 'in the role of being their own constitutional watchdogs.'" Pls.' Moving Mem. p. 17, n.9. Yet, that is strikingly at odds with Plaintiffs' statement that "[t]he Regents, and the SED that they oversee, are the State authorities with the expertise needed to design a constitutionally compliant education finance system. . . . this Court should defer to the SED's expertise and the Regents' judgment on what was needed to accomplish that objective." Pls.' Mem. p. 26. The Hussein concurring opinion specifically noted:

[10] Plaintiffs rely on Albany Law School v. N.Y. State Office of Mental Retardation & Developmental Disabilities, 19 N.Y.3d 106, 122 (2012), yet that case involved statutory interpretation, which is not the case here. This is not a case of evaluating the 2007 legislation to determine its constitutionality. Rather, this is a case brought under the Education Article to determine whether the current education financing statutory framework is constitutional. Further, the Albany Law School case specifically states that the statute at issue can be amended. Albany Law School, 19 N.Y.3d at 123. Here, Plaintiffs take the opposite approach, and claim that the legislature had no authority to amend the education financing statutes once it enacted the 2007 legislation. The other cases relied on by Plaintiffs are also inapposite as they all concern the interpretation of current, effective statutes. None involve a review of the legislature's intentions in enacting past legislation that has since been amended, and none involve an analysis of the constitutionality of current legislation.

> If we declare that a sound basic education consists only of what the Legislature and Executive dictate, the scope of the State's constitutional duty under the Education Article and, conversely, the scope of the constitutional rights of our schoolchildren, is limited to what those branches say it is. Abandoning CFE I would not only entrust the Legislature and Executive with the decidedly judicial task of interpreting the meaning of the Education Article but cast them in the role of being their own constitutional watchdogs. . . . Our system of separation of powers does not contemplate or permit such self-policing, nor does it allow us to abdicate our function as "the ultimate arbiters of our State constitution" . . . .

Hussein, 19 N.Y.3d at 903 (footnote omitted). The Court of Appeals' repeated, well-established assertion that the courts maintain the responsibility for making constitutionality determinations eviscerates Plaintiffs' position that this Court should abdicate its role to the Executive and Legislature, and allow the mere enactment of legislation to serve as an unmovable constitutional determination.

Finally, even if Plaintiffs were correct and the 2007 legislation was intended to provide the minimum funding necessary to provide an opportunity for a sound basic education, there is no rational basis for Plaintiffs' position that those amounts represented an unyielding constitutional baseline. If, as Plaintiffs argue, the 2007 legislature was able to determine the cost of providing a constitutionally sufficient education, then subsequent legislatures enjoyed the same freedom to make their own determinations. Those later funding decisions are entitled to the same deference and presumption of constitutionality. See LaValle, 98 N.Y.2d at 161. Nonetheless, despite Defendants' showing that the 2007 Legislature could not preclude later repeal, amendment, or modification of the 2007 legislation, Plaintiffs' papers utterly fail to refute this logic that mandates the dismissal of their claims. See Defs.' Mem. pp. 27-28. Accordingly, Plaintiffs' First and Second Causes of Action must be dismissed.

III. THE COURT CANNOT EVALUATE FUNDING PROVISIONS PIECEMEAL.

A. School Districts Receive Billions of Dollars in Education Funding Outside of Foundation Aid.

As demonstrated in Defendants' cross-motion papers, education financing provisions, including legislation concerning Foundation Aid, cannot be evaluated in a vacuum. Defs.' Mem. pp. 23-24, 30-40. An Education Article claim requires an analysis of the funding system as a whole. Therefore, Plaintiffs' claims that the State has violated the Education Article simply based on allegations that the State has not funded Foundation Aid at the levels contemplated in 2007 must be dismissed.

Plaintiffs make the outrageous statement that "the only funding component that is constitutionally relevant, and thus relevant for this Motion, is funding generated and allocated by the core Foundation Aid Formula . . ." See Pls.' Mem. p. 23. Plaintiffs ask this Court to parse out individual funding provisions and evaluate them in isolation, ignoring the billions of dollars provided by the State, as well as by local and federal sources, outside of Foundation Aid. Plaintiffs offer no logical explanation as to why, after bringing this action claiming that education is underfunded, this Court should only look at a portion of the funding available, as opposed to analyze all funding provided for educational purposes. Their refusal to consider significant sources of funding at the State, local, and federal level defies logic and precedent. See CFE III, 8 N.Y.3d at 24, n.3 (noting that the funding increase would come from "state, local and federal sources").

Plaintiffs argue that "all of the other funding categories, as well as federal aid, were for purposes that were 'above and beyond' or 'outside of Foundation Aid' . . . i.e., not centrally related to sound basic education needs" (Pls.' Mem. p. 31), yet they offer no support for that position. Plaintiffs do not offer any evidence that the billions of dollars in aid provided outside

of Foundation Aid do not support educational needs, nor do they offer proof that all aid must come from Foundation Aid. Instead, Plaintiffs take the absurd position that the $45 billion provided to districts for education outside of Foundation Aid in the 2013-14 school year (as compared with the $15.177 billion in Foundation Aid) is worthless and inconsequential.[11] Essentially Plaintiffs' position is that if Foundation Aid was funded at the levels contemplated in 2007, school districts could forego the approximately $45 billion they receive from other sources, and still be adequately funded. That irrational position cannot sustain Plaintiffs' claims.

Remarkably, Plaintiffs concede that there were some aspects of the 2007 legislation that were not tied to the constitutional standard or the CFE holdings. Pls.' Mem. p. 23. Yet Plaintiffs seek to have this Court implement that legislation on the premise that it is the intractable constitutional minimum. It is unclear whether Plaintiffs are retreating from that position, or whether they have now decided to arbitrarily pick and choose which aspects of that litigation they would like this Court to forcibly implement. Regardless, funding must be analyzed as a whole, and thus Plaintiffs' claims narrowly based on a subset of funding must be dismissed.

B. Plaintiffs Cannot Maintain Their Claims Seeking to Invalidate Specific Statutes.

As discussed above and in Defendants' cross-motion papers, the education financing system must be reviewed as a whole. Plaintiffs cannot ask this Court to nullify statutory provisions that could lessen funding, while disregarding those parts of the financing system that increase funding.

Plaintiffs acknowledge that this Court must give deference to the legislature's actions. Pls.' Mem. pp. 26, 33. They acknowledge that they cannot sustain their claim if the State's

[11] In 2013-14, total funding for education amounted to approximately $60.188 billion, of which $15.177 billion was Foundation Aid. See Conroy Aff. ¶ 15 (citing http://www.oms.nysed.gov/faru/Profiles/profiles_cover.html); Defs.' Mem. p. 12; https://www.budget.ny.gov/pubs/archive/fy1314archive/enacted1314/2013-14NewYorkStateSchoolAidPrograms.pdf.

funding methodology is rational. Yet, Plaintiffs apply those standards solely to the 2007 legislation. Pls.' Mem. p. 26. They ask this Court to defer to the State and its agencies with respect to the 2007 legislation, but not with respect to subsequent legislation enacted, and currently in effect, including the gap elimination adjustment, the allowable growth amount, the legislation concerning the implementation of Annual Professional Performance Reviews (APPRs), and the "property tax cap." Plaintiffs do not offer any legitimate rationale why the Court should offer enhanced deference to past legislation, yet not offer that same deference, or even any deference, to current, effective legislation.

Plaintiffs argue that Foundation Aid is the only relevant funding source when evaluating whether the State is meeting its constitutional obligations, and that all other financing statutes are immaterial. Pls.' Mem. pp. 30-32. For example, Plaintiffs argue that "increases in local revenues in recent years are . . . immaterial." Pls.' Mem. p. 32 (citation omitted). Yet, at the same time, Plaintiffs ask this Court to invalidate the property "tax cap" solely on the basis that it could affect local funding.[12] Plaintiffs cannot have it both ways. They cannot ask this Court to evaluate Foundation Aid to the exclusion of all other aid, while at the same time assert claims attempting to invalidate other statutory provisions that allegedly could affect education aid, including aid from sources other than the State.[13] That inconsistent, illogical position cannot salvage their First or Second Cause of Action.

The same is true for Plaintiffs' challenges to other statutes, including the gap elimination adjustment, the allowable growth amount, and the conditions concerning the implementation of Annual Professional Performance Reviews (APPRs). As Plaintiffs acknowledge, a statute is

[12] Plaintiffs do not assert any arguments, much less provide any proof, concerning the "property tax freeze credit" (N.Y. Tax Law § 606(bbb).

[13] Plaintiffs' position also ignores the fact that Foundation Aid takes into consideration local revenues by subtracting the anticipated local contribution from the district's adjusted foundation cost. See Shippee Aff. ¶ 11; N.Y. Educ. L. § 3602(4)(a).

presumed constitutional unless there is no set of circumstances under which the statute could be valid, and the statute's invalidity is proven beyond a reasonable doubt. See Defs.' Mem. pp. 30-31 (citing cases); Pls.' Mem. p. 38. And Defendants' papers highlighted the fundamental flaw with Plaintiffs' attempt to parse out individual statutes rather than view the education financing system as a whole. See Defs.' Mem. p. 37 ("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"); See also CFE III, 8 N.Y.3d at 24, n.3 (noting that funding must be measured by considering State, local, and federal sources).[14] Therefore, Plaintiffs' opposition is insufficient to overcome Defendants' cross-motion.

IV. PLAINTIFFS CANNOT SUSTAIN AN EDUCATION ARTICLE CLAIM WITHOUT PROVING EDUCATIONAL DEFICIENCIES ON A DISTRICT-BY-DISTRICT BASIS AND THUS PLAINTIFFS' CLAIMS PREMISED SOLELY ON THE 2007 LEGISLATIVE GOALS MUST BE DISMISSED.

The premise of Plaintiffs' action, specifically the First and Second Causes of Action, is that this Court can adjudicate the issue of the State's compliance with the Education Article merely by looking at the 2007 legislation, without any evaluation of the educational opportunities provided to students. Plaintiffs' position is that the educational opportunities provided to schoolchildren are immaterial, and this Court has no obligation to evaluate them. According to Plaintiffs, even if the educational opportunities in all 700 districts in the State are sufficient, the mere fact that the districts are not receiving the exact amount contemplated in 2007 from the State (regardless of whether they are receiving that amount from other sources), is

[14] Similarly, adopting Plaintiffs' logic that Foundation Aid is the only relevant funding source, if the legislature enacted a budget such that Foundation Aid was increased to well over the amounts contemplated in 2007, yet left the gap elimination adjustment intact, Plaintiffs would have no basis to their claims concerning the constitutionality of the gap elimination adjustment.

all that matters. This is incorrect. As made clear in Defendants' papers, an Education Article claim cannot proceed without evidence of deficiencies in inputs and outputs, on a district-by-district basis, and evidence showing a causal connection between those deficiencies and the funding system as a whole. Defs.' Mem. pp. 23-24 (citing cases). Plaintiffs attempt to short-circuit these requirements in violation of Court of Appeals precedent. Specifically, Plaintiffs argue that because the Court of Appeals has not specifically foreclosed such claims, they should be allowed to proceed (and prevail on summary judgment), even though no court has ever allowed a case of this scope to proceed. Plaintiffs are incorrect.

Plaintiffs unsuccessfully attempt to distinguish N.Y. Civ. Liberties Union v. State, 4 N.Y.3d 175 (2005), which mandates the dismissal of their claim. In that case, the Court of Appeals reiterated that "a cause of action may be stated under the Education Article when the State fails in its obligation to meet minimum constitutional standards of educational quality" and that "[f]undamentally, an Education Article claim requires two elements: the deprivation of a sound basic education, and causes attributable to the State." N.Y. Civ. Liberties Union, 4 N.Y.3d at 178-179. Here, where Plaintiffs assert claims unrelated to educational quality, their claims cannot survive summary judgment.

In addition, Plaintiffs completely disregard the fact that N.Y. Civ. Liberties Union v. State holds that Education Article claims must be brought on a district-by-district basis. N.Y. Civ. Liberties Union, 4 N.Y.3d at 182 ("a claim under the Education Article requires that a district-wide failure be pleaded."). Plaintiffs also ignore the Third Department's decision in State Ass'n of Small City School Districts, Inc. v. State of N.Y., 42 A.D.3d 648, 651-52 (3d

Dept. 2007), which is binding on this court.[15] The Small City School Districts case affirmed the dismissal of an Education Article claim, relying on Paynter and CFE II for the principle that:

> To state such a cause of action, plaintiffs must allege, "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."

State Ass'n of Small City School Districts, Inc, 42 A.D.3d at 652 (citing Paynter, 100 N.Y.2d at 440; CFE II, 100 N.Y.2d at 909-18). While the operative complaint in Small City School Districts alleged deficiencies in educational quality and resources, it did not include factual allegations specific to the four school districts represented by the plaintiffs. The court stated:

> Further, even where--as here--deficiencies in both inputs and outputs are alleged, the allegations must demonstrate that plaintiffs are harmed by some district-wide failure. . . . Without factual data or statistical support specifically pertaining to the four remaining districts, or other information regarding whether these districts are actually experiencing the problems reflected by the aggregate statistics, it is impossible to determine whether the remaining plaintiffs are actually aggrieved.

Id. This directly refutes Plaintiffs' position that no specific data pertaining to any district is necessary to prevail on their claim, and that this case can proceed on a statewide basis.

Plaintiffs seize on the language from Paynter v. State of N.Y., 100 N.Y.2d 434 (2003), which stated that "in CFE I we addressed the sufficiency of the pleadings then before us and had no occasion to delineate the contours of all possible Education Article claims." Yet in Paynter, the Court of Appeals affirmed the dismissal of the complaint, because the Education Article "creates a right to adequate instruction and facilities" and the plaintiffs' theory in that case had "no relation to the discernible objectives of the Education Article." Paynter, 100 N.Y.2d at 442.

[15] Where there is no contrary First Department authority, precedent in other departments in the State is binding on all New York trial courts. See People v. Turner, 5 N.Y.3d 476, 482 (2005); D'Alessandro v. Carro, 123 A.D.3d 1, 6 (1st Dep't 2014) ("where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals").

Here, Plaintiffs' theory narrowly concerns a very specific subset of State education funding, with no established relationship to the educational opportunities provided to students. Yet, the Education Article concerns the educational opportunities provided to students; it does not mandate specific amounts of funding. The contours of an Education Article claim are quite clear: plaintiffs must establish a district-wide failure to provide minimally adequate educational services and a causal connection to the education financing system. Here, where Plaintiffs fail to do so, their claims cannot survive.

V. PLAINTIFFS CONCEDE THAT THERE IS NO BASIS FOR THEIR THIRD CAUSE OF ACTION.

Defendants cross-moved for summary judgment dismissing Plaintiffs' Third Cause of Action, which claims that the State has violated the Education Article by failing to implement measures concerning services, guidance, and accountability to school districts and schools. Defs.' Mem. pp. 44-48. Plaintiffs concede that the Court of Appeals in CFE III held that the State's accountability mechanisms were adequate, and that regular cost studies and new accountability measures were not required, mandating the dismissal of the Third Cause of Action. See Pls.' Mem. p. 44; see also CFE III, 8 N.Y.3d at 32.

While Plaintiffs admit that the State's system for accountability was upheld as constitutional in CFE III, they argue that because the current system is not identical, it must be found unconstitutional. Pls.' Mem. p. 44. However, Defendants submitted uncontroverted proof that the State's accountability measures are more rigorous than they were at the time of CFE.[16] See Defs.' Mem. pp. 46-47; Schwartz Aff. ¶¶ 2-26; Coughlin Aff. ¶¶ 3-12. Without any evidence submitted by Plaintiffs to the contrary, the Third Cause of Action must be dismissed.

[16] Incomprehensibly, Plaintiffs' brief asserts that: "The State's copious regulations 'exceed notions of a minimally adequate or sound basic education,'" but complain that the State does not "differentiate which of those regulations are constitutionally required, and which are not." Pls.' Mem. p. 46 (citing CFE I, 86 N.Y.2d at 317 and Schwartz Aff. ¶ 2).

Remarkably, while Plaintiffs concede that the State has no legal obligation to implement ongoing constitutional review systems, they argue that New York should implement such a system in order to serve as an "education system role model." Pls.' Mem. p. 44. That baseless argument makes clear that this action is not meant to address any purported constitutional violation, but is merely a lobbying effort to implement education reform policies properly left to the elected branches. Plaintiffs' attempt to lobby through litigation is inappropriate and should not be countenanced by this Court.

Finally, Plaintiffs' attempt to have this Court force the State to micromanage education and budgetary policy for all approximately 700 school districts as contemplated by the Third Cause of Action is not only impractical, but is contrary to the principle of local control enshrined in this State. As the Court of Appeals held in Bd. of Educ., Levittown Union Free School Dist. ("Levittown") v. Nyquist, "[a]ny legislative attempt to make uniform and undeviating the educational opportunities offered by the several hundred local school districts . . . would inevitably work the demise of the local control of education available to students in individual districts." 57 N.Y.2d 27, 46-47 (1982). The Levittown court recognized that "[f]or all of the nearly two centuries that New York has had public schools, it has utilized a statutory system whereby citizens at the local level, acting as part of school district units containing people with a community of interest and a tradition of acting together to govern themselves, have made the basic decisions on funding and operating their own schools." Id. (quoting amicus brief of school districts). Plaintiffs' Third Cause of Action attempts to diminish that local control, and accordingly, it must be dismissed for that reason as well.

VI. PLAINTIFFS, INCLUDING INTERVENOR-PLAINTIFF THE CITY OF YONKERS, DO NOT HAVE CAPACITY OR STANDING TO MAINTAIN THIS ACTION.

Defendants' cross-motion papers demonstrated that Plaintiffs lack standing and capacity, and that any claim challenging the educational opportunities provided in a district in which no individual plaintiff resides must be dismissed for lack of standing. Defs.' Mem. p. 49. Plaintiffs' only argument in opposition is that these issues were already decided on Defendants' motion to dismiss and Yonkers's motion to intervene. However, those decisions are on appeal to the Appellate Division, First Department. The need for clarity from the Appellate Division underscores the necessity of a stay of any decision on this motion pending a ruling from the Appellate Division.

With respect to standing, Plaintiffs have not met their burden in proving that they have standing to bring this claim. Specifically, they offer no proof of any harm (i.e., a lack of educational opportunities), nor do they offer any legal or factual basis for their attempt to challenge educational opportunities provided in districts where no plaintiff resides. Therefore, they cannot defeat Defendants' cross-motion for summary judgment dismissing all challenges to the educational opportunities in the districts where no individual plaintiff resides.

With respect to Yonkers's lack of capacity, Yonkers argues that this Court should defy the Court of Appeals' ruling in City of N.Y. v. State of N.Y., 86 N.Y.2d 286, 291 (1995). In City of N.Y. (a case consolidated with CFE prior to its dismissal), the Court of Appeals held that a municipality cannot sue the State challenging the constitutionality of the State's education financing system. While there is an exception where the challenged legislation affects the municipality's proprietary interest in a specific fund of money, the Court of Appeals found that

the exception does not apply where a municipality merely seeks a greater portion of funds than the Legislature appropriates for public education. Id.

Yonkers, however, seeks to invoke this exception, which has already been rejected in a nearly identical situation by both the Court of Appeals and the Westchester County Supreme Court. 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).[17] Yonkers does not argue, nor could it argue, that these cases have been overturned or are no longer good law. Instead, Yonkers attempts to rationalize its unsupportable position by arguing that this binding precedent is inapplicable because it "pre-date[s] the passage and implementation of the 'gap elimination adjustment.'" Yonkers Opp. ¶ 6. That position essentially would have this Court ignore all controlling case law where there is intervening legislative action. Yet, basic legal principles set forth by the Court of Appeals are applicable to subsequently enacted statutes. To hold otherwise would wreak havoc on the doctrine of stare decisis, and cause courts to rehear cases, and reestablish fundamental principles, year after year after each annual budget is passed. Instead, it is the courts' function and responsibility to apply the principles set forth by the Court of Appeals concerning capacity to the current statutory framework. Specifically, here, neither Yonkers, nor any other school district, is entitled to any specific funds beyond what is authorized in the effective statutes.

In addition, the "proprietary interest" exception is used only in limited circumstances where the municipality's right to the funds are "unconditional and absolute" under the current statutory framework. County of Rensselaer v. Regan, 173 A.D.2d 37, 40 (3d Dep't 1991), aff'd 80 N.Y.2d 988 (1992). Here, Yonkers is not entitled to any specific funds because the gap elimination adjustment is lawfully enacted legislation, and it represents a fluctuating amount

[17] Yonkers does not attempt to distinguish that opinion.

depending on numerous formulae, including the Foundation Aid formula, the number of students, the makeup of the student body, and the resources available. See In The Matter of Bd. of Ed. of the Roosevelt Union Free Sch. Dist. v. Bd. of Trustees of the State Univ. of N.Y., 282 A.D.2d 166 (3d Dep't 2001) ("Even though the Charter Schools Act contemplates that the State will initially fund money to the District which, in turn, will distribute it to the Academy Charter School depending on the number of students enrolled in that school, we find nothing in this funding mechanism which creates a proprietary interest in the District to a specific sum of money where none otherwise existed.") (citation omitted). Therefore, Defendants' cross-motion for summary judgment dismissing Intervenor-Plaintiff Yonkers' claims must be granted.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Defendants' moving papers, Defendants respectfully request that the Court Defendants' cross-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, together with such other and further relief as it deems just and proper.

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