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

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

Plaintiffs,

-against-

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

Defendants.

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

Hon. Manuel Mendez, J.S.C.

**DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT**

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Defendants the State of New York, Governor Andrew M. Cuomo, the Board of Regents, and John B. King, Jr., Commissioner of Education and President of the University of the State of New York, respectfully submit this reply memorandum of law in further support of their motion to dismiss this action.

## PRELIMINARY STATEMENT

As demonstrated in Defendants' moving papers, Plaintiffs' claims fail as a matter of law because (1) Plaintiffs lack capacity and standing to bring this suit on a statewide basis; (2) Plaintiffs fail to state a claim under the Education Article (Article XI, section 1 of the New York Constitution) because they do not allege a failure to provide an opportunity for a sound basic education (including allegations of deficient inputs and outputs) on a district-by-district basis, nor do they allege that any educational deficiencies were caused by the funding system; (3) the Court does not have the authority to order the Executive or the Legislature to implement specific budgetary measures; (4) Plaintiffs may not bring this action to enforce the CFE holdings (Campaign for Fiscal Equity v. State, 86 N.Y.2d 307 (1995) ("CFE I"); Campaign for Fiscal Equity v. State, 100 N.Y.2d 893 (2003) ("CFE II"); and Campaign for Fiscal Equity v. State, 8 N.Y.3d 14 (2006) ("CFE III")); and (5) Plaintiffs cannot assert a cause of action based on their request for the provision of specific educational services. Plaintiffs' opposition papers do not offer any legitimate refutation of those defects mandating the dismissal of their claims. Instead, they mischaracterize the issues in this action and on this motion, while disregarding governing legal standards and controlling precedent.

In their amended complaint and in their opposition papers, Plaintiffs ignore the fundamental principle that the Education Article requires the State to provide students with an opportunity for a sound basic education – it does not require the State to provide a specific

amount of funding. New York precedent clearly establishes that to state a claim under the Education Article, Plaintiffs must allege facts concerning the educational opportunities provided to students, including inputs, such as teacher qualifications, supplies, and curricula, and outputs, such as graduation rates and test scores. If the educational opportunities are sufficient, then there is no constitutional violation, irrespective of the funding system. Further, the law is clear that Plaintiffs cannot assert a claim without alleging facts concerning the educational opportunities available to students on a district-by-district basis. Thus, where Plaintiffs attempt to assert a statewide challenge, they must allege deficiencies in educational opportunities provided to students in each of the almost 700 individual districts in the State. Here, where Plaintiffs disavow their obligation to plead educational deficiencies on a district-by-district basis, and choose to rely solely on allegations concerning funding, their claims cannot survive.

Further, in order to state a claim, Plaintiffs must allege that purported educational deficiencies are caused by the funding system. This requires an analysis of funding from all sources – State, federal, and local. Here, where Plaintiffs choose to rely exclusively on State foundation aid and ignore all other funding sources, a causal link has not been alleged, and Plaintiffs' claims are insufficient as a matter of law. Indeed, even apart from the causation requirement, where Plaintiffs style their case as an inadequate funding claim, Plaintiffs' failure to allege deficiencies in total funding mandates the dismissal of their claims.

Finally, Plaintiffs admit that under separation of powers principles, deference must be given to budgetary decisions made by the executive and legislative branches, and their actions are presumed to be constitutional. Yet Plaintiffs request that this Court defer only to the legislative action taken in enacting the 2007 Budget and Reform Act, and not afford deference to subsequent budgetary or education financing legislation, which defies logic and is contrary to

established precedent. Accordingly, as set forth in Defendants' moving papers and below, Plaintiffs' amended complaint must be dismissed.

## ARGUMENT

### I. PLAINTIFFS HAVE NOT MET THEIR BURDEN TO ESTABLISH THAT THEY HAVE CAPACITY AND STANDING TO MAINTAIN THIS ACTION

Plaintiffs bear the burden to show that they have standing to maintain this action. See N.Y. State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004); Uhlfelder v. Weinshall, 47 A.D.3d 169, 181 (1st Dep't 2007). Yet they utterly fail to do so here.

In opposition to Defendants' showing that they lack standing and capacity to bring this suit, Plaintiffs' sole argument is that because the individual Plaintiffs have capacity to sue, NYSER is able to maintain this action. That argument completely misses the mark, and conflates the two separate requirements that Plaintiffs demonstrate both capacity to sue and injury-in-fact sufficient to confer standing. See Graziano v. County of Albany, 3 N.Y.3d 475, 479 (2004) ("Without both capacity and standing, a party lacks authority to sue."); Soc'y of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 773 (1991) ("The requirement of injury in fact for standing purposes is closely aligned with our policy not to render advisory opinions.").

The law of this State is clear that in order to state an injury under the Education Article, Plaintiffs must establish denial of the opportunity for a sound basic education on a district-by-district basis. N.Y. State Ass'n of Small City School Dists., Inc., 42 A.D.3d 648, 651-652 (3d Dep't 2007). Although Plaintiffs have brought an action challenging the educational opportunities provided to students in each and every school district in New York State, Plaintiffs do not have capacity or standing to bring a statewide action asserting constitutional violations in each and every district. While the named individual Plaintiffs may have capacity and standing to challenge the educational opportunities provided in the nine districts where their children attend

public school, their standing is limited to those particular districts.[1] There are no plaintiffs with standing to challenge the remaining districts in the State, and thus the educational opportunities provided in those districts cannot be challenged.[2]

Plaintiffs argue that NYSER has standing in every school district in New York where its members have standing. Pls.' Mem. p. 6. Indeed, those are the **only** districts in which Plaintiffs could possibly have standing. Plaintiffs then attempt to make the leap that because one of NYSER's members is the New York State PTA, which "is a statewide organization of hundreds of thousands of parents, teachers, administrators, students, and other child advocates in approximately 1600 local units and councils," and because parent and student members have standing, NYSER has standing to represent those individuals in each district where they are located. Id. (citing Am. Compl. ¶ 5(j)). Yet, Plaintiffs do not provide the names of those individuals, nor do they provide information identifying the particular school district or districts in which they are located. See Dental Soc. of New York v. Carey, 61 N.Y.2d 330, 339-340 (1984) (finding that establishment of standing is not a "technicality" to be "palmed off" and holding that plaintiff must establish standing "factually and specifically" and not in a "conclusory or speculative" manner). Bare statements that there are unidentified parent and student members of an organization who potentially have standing to sue based on educational

[1] Plaintiffs do not dispute that school boards and school districts themselves do not have capacity to maintain this action, and thus challenges to the educational opportunities provided in those districts which are only represented by such entities cannot be heard.

[2] Plaintiffs' citation to this Court's decision in Aristy-Farer v. State (which has been consolidated with this action), is unavailing. While this Court declined to dismiss Plaintiffs' claims in Aristy-Farer, in that action, the claims related solely to funding to the New York City School District, and the plaintiffs resided in New York City. That action did not involve a plaintiff from one district attempting to challenge the educational opportunities provided in another district. That decision is currently on appeal to the Appellate Division, First Department.

opportunities in undisclosed districts are insufficient to meet Plaintiffs' burden of establishing standing.[3]

Further, even if NYSER included individual members from every school district in the State, in order to meet their burden of demonstrating standing, Plaintiffs must allege that they have suffered an injury-in-fact that is different from that of the public at large. See N.Y. State Ass'n of Nurse Anesthetists, 2 N.Y.3d at 211; Transactive Corp. v. N.Y. State Dep't of Social Services, 92 N.Y.2d 579, 587 (1998); Rudder v. Pataki, 246 A.D.2d 183, 185 (3d Dep't 1998), aff'd 93 N.Y.2d 273 (1999).[4] Plaintiffs have not met that burden. Plaintiffs do not allege facts showing that they have suffered harm. While Plaintiffs claim that they have pled adverse effects on school children represented by NYSER and its members across the state, that assertion is belied by the amended complaint, which merely contains generic, conclusory allegations concerning unidentified school districts. Even where the allegations reference a specific district, they only name five districts, ignoring the remaining 99% of districts in the State. There is not one specific factual allegation concerning the remaining approximately 695 school districts in the State, including the Wyoming Central, Middletown Enlarged City, William Floyd, Spencer-Van Etten Central, or Hermon-Dekalb Central school districts, attended by individual Plaintiffs or their children. Accordingly, Plaintiffs have not established standing, and their claims must be dismissed.

[3] Plaintiffs' citation to CFE is inapt. In CFE, the plaintiffs only challenged the educational opportunities provided in the New York City School District. The plaintiffs included individual students who attended New York City public schools and their parents. Therefore, the same issues were not present there. Here, the individual Plaintiffs only have standing to challenge the educational opportunities provided in their individual districts.

[4] Plaintiffs rely on Dental Soc'y of State of N.Y. v. Carey, 61 N.Y.2d 330, 334 (1984), yet that holding reiterates the proposition that for an association to have standing to sue, some of its members must have standing, which requires allegations of an adverse effect. In Dental Soc'y, the association challenged a Medicaid dental fee reimbursement schedule. The association represented nearly every dentist in the State, including those who were Medicaid providers. Thus, the individual members had capacity and standing to challenge the reimbursement schedule and maintain the entire action. In contrast, here, while some individual members of NYSER may have capacity and standing to sue challenging the educational opportunities provided in their particular districts, they do not have standing to maintain a statewide action, and thus cannot confer such standing on NYSER to maintain such an action.

## II. PLAINTIFFS FAIL TO STATE AN EDUCATION ARTICLE CLAIM

As demonstrated in Defendants' motion to dismiss, Plaintiffs do not assert a viable Education Article challenge because they do not allege facts showing deficient educational opportunities provided to students on a district-by-district basis. In response, relying upon inapposite cases from other states, Plaintiffs argue that they are not obligated to assert such educational deficiencies, because this is a statewide challenge to the State's education financing system. Plaintiffs' arguments fail.

### A. Plaintiffs Cannot State A Claim For A Violation Of The Education Article Merely By Asserting Generic Allegations Concerning State Education Funding

#### 1. The Court of Appeals Has Made It Clear that Courts May Not Review Funding In the Absence of a Demonstration of Gross and Glaring Deficiencies in Educational Opportunities.

New York law is clear that to state an Education Article claim, Plaintiffs must demonstrate that "through some 'gross and glaring inadequacy' in their schools, students are being deprived of their right to a 'sound basic education.'" N.Y. State Ass'n of Small City School Dists., Inc., 42 A.D.3d at 651-652 (citing Paynter v. State of N.Y., 100 N.Y.2d 434, 439 (2003)); Board of Educ., Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 27, 48 (1982)). To state a cause of action under the Education Article, 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." Paynter, 100 N.Y.2d at 440. A complaint which merely alleges reductions in financing, without alleging educational deficiencies, cannot proceed. See id.; Levittown, 57 N.Y.2d at 48-49; CFE I, 86 N.Y.2d at 319. Plaintiffs do not point to any other standard for asserting such an action, nor could they.

Yet in their opposition, Plaintiffs completely disavow their obligation to plead deficiencies in inputs and outputs. Those words do not appear even once in Plaintiffs' opposition papers. The New York Court of Appeals has been clear: Plaintiffs cannot establish a violation of the Education Article without showing deficiencies in inputs and outputs. Id. Allegations about funding are not enough, and Plaintiffs' generalized allegations are particularly insufficient, especially in contrast to the allegations deemed sufficient to state an Education Article claim by the Court of Appeals and the Third Department. See CFE I, 86 N.Y.2d at 318-19 (finding plaintiffs stated a claim where they asserted "fact-based claims" supported by specific allegations of "inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books, etc."); CFE II, 100 N.Y.2d at 932 (noting that plaintiffs prevailed because of "a unique combination of circumstances: New York [City] schools have the most student need in the state and the highest local costs yet receive some of the lowest per-student funding and have some of the worst results. Plaintiffs in other districts who cannot demonstrate a similar combination may find tougher going in the courts"); Hussein v. State of N.Y., 81 A.D.3d 132, 136 (3d Dep't 2011), aff'd 19 N.Y.3d 899 (2012) (allowing claim to proceed where the complaint was "replete with detailed data allegedly demonstrating, among other things, inadequate teacher qualifications, building standards and equipment, which illustrate glaring deficiencies in the current quality of the schools in plaintiffs' districts and a substantial need for increased aid"). Plaintiffs' failure to plead facts demonstrating "gross and glaring" deficiencies in educational inputs and outputs mandates the dismissal of their claims.

### 2. Plaintiffs Must Set Forth Factual Allegations Demonstrating a Failure to Provide an Opportunity For a Sound Basic Education on a District-by-District Basis

In their opposition, in an attempt to evade their pleading obligations, Plaintiffs argue that they may make a statewide Education Article challenge without asserting factual allegations of educational deficiencies on a district-by-district basis because they bring this action to challenge the statewide education financing formula. Plaintiffs' position that they have filed this action to "compel the Legislature to fulfill its constitutional obligation to provide sufficient funding to provide the opportunity for a sound basic education statewide" (Pls.' Opp. p. 11) ignores the fact that in order to state such a claim, they must first allege that the opportunity for a sound basic education is not being provided statewide by showing deficiencies in each and every district. Because the public education system in this State is organized into local school districts which make the basic decisions on the operation of schools, and because State funding is determined on a district-by-district basis, "challenges to the adequacy of the funding scheme have been limited to the quality of education provided by a particular district." N.Y. State Ass'n of Small City School Dists., Inc. v. State of N.Y., 21 Misc. 3d 1117(A) (Sup. Ct. Albany Cty. 2006), aff'd 42 A.D.3d 648, 650 (3d Dep't 2007) (citing N.Y. Civil Liberties Union, 4 N.Y.3d at 182).

Plaintiffs' position is directly contradicted by the case law. This same issue was decided in the State's favor in N.Y. State Ass'n of Small City School Dists., Inc. ("Small Cities"), in which the Appellate Division for the Third Department affirmed the dismissal of an amended complaint asserting Education Article violations where the plaintiffs failed to allege a district-wide failure to provide a sound basic education for any particular district in which plaintiffs had standing to sue. The Third Department held that in order to state a claim under the Education Article, plaintiffs must allege harm caused by a "district-wide failure" for each particular district

on which plaintiffs base their claim. N.Y. State Ass'n of Small City School Dists., 42 A.D.3d at 651-52 (citing N.Y. Civ. Liberties Union v. State of N.Y., 4 N.Y.3d 175, 181-182 (2005) ("a claim under the Education Article requires that a district-wide failure be pleaded")). In particular, Plaintiffs must allege factual data, statistical support, or other information concerning each specific district and the harm they allegedly experienced. Id.

In Small Cities, even though the amended complaint alleged deficiencies in the quality of teaching, facilities, and resources in small city school districts, which resulted in poor outputs, such as low test results and low high school completion rates, and that such failings were caused by the funding system, the court still affirmed the dismissal of the amended complaint because it failed to include factual allegations specific to the four school districts represented by the plaintiffs with capacity and standing. The court held that "even where . . . deficiencies in both inputs and outputs are alleged, the allegations must demonstrate that plaintiffs are harmed by some district-wide failure." N.Y. State Ass'n of Small City School Dists., Inc., 42 A.D.3d at 652 (citing N.Y. Civ. Liberties Union, 4 N.Y.3d at 181-182). "Without factual data or statistical support specifically pertaining to the four remaining districts [where plaintiffs reside], 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.

Contrary to Plaintiffs' erroneous claim that Defendants did not cite case law for the proposition that Plaintiffs must plead specific harms on a district-by-district basis (Pls.' Opp. p. 10), Defendants cited extensive precedent for that proposition, including the Small Cities case. See Defs.' Mem. pp. 16-17; see also N.Y. Civ. Liberties Union, 4 N.Y.3d at 181-182 ("a claim under the Education Article requires that a district-wide failure be pleaded"); CFE II, 100 N.Y.2d

at 928 ("Given all of the jurisprudential constraints discussed above, we begin our review of the trial court's directives by rejecting the provision that the remedy be statewide, and that variations in local costs be taken into account. Courts deal with actual cases and controversies, not abstract global issues, and fashion their directives based on the proof before them."). Plaintiffs fail to distinguish these cases, and instead merely state that those cases did not seek statewide relief. However, that merely highlights the impropriety of Plaintiffs' attempt to assert a statewide claim and Plaintiffs' inability to seek statewide relief without pleading specific facts concerning each and every district in the State. In fact, Plaintiffs acknowledge that the Small Cities case was dismissed because "plaintiffs failed to include any factual allegations concerning any of the school districts in which they had standing." Pls.' Opp. p. 10, n.7. Plaintiffs' attempt to relieve themselves of their obligation to plead district-specific facts concerning educational deficiencies is contrary to New York State law.

In an apparent recognition of the fact that their claims fail under the law of New York State, Plaintiffs cite case law from other states. See Pls.' Opp. pp. 10-12. Yet those cases do not support Plaintiffs' position either.

First, where, as here, there is controlling precedent from this State mandating the dismissal of Plaintiffs' claims, such precedent must be followed. See, e.g., People v. Turner, 5 N.Y.3d 476, 482 (2005); Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 664-665 (2d Dep't 1984) ("The Appellate Division is a single State-wide court divided into departments for administrative convenience and, therefore, the doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule.") (internal citations omitted); People v. Anderson, 151 A.D.2d 335, 338 (1st Dep't 1989) (same); Slattery v. City of New

York, 179 Misc. 2d 740, 751 (Sup. Ct. N.Y. Cty. 1999) ("the decisions of the courts of other States, interpreting their own statutes and ordinances, do not bind the courts of New York in interpreting New York State and local laws"). The courts of other states simply cannot control where New York State law is clear on an issue.

Second, the cases Plaintiffs cite do not support their arguments. Specifically, Plaintiffs rely on Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979), which was brought by five students in public schools in Lincoln County in West Virginia on behalf of themselves and as a class action on behalf of other students in that county's school system. Contrary to Plaintiffs' argument, it was not a statewide challenge. As such, it supports the proposition that education challenges must be brought on a localized basis.

Plaintiffs also rely on Leandro v. State, 488 S.E.2d 249 (N.C. 1997), which merely highlights the insufficiencies of Plaintiffs' amended complaint. In Leandro, students from school systems in five counties and their parents or guardians brought an action alleging that they were denied equal and adequate rights to education. The plaintiffs alleged that children in their districts were not receiving sufficient education to meet the minimal standard for a constitutionally adequate education, due to a lack of resources caused by the funding system in place. Leandro, 488 S.E.2d at 252. The plaintiffs asserted specific factual allegations concerning inputs including class sizes, teacher salaries, "inadequate school facilities with insufficient space, poor lighting, leaking roofs, erratic heating and air conditioning, peeling paint, cracked plaster, and rusting exposed pipes[,]. . . . sparse and outdated book collections, and [a] lack [of] technology." Id. They also alleged specific deficiencies in outputs like college admission test scores, yearly aptitude test scores, and end-of-grade test scores showing failures in

basic subjects. Id. No similar allegations are present here, making Plaintiffs' silence on these issues glaring.

While Plaintiffs argue that the Leandro court looked at North Carolina's funding system, they fail to recognize the fact that just because a challenge requires an analysis of the state's funding system does not mean Plaintiffs can assert a statewide challenge. In Leandro, the plaintiffs' claims survived because of the detailed factual allegations concerning the provision of educational services in the plaintiffs' individual districts.[5] Any analysis of other districts was in the context of evaluating the plaintiffs' equal protection claim. A court analyzing an equal protection claim must necessarily look to other districts, yet such a claim is not at issue in this case. Thus, Leandro does not support Plaintiffs' position.[6]

Finally, the language Plaintiffs cite from Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989) concerning class actions is inapposite. Defendants did not move to

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[5] Further, in allowing the plaintiffs' complaint to go forward, the North Carolina court recognized that its role was limited under separation of powers principles:

> We acknowledge that the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education. The members of the General Assembly are popularly elected to represent the public for the purpose of making just such decisions. The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants.
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> In conclusion, we reemphasize our recognition of the fact that the administration of the public schools of the state is best left to the legislative and executive branches of government. Therefore, the courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education. A clear showing to the contrary must be made before the courts may conclude that they have not. Only such a clear showing will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education.

Id. at 254-55, 261.

[6] Similarly, in Lobato v. People, 218 P.3d 358, 374 (Colo. 2009), the plaintiffs alleged that the state's education financing system was unconstitutional because it was underfunded and disbursed funds on an irrational and arbitrary basis. Under Colorado precedent, the court had the responsibility to review the funding scheme to determine whether the system was rationally related to the General Assembly's constitutional mandate to provide a "thorough and uniform" system of public education. That standard is inapplicable here, and does not support the argument that Plaintiffs can abdicate themselves from the responsibility of establishing district-wide deficiencies to state a claim of a violation of the Education Article of the New York Constitution.

dismiss on the basis that Plaintiffs' claims cannot continue unless they are certified as a class, and case law cited by Plaintiffs concerning class actions is irrelevant. Further, in Rose, the Kentucky Supreme Court reviewed a ruling where the constitution required the state to provide an equal and efficient education. As such, the decision focuses on inefficiencies and disparities between districts, two standards which are not at issue here, and which necessarily require a broader approach. Moreover, the court issued its decision after a trial in which the plaintiffs presented evidence of deficiencies in the education provided to students in districts across the state, including curricula and achievement test scores, taking note of the fact that Kentucky ranked 40th in the country in the area of per pupil expenditures. Rose, 790 S.W.2d at 197. This is in stark contrast to New York, which currently spends more money per pupil than any other state in the country,[7] and to Plaintiffs' refusal to present facts showing deficiencies in any inputs or outputs into specific school districts.

Thus, Plaintiffs cannot assert that students statewide are being denied an opportunity for a sound basic education unless they show that statewide, in each and every district, educational inputs and outputs are so deficient that they deprive students of their constitutionally mandated right. Because Plaintiffs fail to do so, their amended complaint must be dismissed.

### B. Plaintiffs Fail to Allege Facts Showing A Causal Link Between Any Educational Deficiencies And The Funding System

Just as Plaintiffs refuse to comply with their obligation to plead educational deficiencies on a district-by-district basis, Plaintiffs renounce their obligation to plead causation. To state a claim under the Education Article, Plaintiffs must allege that the purported failure to provide an opportunity for a sound basic education, as shown by deficient inputs and outputs, is causally connected to the education funding system. See Paynter, 100 N.Y.2d at 440; CFE I, 86 N.Y.2d

[7] See Public Education Finances: 2012, Governments Division Reports (May 2014), http://www2.census.gov/govs/school/12f33pub.pdf, Table 8.

at 318 ("plaintiffs will have to establish a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children."). Plaintiffs refuse to do so, merely claiming that they do not need to plead causation on a district-by-district basis. But Plaintiffs do not even allege causation on a statewide basis. Thus, even under their own misguided principles, Plaintiffs' claims fail.

While Plaintiffs argue that their amended complaint contains allegations concerning harm caused by the funding system, Plaintiffs only cite to seven paragraphs in their amended complaint, all of which offer non-specific, conclusory allegations concerning generic harms purportedly suffered by unidentified students in unidentified districts. See, e.g., Am. Compl. ¶ 23 ("plaintiffs have been injured by the defendants' failure to provide . . . the opportunity for a sound basic education"); ¶ 79 ("all school districts in the state have been detrimentally affected by these cuts"); ¶¶ 83-84 (alleging that unidentified school districts, excluding many of the districts where Plaintiffs reside, are "unable to . . . provide their students with the opportunity for a sound basic education"). Plaintiffs do not offer non-conclusory factual allegations establishing a causal link between any alleged harm and the funding system.[8]

Further, Plaintiffs completely ignore their obligation to allege facts concerning the total funding provided to the districts at issue, as opposed to just State foundation aid, nor do they respond to Defendants' assertion that a failure to allege such facts mandates the dismissal of the amended complaint. See Defs.' Mem. pp. 24-26; see also In re UBS AG Secs. Litig., 2012 U.S. Dist. LEXIS 141449 (S.D.N.Y. Sept. 28, 2012) (recognizing that a party "concedes through silence" arguments by its opponent that it fails to address); First Capital Asset Mgmt., Inc. v.

[8] Plaintiffs' arguments concerning the heightened pleading standard are misplaced. Defendants are not attempting to hold Plaintiffs to a heightened pleading standard under CPLR 3016. Rather, Defendants have demonstrated that Plaintiffs have not met the pleading standard as set forth in the relevant case law interpreting Education Article claims such as those brought by Plaintiffs here.

Brickellbush, Inc., 218 F. Supp. 2d 369, 392-393 & n.116 (S.D.N.Y. 2002) (considering an argument not addressed in opposition brief to be waived). Nor do Plaintiffs address the fact that New York spends more money per pupil on education than any other state in the nation. See Defs.' Mem. pp. 7-8.[9]

Plaintiffs attempt to bring this action as an "inadequate funding" claim, yet they disregard total funding from all sources outside of State foundation aid. Thus, even under Plaintiffs' own theory of their case, their claims cannot survive due to the incompleteness of the facts alleged, and Plaintiffs' narrow focus on one sole source of education aid to the exclusion of all other aspects of education funding. Plaintiffs do not present any factual allegations concerning total funding to any district, nor does their amended complaint present facts concerning aid from the multiple sources beyond State foundation aid. Accordingly, Plaintiffs' claims must be dismissed.

### C. Plaintiffs' Attempts to Nullify Specific Budgetary Statutes Must Be Rejected

Plaintiffs ask this Court to order the implementation of the budget amounts contemplated in the 2007 Budget and Reform Act by striking down subsequent legislative enactments which cause, or could potentially cause, education funding to deviate from those amounts, specifically: (1) the gap elimination adjustment set forth in N.Y. Education Law § 3602(17); (2) the allowable growth amount for School Aid increases set forth in N.Y. Education Law § 3602(1)(dd); (3) the requirements regarding increases in local property tax levies set forth in N.Y. Education Law § 2023-a; and (4) the aid withholding provisions of L. 2012, ch. 57, Part A, § 1 and L. 2013, ch. 57, Part A, § 1.[10] Even if this Court had the authority to order such relief, which the Court of

[9] See also Public Education Finances: 2012, Governments Division Reports (May 2014), http://www2.census.gov/govs/school/12f33pub.pdf, Table 8.

[10] Plaintiffs' opposition papers do not address the aid withholding provisions, which were the subject of a motion to dismiss in Aristy-Farer v. State of New York, Sup. Ct., N.Y. County, Index No. 13-100274, which has been

Appeals has made clear it does not (Defs.' Mem. pp. 27-33), Plaintiffs still cannot state a claim with respect to any of the challenged statutes. "Legislative enactments enjoy a strong presumption of constitutionality" and thus "parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt.'" LaValle v. Hayden, 98 N.Y.2d 155, 161 (2002) (internal citations omitted). "Only as a last resort will courts strike down legislative enactments on the ground of unconstitutionality." Schultz Management v. Bd. of Standards and Appeals of City of N.Y., 103 A.D.2d 687, 689 (1st Dep't 1984) (citing Sgaglione v. Levitt, 37 N.Y.2d 507, 515 (1975)); see also Matter of State of N.Y. v. Enrique T., 93 A.D.3d 158, 167 (1st Dep't 2012) ("Facial invalidation is an extraordinary remedy and generally is disfavored"). Plaintiffs' attempts to nullify these statutes merely because they affect education funding fall far short of their heavy burden.

Plaintiffs cannot state a claim asserting the unconstitutionality of statutes without showing that the statutes have harmed Plaintiffs. Plaintiffs, however, do not allege that any of these four statutes have caused educational deficiencies. See Defs.' Mem. pp. 30-33. Plaintiffs attempt to refute that fact by citing three paragraphs of the amended complaint (see Pls.' Opp. pp. 13-14), but the cited allegations are wholly conclusory, and Plaintiffs cannot meet their pleading obligation by stating legal conclusions, such as that the statutes at issue "deny students the resources necessary to provide them the opportunity for a sound basic education." That is insufficient as a matter of law. See Niagara Mohawk Power Corp. v. State, 300 A.D.2d 949, 952 (3d Dep't 2002) ("More is needed to state a claim, however, than factual allegations which are conclusory, vague or inherently incredible"); Quatrochi v. Citibank, N. A., 210 A.D.2d 53 (1st

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consolidated with this action. This Court denied the State's motion to dismiss in that action and the matter is on appeal to the Appellate Division, First Department. Defendants repeat and adopt the arguments for the dismissal of claims related to those provisions which were asserted in their motion to dismiss the Aristy-Farer amended complaint and their motion to dismiss this action.

Dep't 1994) ("Although on a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and accorded every favorable inference, nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration.").

With respect to the Education Law "property tax cap," Plaintiffs do not address the fact that it is not a "hard cap" on local funding, nor does it apply to the four districts (New York City, Yonkers, Syracuse, and Rochester) for which there is a representative plaintiff and for which there are any factual allegations – however insufficient – concerning the provision of educational opportunities. See Defs.' Mem. p. 30; see also N.Y. Educ. Law § 2023-a(2)(h); Am. Compl. ¶ 193(f) (recognizing that the "tax cap" does not apply to the New York City, Yonkers, Rochester, or Syracuse districts). Given that the amended complaint does not contain factual allegations concerning the educational opportunities provided in any district where the "property tax cap" applies, much less showing that any deficient opportunities are caused by the statute, Plaintiffs have not stated a claim challenging that statute under the Education Article.

Nor do Plaintiffs address the fact that the statutorily calculated personal income growth index has been exceeded for the past two budgets and thus is not currently impacting Plaintiffs in any way. See Defs.' Mem. pp. 31-32. Again, Plaintiffs premise their challenge on the erroneous presumption that the 2007 goals are the benchmark from which funding cannot deviate, without alleging any educational deficiencies or harm suffered as a result of the allowable growth amount.

Similarly, Plaintiffs do not address their failure to allege facts showing that the gap elimination adjustment has caused any educational deficiencies in any district. Instead, Plaintiffs

challenge the gap elimination adjustment merely because it reduces State foundation aid below the amounts contemplated by the 2007 Budget and Reform Act. In doing so, however, Plaintiffs make the baseless assumption that the payment of those amounts was constitutionally necessary, despite the fact that this Court must presume that the gap elimination adjustment is constitutional. Further, Plaintiffs completely disregard their obligation to consider the total funding provided to any challenged district. Defs.' Mem. pp. 32-33. For example, the amended complaint is silent as to whether the individual Plaintiffs' districts, or any other districts, received contributions from other sources that mitigated the reductions of the gap elimination adjustment, although they acknowledge that federal funding made up for most of the decreases experienced in the years following the 2008 economic downturn. See Am. Compl. ¶¶ 47, 51. Plaintiffs' opposition papers are similarly silent. The mere fact that the gap elimination adjustment resulted in a deviation from the 2007 State foundation aid goals is inadequate to state a claim because the Court in CFE III never determined that the 2007 foundation aid formula was the minimum amount of aid required for a sound basic education. Plaintiffs do not allege that the gap elimination adjustment, when analyzed together with funding from all sources, has caused inadequacies in inputs and outputs in districts statewide that are so severe they deprive students of the opportunity for a sound basic education. Accordingly, Plaintiffs' claims must be dismissed.

## III. PLAINTIFFS CONCEDE THAT THIS COURT MUST GIVE DEFERENCE TO THE ELECTED BRANCHES AND PRESUME THAT THEIR ACTIONS ARE CONSTITUTIONAL

In asking this Court to nullify statutes related to school funding, Plaintiffs' claims fail because, as they concede, the Court must defer to the Legislature's judgment in determining budgetary matters. Plaintiffs admit that "[i]t is within the purview of the Legislature, not the

courts, to make determinations with respect to appropriations and funding." Pls.' Mem. p. 19.[11] Remarkably, Plaintiffs then ask this Court to exercise the requisite deference to the 2007 Budget and Reform Act, yet abandon that deference when reviewing subsequent legislative or executive determinations concerning budgetary or education matters. That argument is illogical and contrary to established law. All budgetary decisions are the prerogative of the Executive and the Legislature, not solely the budgetary decisions favored by Plaintiffs.

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

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

Larabee v. Governor of the State of N.Y., 2014 N.Y. App. Div. LEXIS 5169, at **17-18 (1st Dep't July 10, 2014) (citing Matter of Maron v. Silver, 14 N.Y.3d 230 (2010)).

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

[11] See also Pls.' Mem. in Opp. to Defs.' Motion to Dismiss Aristy-Farer, p. 6, n.1 ("the legislature's appropriation decisions last year allow the court to render a prompt remedy in this case without the need to consider the extensive budgetary issues and possible separation of powers issues that might properly arise in a case that involved broader claims."); Baker, Al, "Lawsuit Challenges New York's Teacher Tenure Laws," N.Y. Times, at p. A14 (July 4, 2014) ("'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' counsel in this action]. 'Even if a court agrees there is a problem, they are more likely to defer to the legislative branch . . . .'").

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

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

provided by statute or charter provisions, one county legislature may not bind the hands of its successors in areas relating to governmental matters").

The Zarb Commission, and Standard and Poor's, calculated the cost of providing an opportunity for a sound basic education (CFE III, 8 N.Y.3d at 21-24); none of the legislation at issue constitutes a recalculation of the minimum amount constitutionally necessary. Rather, the amounts in the 2007 Budget and Reform Act and the subsequent legislation reflect the political determination of that particular enacting Legislature and Governor as to how much, for policy purposes, they would and could provide for education consistent with the Education Article. To the extent Plaintiffs argue that the 2007 legislation represented a new minimum determination by the Legislature, then subsequent Governors and Legislatures would have an equal right to make their own determination, and all would be presumed to have acted constitutionally. Plaintiffs' argument that the Legislature, without a new costing-out study, determined the precise amount necessary to provide the opportunity for a sound basic education and that subsequently the Legislature (along with the Governor) is without authority to amend or alter that determination, is simply contrary to law.

In deceptively claiming that the 2007 Budget and Reform Act was ordered by the Court of Appeals in CFE, Plaintiffs ignore the absence of any such language in the Court of Appeals' decisions. Plaintiffs also disregard the Court of Appeals' rejection of the trial court's efforts to itself establish the minimum amount of aid necessary, finding it inappropriate under separation of powers principles. CFE III, 8 N.Y.3d at 27 ("The role of the courts is not, as Supreme Court assumed, to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State's proposed calculation of that cost is rational."). Courts must assume that that the Legislature intended to enact a statute which was in harmony

with the Constitution. See People v. Epton, 19 N.Y.2d 496, 505 (1967); see also LaValle v. Hayden, 98 N.Y.2d 155, 161 (2002). Here, Plaintiffs subvert that assumption, and essentially argue that any contemplated increase in education funding constitutes a recalculation of the constitutional minimum, and any subsequent delay or decrease in funding is an intentional decision by the Legislature to fund schools below the constitutional minimum. This is not only illogical, but it is in contravention of established Court of Appeals precedent. See CFE III, 8 N.Y.3d at 27 (rejecting Appellate Division's order directing payment of $4.7 billion, the amount approved by then-Governor Pataki, finding that that "amounted to a policy choice to exceed the constitutional minimum."); id. at 33 (Rosenblatt, J., concurring) ("[j]udging 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.").

The Legislature's enactment of all statutes must be afforded deference and presumed constitutional, including the gap elimination adjustment, the "property tax cap," the allowable growth amount, and the withholding of an increase in funding for failure to implement a required performance evaluation system. Plaintiffs do not plead facts sufficient to assert a constitutional challenge to these statutes, or any other legislation, under the Education Article, and accordingly, their claims must be dismissed.

## IV. PLAINTIFFS CANNOT BRING THIS ACTION TO ENFORCE CFE

Plaintiffs cannot bring this action to enforce CFE. First, Plaintiffs have simply failed to overcome Defendants' demonstration that they cannot bring this action as a CFE compliance action because Plaintiffs seek statewide relief and the CFE action related only to New York City. See Defs.' Mem. pp. 34-36. Further, the CFE holdings concerned the New York City School

District at a specific point in time. Different plaintiffs from different districts, and New York City plaintiffs from a different time period, cannot initiate a new, separate action seeking enforcement of a declaratory judgment issued eight years ago stemming from a trial that occurred fourteen years ago relating to the quality of education at that time. See CFE II, 100 N.Y.2d at 902. Plaintiffs do not allege that the educational opportunities now are the same as they were then, and any conclusory suggestions to that effect are not entitled to the assumption of truth on a motion to dismiss. See Quatrochi, 210 A.D.2d at 53. While the Court of Appeals' CFE decisions provide precedent for this Court to follow in analyzing Education Article claims, they do not provide a separate cause of action.

Instead, Plaintiffs posit that the 2007 Budget and Reform Act was a "CFE compliance plan," enacted by the Legislature to comply with its constitutional obligations as set forth in CFE. But this claim fails. In CFE, the plaintiffs challenged the educational opportunities provided to students in New York City, and obtained 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. Id. at 930. Within weeks after that decision, "Governor Pataki issued an executive order creating the New York State Commission on Education Reform [known as the "Zarb Commission"], 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.

Based on the analysis conducted by S&P, the Zarb Commission recommended "$2.5 to $5.6 billion from State, local, and federal sources" as the additional amounts necessary to

provide the minimum funding across New York State to provide the opportunity for a sound basic education. Id. at 24, n.3. 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." Id. at 24. The Court of Appeals agreed that Governor Pataki'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." Id. at 31. Incomprehensibly, Plaintiffs argue that "Defendants do not, and cannot, state that the Court of Appeals established $1.93 billion as the additional funding required to bring New York City schools into constitutional compliance." In fact, Defendants have stated that proposition, because that is precisely what the Court of Appeals did in CFE III. [12]

The Court of Appeals recognized that the approved amount for New York City set a floor for funding, and it was expected, although not required, that legislation would surpass this minimum. Indeed, the Court of Appeals noted that "Governor Pataki's proposal to provide $4.7 billion in additional funding amounted to a policy choice to exceed the constitutional minimum." Id. at 27. The concurring opinion similarly stated:

[12] Plaintiffs attempt to avoid dismissal by claiming that any dispute over whether the amounts contemplated by the 2007 Budget and Reform Act constituted a calculation of the cost of providing an opportunity for a sound basic education is a factual dispute inappropriate for adjudication on a motion to dismiss. That argument is misguided. As a matter of law, as declared by the Court of Appeals in CFE III, the funding necessary to provide students in New York City with a sound basic education was an additional $1.93 billion of operating funds, adjusted for inflation since 2004. As such, Plaintiffs cannot attempt to create a factual dispute as to whether the amounts aspired to in the 2007 Act were a calculation of the cost of providing a sound basic education; the Court of Appeals in CFE III did not determine that the State foundation aid is required to provide a sound basic education or that the amounts aspired to in the 2007 State foundation aid formula are constitutionally required. Further, even if it were a factual dispute, Plaintiffs' failure to make allegations concerning total education funding, including funding from all sources (State, federal, and local), and their failure to allege facts showing district-by-district educational deficiencies, mandates the dismissal of their claims. See supra Part II(A).

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

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

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

The Court of Appeals in CFE III did not direct the Executive and Legislative branches to pass the 2007 Budget and Reform Act, nor did it direct the passage of any specific legislation concerning education funding. Nonetheless, it explicitly declared that "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" and a proposal to provide additional funding is "a policy choice to exceed the constitutional minimum." Id. at 27. Plaintiffs'

argument that "[t]he court did not purport to set the minimum level of required funding" is wrong. That is exactly what the Court of Appeals did.[13]

After the Court of Appeals approved the amounts calculated by the Zarb Commission, it did not direct the State to recalculate the cost the cost of providing students in New York City or statewide with an opportunity for a sound basic education. Instead, the Court of Appeals declared that $1.93 billion in additional funding was necesary for New York City, while explicitly recognizing that the Governor and the Legislature could, and likely would, go above the constitutional minimum. Hence, the 2007 Budget and Reform Act was not a "CFE compliance plan" and Plaintiffs cannot legitimately assert a claim based on any deviation from the education funding amounts contemplated by that Act.

In any event, even if Plaintiffs were somehow permitted to assert a claim for enforcement of the CFE declaratory judgment, i.e., that by varying from the 2007 Budget and Reform Act, the State has not complied with the CFE III declaration that $1.93 billion in additional operating funds was necessary for New York City, Plaintiffs have failed to state a claim. First, as set forth in Part III, if this Court affords deference to the Legislature's enactment of the 2007 Budget and Reform Act as satisfying the State's constitutional obligations, then it must similarly give deference to other subsequent legislative enactments as intending to satisfy the State's constitutional obligations.

Further, Plaintiffs have not asserted factual allegations showing that New York City did not receive the required funding amount when taking into account operating funds received from

[13] In Plaintiffs' erroneous interpretation of the CFE III holding, Plaintiffs acknowledge, as they must, that the Court specifically stated: "[w]e declare that the constitutionally required funding for the New York City School District includes . . . additional operating funds in the amount of $1.93 billion." Pls.' Mem. pp. 17-18. Plaintiffs highlight the word "includes" as if to imply that more was actually necessary, even though the Court of Appeals did not hold that anything further was necessary, and in fact specifically modified the First Department's holding that a higher amount was necessary.

all sources (state, federal, and local), as the CFE holdings dictate. CFE III, 8 N.Y.3d at 24, n.3; CFE II, 100 N.Y.2d at 904, 940, 955. In fact, as Plaintiffs admit, total funding for New York City public schools has significantly increased since that time. Am. Compl. ¶ 61. Since 2004, when the Zarb Commission issued its recommendation for additional funding to provide the opportunity for a sound basic education in New York State, education funding in New York City from all sources has increased by at least $8.5 billion in absolute dollars.[14]

Plaintiffs do not allege that this $8.5 billion increase was insufficient to provide New York City with the additional $1.93 billion in operating funds in 2004 dollars as required by CFE III.[15] Plaintiffs focus solely on deviations from the 2007 Budget and Reform Act amounts, and specifically on foundation aid, and have utterly failed to set forth factual allegations regarding other education funding streams, including from local and federal sources, as well as from other State aid programs. In the absence of allegations demonstrating that school funding from all sources is not sufficient to meet the State's constitutional obligation to provide the opportunity for a sound basic education, the claim fails. Accordingly, Plaintiffs fail to state a claim that Defendants did not comply with CFE.

## V. THE THIRD CAUSE OF ACTION FAILS TO STATE A CLAIM AND SHOULD BE DISMISSED

Plaintiffs' Third Cause of Action does not allege educational deficiencies or inadequate education funding; it asserts that "the State has failed to, among things, "[i]dentify the essential

[14] The State Education Department's Fiscal Profiles report that the New York City School District's total revenues (including non-operating funds) from State, local and federal sources amounted to approximately $14.4 billion in the 2003-04 school year. See http://www.oms.nysed.gov/faru/documents/webMasterfile0304.xls. The District's total revenues (including non-operating funds) had grown to approximately $22.9 billion by the 2012-13 school year. See http://www.oms.nysed.gov/faru/Profiles/26thMasterfileforweb.xlsx. That number is undoubtedly higher today. See http://schools.nyc.gov/AboutUs/funding/overview/default.htm. Therefore, New York City's total revenues from State, local and federal sources has increased by over $8.5 billion (not adjusted for inflation) since 2004.

[15] Plaintiffs' opposition papers explicitly state that "Plaintiffs' Amended Complaint rests not on the proposed funding plan considered in CFE III . . . ." See Pls.' Opp. p. 16.

course of study and types of service, supports and resources that must be available to meet constitutional requirements" and notify school districts of their responsibility to do so. Am. Compl. ¶ 195(a)-(f). There is no constitutional basis for this unprecedented attempt to micromanage the manner in which educational services are delivered, and the Third Cause of Action must be dismissed.

In opposition, Plaintiffs contend that the arguments supporting dismissal are premature because this requested provision of services is a remedy more appropriately addressed later in the litigation. Pls.' Opp. p. 20. However, Plaintiffs' argument ignores the fact that the failure to deliver these services is asserted as a separate cause of action in their amended complaint, and thus is the proper subject of a motion to dismiss.

Plaintiffs admit that in CFE III, the Court of Appeals found the State's accountability measures sufficient. They further admit that the State has continually augmented its accountability measures since that decision. And Plaintiffs admit that the Court of Appeals explicitly held that New York State is not obligated to continually perform studies to assess the cost of providing the opportunity for a sound basic education. See Pls.' Mem. pp. 21-22; see also CFE, 29 A.D.3d at 191; CFE III, 8 N.Y.3d at 32 (affirming the Appellate Division's decision to strike the "Supreme Court's call for state costing-out studies every four years").[16] Plaintiffs have simply failed to cite any basis for a claim asking the Court to micromanage the oversight of educational services under the Education Article.[17] Moreover, as stated in the

[16] 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 and requirement that the New York City Department of Education prepare a comprehensive "sound basic education" plan, to ensure accountability).

[17] Plaintiffs' citation to two cases for the general proposition that courts may order injunctive relief tailored to remedy the harms identified in the case before it is of no effect. See Pls.' Mem. pp. 19-20. As an initial matter,

motion to dismiss, while the State does not have a constitutional obligation to do so, it already provides substantial educational and fiscal guidance to the State's school districts. Defs.' Mem. pp. 38-40. Accordingly, the Third Cause of Action must be dismissed.

## CONCLUSION

For the foregoing reasons, and for the reasons stated in their moving papers, Defendants respectfully request that this Court dismiss the amended complaint, with prejudice, together with such other and further relief as it deems just and proper.

Dated: New York, New York
September 12, 2014

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Plaintiffs are required to first demonstrate harm, which they fail to do. Further, neither case cited by Plaintiffs involved a challenge to a budgetary provision or to legislation duly enacted by the elected branches. 829 Park Ave. Corp. v. LaBruna, 486 N.Y.S.2d 7 (1985) (issuing injunction concerning dentist operating his practice out of his residential apartment); Reynolds v. Giuliani, 43 F. Supp. 2d 492 (S.D.N.Y. 1999) (modifying injunction concerning corrective action plan and stating that "[c]onsiderations of federalism preclude unnecessary intrusions on managerial prerogatives of local governments.").