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

MIRIAM ARISTY-FARER, JACQUELINE COLSON, MONA DAVIDS, NICOLE JOB, FATIMAH MOHAMMED, HECTOR NAZARIO, CHRIS OWENS, SAM PIROZZOLO, PATRICIA PADILLA, EETIAH FRANCOIS SANDLER, and ROBERT JACKSON, Plaintiffs, vs. THE STATE OF NEW YORK, ANDREW M. CUOMO, as Governor of the State of New York, and JOHN B. KING, Jr. as President of the University of the State of New York, Defendants	INDEX NO.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR REQUEST FOR AN ORDER TO SHOW CAUSE AND A PRELIMINARY INJUNCTION

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Preliminary Statement And Factual background

At issue in this case is a state statute that imposes on the plaintiffs and the approximately one million other students attending public schools in New York City a $250 million penalty because officials of the New York City Department of Education ("DOE") and the United Federation of Teachers ("UFT") have failed to conclude an agreement related to the state's new annual professional performance review system for evaluating teachers and building principals ("APPR").[1] In order to pressure the DOE and the UFT to conclude such an agreement by January 17, 2013, the legislature enacted a penalty provision in the budget bill for the current 2012-2013 school year (L. 2012, ch. 57, Part A, § 1) ("the penalty provision"). It denies to any school district that fails to meet the deadline the full amount of its scheduled increase in basic state operating aid for the current school year. Because New York City failed to conclude an agreement with the UFT by the stated date, the state is now preparing to reduce its state aid payments to the New York City schools by $250 million. The New York City mayor and schools chancellor have announced that substantial cuts in services to students will be instituted effective February 13, 2013.

The governor's executive budget for 2013-2014 further recommends that as an "APPR past non-compliance penalty" the $250 million penalty amount be deducted from the base upon which next year's general support aid for New York City will be calculated, and that a similar amount, compounded by the value of the percentage increase allowed for general support aid in future years, be deducted from New York City's base funding amount *for all of the years thereafter*. Moreover, if the DOE and the UFT do not reach agreement on an APPR plan by September 1, 2013, the governor's executive budget calls for an additional penalty of

[1] The specific details of the APPR system and the agreements that are required are set forth in Educ. Law § 3012-c.

approximately $280 million for 2013-2014, meaning that for next year, the approximately one million students attending New York City schools will be penalized by the loss of approximately $530 million in educational services – and by similar amounts *for all the years thereafter* -- for actions or inactions of local officials and unions in which they had no involvement and for which they had no responsibility whatsoever.

The $250 million reduction in state aid for the current 2012-2013 school year must be totally absorbed during the second half of the school year. This means that funding during this period will, absent an order from this court, have an impact on student services equivalent to approximately $500 million worth of cuts on an annual basis. New York City Mayor Michael Bloomberg and Chancellor Walcott have publicly announced that this substantial reduction in funding will result, among other things, in the loss of guidance counselors and 700 teachers lines with attendant increases in class size, a reduction in opportunities to provide teachers with professional development to improve their teaching skills and to train to implement state-mandated Common Core standards, and cuts in afterschool and anti-bullying programs, pre-kindergarten special education, and test preparation , and elimination of extra-curricular student activities, such as student newspapers and chess, science, and technology clubs

Enforcement of the penalty provision would, therefore, violate the constitutional rights of the plaintiffs and the approximately one million other students attending the New York public schools to a sound basic education under Art. XI, § 1 of the New York State Constitution, as well as constitutional due process and equal protection protections. The Court of Appeals has repeatedly held in the series of *CFE v. State* litigations[2] that school funding must be based on "the actual costs of providing the opportunity for a sound basic education" and that these costs

[2] *Campaign for Fiscal Equity ("CFE") v. State of New York*, 86 N.Y.2d 307 (1996) ("*CFE I*"); *CFE v. State of New York*, 100 N.Y.2d 893 (2003) ("*CFE II*"); *CFE v. State of New York*, 8 N.Y.3d 14 (2006) ("*CFE III*").

must be calculated on the basis of student "need." Last spring the governor and the legislature provided a $250 million increase in funding for students in New York City for the current state in order to meet students' educational needs. However, now they intend to reduce the need-based amount they themselves had established by $250 million solely because of a negotiation impasse between city and union officials and not because of a change in student need.

None of essential facts discussed above and set forth in the complaint are in dispute. The core issues in this case involve the constitutionality of the penalty provisions of chapter 57 of the laws of 2012. The immediacy of the funding reductions and their impact on plaintiffs and the approximately one million other students attending New York City public schools are matters of public record which defendants cannot deny and of which the court can take judicial notice. Because of the defendants' blatant violations of plaintiffs' right to the opportunity for a sound basic education under Article XI, § 1 of the New York State Constitution and other constitutional provisions, plaintiffs are likely to succeed on the merits in this case. Certainly, the immediate, extensive reductions in educational services to approximately one million other students attending public schools in New York City will constitute a substantial, irreparable injury. And the fact that plaintiffs are being held hostage to a political battle between the state, the city and the UFT, in which they have no involvement or responsibility whatsoever, plainly tilts the balance of the equities strongly in plaintiffs' favor. Accordingly, the grounds for issuance of a preliminary injunction are clearly established in this case.

ARGUMENT

In order to obtain a preliminary injunction, plaintiffs must show a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and a balancing of the equities in their favor. *Aetna Ins. Co. v Capasso*, 75 N.Y.2d 860, 861-862 (1990). Such a

preliminary injunction may be issued to stay the enforcement of a statute challenged as being unconstitutional pending a full trial regarding its constitutionality. *Farias v. City of New York*, 101 Misc.2d 598 (Sup. Ct., N.Y. Co. 1979) (preliminary injunction issued staying on first amendment and due process grounds enforcement of statute prohibiting experienced child circus performers from performing); *Teytelman v Wing*, 2 Misc.3d 608 (Sup. Ct., N.Y. Co. 2003) (preliminary injunction issued to stay enforcement of statute that would deny food stamps to low-income aliens in a manner that plaintiffs claimed would violate federal and state equal protection provisions). Plaintiffs in this case have clearly established all three grounds for the issuance of a preliminary injunction to stay the enforcement of the penalty provision of L. 2012, ch. 57.

I. Plaintiffs Are Likely to Succeed on the Merits

A. Sound Basic Education

A decade ago, the Court of Appeals determined that Article XI, § 1 of the New York State Constitution ("the Education Article") requires the state to "ensure the availability of a 'sound basic education'" to all its students. *CFE II*, 100 N.Y.2d at 902. It further defined a "sound basic education" as one that affords "New York City schoolchildren the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants." *Id* at 908. In order to obtain such an education, the court held that students were entitled to certain essential resources such as qualified teachers, reasonable class sizes and instrumentalities of learning like libraries and computers. *CFE III*, 8 N.Y.3d at 21.

After the seven-month CFE trial, the trial court issued an extensive 117-page decision that thoroughly examined all aspects of the state's system for funding public education. The Court of Appeals affirmed and relied on the trial court's holdings concerning the requirements

for a constitutionally acceptable education finance system. The fundamental constitutional problem with New York's state aid system, the trial court concluded, was that "'resources are not aligned with need. Those schools with the greatest need frequently have the fewest fiscal resources ... . The situation in New York City illustrates this point.'" *CFE v. State of New York,* 187 Misc.2d 1, 83 (Sup. Ct., N.Y. Co. 2001). The trial court also found that even when need factors were built into various state aid formulas, the system remained flawed because the governor and the legislative leaders used various tactics to manipulate the formulas in order to serve political ends that were unrelated to student need. *Id.* at 88.

In holding that the state education finance system then in effect was unconstitutional because it failed to provide sufficient funds to students in the New York City public schools, the Court of Appeals reiterated the trial court's conclusion that the existing funding scheme was "not designed to align funding with need." *CFE II*, 100 N.Y.2d at 929. It then further emphasized the centrality of student "need" to school funding by holding that the "purposes of [state aid] reflect a recognition that inputs should be calibrated to student need…." *id.*, and that state aid must "bear a perceptible relation to the needs of City students." *Id.* at 930; *CFE III*, 14 N.Y.3d at 21.

The specific remedy that the Court ordered required the state to 1) "ascertain the actual cost of providing a sound basic education in New York City;" 2) ensure that "every school in New York City [will] have the resources necessary for providing the opportunity for a sound basic education;" and 3) "ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education." *CFE II*, 100 N.Y. 2d at 930. In other words, the state was ordered to determine the amount of money that is actually required to meet student needs, ensure that such an amount is actually provided to each school in New York

City, and then ensure that the funds are used in a manner that will, in fact, provide students the opportunity for a sound basic education.

For the current school year, the legislature appropriated a $250 increase in general support aid for the New York City schools. These funds are needed to provide essential resources to ensure that "every school in New York City [will] have the resources necessary for providing the opportunity for a sound basic education" *CFE II*, 100 N.Y.2d at 93. The imposition of a $250 million penalty that denies plaintiffs and the approximately one million other students attending New York City public schools funding that is vitally needed to provide them the opportunity for a sound basic education -- for reasons wholly unrelated to student need -- violates Art XI, §1 of the New York State constitution.

B. Substantive Due Process

The due process clause of Article I, § 6 of the New York State Constitution, "condition[s] government regulation by requiring that it not be unreasonable, arbitrary or capricious, and that the means selected have a reasonable relation to the object sought to be attained." *Rochester Gas & Elec. Corp*., 71 N.Y.2d 313, 321 (1988). *See also Fred F. French Investing Co., Inc. v. City of New York*, 39 N.Y.2d 587, 595 (1976)("Every enactment under the police power must be reasonable"); *Brightonian Nursing Home v. Daines*, 93 A.D.3d 1355, 1360 (4th Dept., 2012) (to pass muster under the due process clause, a statute must be "reasonably related to the governmental purpose"). In *CFE III*, the Court of Appeals specifically held in regard to state funding of public education that "The role of the court is…to determine whether the State's proposed calculation of [the] cost is *rational*." *Id*. at 27 (emphasis added). In its latest application of substantive due process, the Court of Appeals applied the more demanding "intermediate scrutiny" test to a substantive due process claim and held that "defendants must show that the

ordinance is 'substantially related' to the achievement of 'important' government interests." *Anonymous v. City of Rochester*, 13 N.Y.3d 35, 48 (2009) (invalidating strict nighttime curfew for juveniles).

In the present case, the court need not decide whether the due process test is a "rational" nexus between a legitimate government end and the means utilized to achieve it, or the more rigorous requirement that the government show a "substantial relationship" between the means and the end. It is clear that under either standard, the penalty provision in L. 2012, ch. 57 is invalid because it is not sensibly related to a valid governmental purpose.

The government aim that led to passage of the statute was obviously a desire to press school boards and local unions to complete negotiations on an APPR plan by January 17, 2013. Assuming that sanctions were necessary to induce the parties to meet this deadline, the state could have enacted a statute that, in the event of a failure to meet the deadline, would have authorized the commissioner of education to supersede the powers of a local school board and the unions to develop and implement such a plan, appointed mediators or arbitrators to facilitate a prompt resolution of the issues, or imposed other appropriate sanctions on the school board and/or the union.

In fact, on or about January 30, 2013, the governor announced that if the DOE and the UFT did not promptly reach agreement on an APPR plan, he would ask the legislature to empower the commissioner of education to develop an APPR plan and to impose it on the city and the union. Even if this happens, the governor reiterated that he would not ask the legislature to revoke the penalty provision. (Compl, ¶ 43).

Instead of putting school districts and unions on notice last spring that the commissioner of education would be empowered to develop and impose an APPR plan if they did not meet the

deadline, or utilizing an alternative sanction, the legislature and the governor chose to impose a harsh penalty on the approximately one million other students attending the New York City schools and/ or on students in other school districts. The one million students attending New York City public schools the ones who will now bear the brunt of $250 million cuts in educational services, even though these students had nothing to do with the negotiations. In essence, the students here are being used as pawns in a power confrontation between the state and city governments and union officials; they are unwitting victims whose vital educational interests are irrationally being forfeited as a penalty for offenses that they did not commit and for which no rational decision maker could hold them responsible.

The funding cut-off required by chapter 57 is immediate, non-revocable and non-appealable:

> Notwithstanding any inconsistent provision of law, no school district shall be eligible for an apportionment of general support for public schools from the funds appropriated for the 2012-13 school year in excess of the amount apportioned to such district for the same time period during the base year unless such school district has submitted documentation that has been approved by the commissioner of education by January 17, 2013 demonstrating that it has fully implemented new standards and procedures for conducting annual professional performance reviews of classroom teachers and building principals to determine teacher and principal effectiveness….
>
> …If any such payments in excess of the amount apportioned to such district for the same time period during the base year were made… the total amount of such payments shall be deducted by the commissioner from future payments to the school district….

L. 2012, ch. 57, Part A, § 1.

It provides no opportunity for review of the facts, settlement or agreement on voluntary compliance, consideration of extenuating circumstances, extensions of time, mediation, arbitration, or other normal due process procedures. The contrast between this arbitrary and

unreasonable statutory penalty and the (rarely invoked) procedure for cutting off federal funding to school districts that have flouted desegregation orders or otherwise violated significant federal anti-discrimination mandates is instructive.

Title VI of the 1964 federal Civil Rights Act, 42 U.S.C. § 2000d, provides a funding cut-off sanction for school districts that have discriminated on the basis of race or national origin in programs receiving federal funding. 42 U.S.C. § 2000d-1(1). On its face, the dissimilarity between the predominant reasons for the imposition of the Title VI penalty -- grave acts of racial discrimination -- and the purpose of the sanction at issue here -- to motivate school boards and unions to meet an arbitrarily determined deadline for completing negotiations on a teacher evaluation plan -- underscores the irrationality of the present penalty provision. In practice, the federal penalty provision is almost never actually invoked because Congress deliberately established a series of demanding procedural steps that the federal Department of Education or other federal agencies would need to complete before they could in fact cut off federal funding for an offending school district.

Specifically, under 42 U.S.C. § 2000d-1, before the U.S. Department of Education could actually cut off federal funding to a school district, there must be:

1. "[A]n express finding on the record, after opportunity for hearing, of a failure to comply with such requirement;"

2. A determination, after conferring with the offending school district, that compliance cannot be secured by voluntary means; and

3. The federal department must "file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

42 U.S.C. § 2000d-1(2).

No such hearings, attempts at achieving compliance by other means, or filing of a report with the appropriate legislative committees are required or allowed before the penalty provision at issue here can take effect. The New York statute contains no procedure to determine why agreement was not reached by the strict deadline date, whether a short extension might allow the parties to reach an agreement, whether alternative mechanisms might be devised for developing an appropriate plan, or whether the legislature might reconsider actual imposition of such a draconian penalty if it were compelled to review the matter after New York City or any other school district actually failed to meet the deadline. The unreasonably strict liability workings of this statute, which provide no recourse before imposing harsh penalties on the innocent student victims, violates basic due process requirements.

C. Equal Protection

Under the circumstances presented here, New York State has arbitrarily created two classes of public school students. Class I consists of all students who live in school districts in which school officials and local unions have successfully negotiated APPR agreements by January 17, 2013; Class II consists of all students who live in school districts that have failed to negotiate such agreements by that date.

As far as the students are concerned, the fact that the district in which they reside falls into Class I or Class II is pure happenstance. They had no say or influence over whether their district successfully negotiated an APPR agreement, and at the time that they or their parents decided to reside in the district, they would have had no way of predicting the category into which their district would ultimately be classified. Nevertheless, those students who happen to reside in Class II school districts -- including the plaintiffs and the approximately one million other students attending the New York City public schools -- will now be deprived of substantial

educational resources and benefits that the state is providing to students who live in Class I school districts.[3]

The constitutional guarantee of equal protection is intended to keep governmental decision makers from treating differently persons who are in all relevant aspects alike. *Great Atlantic & Pacific Tea Co., Inc. v. Town of East Hampton*, 997 F.Supp. 340, 350-351 (E.D.N.Y. 1998). Certainly, students who happen to live in New York City are in all relevant aspects similar to students who happen to live in other parts of the state where the local school officials managed to negotiate an acceptable APPR agreement before the arbitrarily established deadline date. These students should not be denied the full amount of state aid to which they are entitled because of a "factor which has no significant relation …to the reason for granting the benefit." *Abrams v. Bronstein*, 33 N.Y.2d 488, 495 (1974). Although a statute may be nondiscriminatory on its face, it may be grossly discriminatory in its actual operation. *Williams v. Illinois*, 399 U.S. 235, 242 (1970); *People v. Kennedy*, 128 Misc.2d 937, 939 (Sup. Ct., N.Y. Kings Co, Criminal Term 1985). On its face, the penalty provision at issue in this case appeared to apply equally to all students in the state; as applied, however, it has unfairly penalized the approximately one million students attending the city's schools, because of circumstances wholly unrelated to any actions or inactions attributable to them, and totally without any consideration of their educational needs.

II. Irreparable Injury

[3] The penalty provision discriminated even more extensively against New York City students by making it harder for the NYC DOE and its unions to reach agreement by the deadline as compared to all other school districts in the state. L. 2012, ch. 57, Part A, § 1 states, in a provision that applies only to "a school district in a city with a population of one million or more," that the APPR agreement must include "an expeditious appeals process."

In response the mid-year cut of $250 million imposed by the penalty provision, New York City Mayor Michael Bloomberg and Chancellor Dennis Walcott have stated that, effective February 13, 2013 and for the rest of this school year, vacant teacher, guidance counselor, and other positions will not be filled, all school aides' hours will be cut, and professional development opportunities for teachers, afterschool programs, anti-bullying programs, special education pre-kindergarten, test preparation programs, and extra-curricular student activities such as student newspapers and chess, science and technology clubs will be reduced. Principals will also be required to utilize teachers from the Absent Teacher Reserve pool composed of teachers laid off from other schools rather than teachers of their own choice to fill substitute positions. The DOE also is cancelling the Deferred Planning Initiative that allowed principals to roll over money into the following school year to facilitate planning and programming stability. (Rebell Aff.¶ 6).

These substantial service reductions will have an immediate, injurious impact on the plaintiffs and the approximately one million other students attending the New York City schools, and the harms caused by these cutbacks will cumulate with every day that passes. (Rebell Aff, ¶ 7). Teacher quality will be the most immediate casualty of the resource reduction. (Rebell Aff, ¶ 8). The Court of Appeals squarely held that "The first and surely most important [educational] input is teaching." *CFE II*, 100 N.Y. 2d at 909. And, as the trial court noted, "Professional development is essential in training and maintaining qualified teachers." *CFE v. State of New York*, 187 Misc 2d 1, 31(S.Ct. N.Y. Co, 2001); *see also*, *CFE I*, 86 N.Y. 2d at 317 (students are entitled to "sufficient personnel adequately trained to teach those subject areas").

The immediate cessation of professional development activities in the city's schools will cause particularly acute problems at this time, as teachers are expected to be introducing the new

more rigorous "Common Core" curriculum in English language arts and mathematics, and students are to be tested on this Common Core curriculum in the spring. (Rebell Aff., ¶ 8). Extensive professional development, much of which has not yet taken place in New York City, is required to prepare teachers for teaching to these higher standards. (*Id*.) Reduction of school aide hours will place additional burdens on teachers, especially those with large classes, in a manner that also will affect the quality of their instruction. (*Id*.) In addition, the fact that principals will now be compelled to hire substitute teachers from the pool of individuals who were "excessed from other schools rather than substitute teachers of their choice, who meet their schools particular needs, will also detrimentally affect the quality of instruction. (*Id.*)

The mayor has estimated that approximately 700 teacher positions will not be filled over the course of this semester and that this will result in an increase in class sizes (Rebell Aff, ¶ 9). Reasonable class sizes were another essential resource emphasized by the Court of Appeals. It held that "large class sizes negatively affect student performance in New York City public schools." *CFE II*, 100 N.Y. 2d at 912. After-school programs, which are also going to be cut back, are part of the "expanded platform of programs to help at-risk students by giving them 'more time on task' that the trial court specifically held to be a mandatory resource for the New York City public schools. *CFE v. State*, 187 Misc. 2d at 114. The extracurricular activities that are being eliminated such as student newspapers and chess clubs provide important opportunities for students to learn the interpersonal and civic skills necessary for them to "function productively as civic participants." *CFE II*, 100 N.Y. 2d at 908. And the anti-bullying programs that are being reduced are critical to the "safe orderly environment" for learning that was also deemed essential by the CFE trial court, 187 Misc 2d 1, 115(S.Ct. N.Y. Co, 2001.)

In short, virtually every one of the resources and services that will be eliminated for the balance of the school year in New York City is a critical element of the right to a sound basic education as described and upheld by the Court of Appeals. Lack of adequate services, even for a short period of time, can substantially undermine a student's prospects for school success. *See, Goss v. Lopez*, 419 U.S. 565, 576 (1975 (deprivation of education "for more than a trivial period… is a serious event in the life of the …child.") Children who fail to become capable readers early in elementary school are likely never to catch up, and teenagers who become disengaged from school and drop out of high school for lack of sufficient supports will suffer life-long adverse consequences. Clearly, the deprivation of important educational services, having a cumulatively serious impact with every day that passes, will cause substantial educational injuries to plaintiffs and the approximately one million other students attending the New York City schools. And once an educational opportunity has been lost, the injury sustained can never be remedied, even if services are fully r-instated at a later date. (Rebell Aff, ¶ 10.)

III. Balance of the Equities

Simply stated, in the present case, there are no equities on the defendants' side of the ledger to balance. One the one hand, approximately one million students attending the New York City public schools will, absent a preliminary injunctive order from this court, be afflicted with substantial and continuing educational injury. On the other hand, if the preliminary injunction is issued, the State of New York and the individual defendants will suffer no harm whatsoever: the funds at issue have already been obtained, authorized, and appropriated. No funds will need to be shifted from other programs; no taxes will need to be raised. The penalty provision is not even needed to serve its stated purpose since if the DOE and the UFT do not quickly reach agreement, the state is likely to have the commissioner supersede their authority and impose an APPR plan.

The total lack of balance in the equities is actually even more askew. If an injunction is not issued, not only will plaintiffs be irreparably injured, but defendants will, in fact obtain a windfall of $250 million in unanticipated revenues to use for other budgetary purposes that they will obtain at the expense of the innocent school children. Whatever benefit the defendants may think they might achieve by setting a sanctionable deadline for negotiating APPR agreements have already been achieved or shortly will be attained. Almost all of the school districts in the state have already complied, and New York City shortly will, either through continued negotiations or through imposition of a plan developed by the commissioner.

Even if the parties do reach agreement or the commissioner does impose a solution, the governor has made clear that this year's $250 million penalty on the New York City school children will not be revoked, and that he will still ask the legislature to subtract the penalty amount from the city's base funding for next year and all years thereafter (Compl ¶ 43). If the court fails to issue a preliminary injunction and allows this penalty to stand, the net result will be not only a continuing infliction of harm on approximately one million students, but also a validation of defendants' ability to continue to utilize monetary penalties to achieve their policy goals in the future. Such an outcome would mean that students in New York City and throughout the state will be at a continuing risk of having vital educational resources denied to them at any time that the state chooses to link its sound basic education funding to deadlines it may choose to establish for achieving any policy goal.

CONCLUSION

For all the aforesaid reasons, plaintiffs respectfully request that the Court issue an Order to Show Cause, set this matter down for a hearing at the earliest possible date and issue the preliminary injunction at that time.

Respectfully submitted,

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