

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY

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NEW YORK STATE UNITED TEACHERS by its President  
RICHARD C. IANNUZZI, NAOMI AVERY, SETH COHEN,  
TIMOTHY MICHAEL EHLERS, KATHLEEN TOBIN FLUSSER,  
MICHAEL LILLIS, ROBERT PEARL as a Parent, Individually and  
on behalf of his children KYLEIGH PEARL, MICAELA PEARL,  
AVA PEARL and NOLAN PEARL, BRIAN PICKFORD,  
HILARY STRONG as a Parent, Individually and on behalf  
of her child KEVIN STRONG,

Plaintiffs

Index No.: 963-13

-against-

The STATE OF NEW YORK, ANDREW M. CUOMO  
as Governor of the State of New York, THOMAS P. DiNAPOLI  
as Comptroller of the State of New York, and JOHN B. KING, JR.,  
as Commissioner of the New York State Education Department.

Defendants.

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**BRIEF OF AMICUS CURIAE ALLIANCE FOR QUALITY EDUCATION**

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Molly A. Hunter, Esquire  
Wendy Lecker, Esquire  
EDUCATION LAW CENTER, INC.  
60 Park Place, Suite 300  
Newark, New Jersey 07102  
Telephone: (973) 624-1815  
Facsimile: (973) 624-7339

*Attorneys for Amicus Curiae  
Alliance for Quality Education  
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## INTRODUCTION

The Alliance for Quality Education ("AQE") submits this brief *Amicus Curaie* in support of Plaintiffs' opposition to Defendants' motion to dismiss Plaintiffs' Amended Complaint, in particular Plaintiff's claim under the Education Article of the New York Constitution, N.Y. Const. art. XI, §1. The Amended Complaint alleges facts demonstrating that the State's cap on raising local property tax revenue, Education Law §2023-a, et seq., prevents school districts from providing students the opportunity to achieve a sound basic education as guaranteed under the New York Constitution.

In this brief, AQE will review the seminal holdings in Campaign for Fiscal Equity v. State ("C.F.E."), and other rulings, in which the Court of Appeals established a clear substantive definition for a constitutional "sound basic education" under the Education Article. The Court also explicitly delineated the resources essential to provide a constitutional education to all New York schoolchildren. This brief also summarizes the State's major reform of school funding enacted in 2007 as the Foundation Aid Formula ("Formula"); the State's subsequent failure to provide the foundation aid required by the Formula; and the resulting negative impacts on school districts, particularly those with high enrollments of poor and at-risk children ("high need districts"). Finally, the brief describes how, in the current context of a substantial shortfall in state foundation aid under the Formula, the cap on property tax revenue challenged by Plaintiffs effectively prevents districts from raising additional local funds to provide the essential resources necessary to enable school children to achieve a sound basic education under N.Y. Const. art. XI, §1, as substantively defined in the C.F.E. rulings.

## **STATEMENT OF INTEREST OF AMICUS CURIAE**

Founded in 2000, AQE is a leading, statewide community-based organization that advocates to ensure New York public school children the opportunity for a high quality, equitable education. Specifically, AQE advocates for quality teaching for all students, sufficient and equitable resources for all schools, parent and family engagement, positive school climates, and access to, *inter alia*, high quality early childhood education, a rigorous and complete curriculum, and community schools.

AQE believes that all New York school children have a fundamental constitutional right to a sound basic education -- a meaningful high school education -- that enables them to become capable civic participants in our society and democracy. AQE, therefore, has a strong interest in a fair system of State education finance that will enable parents and communities to support their schools with adequate resources. Such a finance system is essential to afford the opportunity to achieve a sound basic education to all of New York State's public schoolchildren and ameliorate the current condition of unequal and inadequate school funding that deprives this opportunity to the State's students in violation of their constitutional rights.

## STATEMENT OF FACTS

*Amicus* adopts herein the facts in Plaintiffs' Amended Complaint which allege that the operation of the State cap of local tax revenue -- within the context of a continuing and substantial shortfall of State foundation aid -- prevents districts from providing a sound basic education to their school children, as guaranteed by N.Y. Const. art. XI, §1.<sup>1</sup> *Amicus* supplements those factual allegations as follows.

In 2007, in response to the Court of Appeals' landmark decision in Campaign for Fiscal Equity v. State, 100 N.Y. 2d 893 (2003) ("C.F.E. II"), the New York Legislature enacted a major reform of school funding by establishing the Foundation Aid Formula ("Formula"). The Formula determines the cost of providing a sound basic education to all students; establishes an overall sound basic funding target for each district based on those costs; determines the amount of local property tax revenue each district is able to contribute to its funding target, i.e. the local revenue share; and determines the amount of state foundation aid to ensure, at a minimum, districts have the resources to spend at the sound basic funding target level. See Affidavit of Dr. Bruce Baker ("Baker Aff."), ¶¶ 9-10 .

To meet the state share of supporting the districts' sound basic funding targets, the Formula required a substantial increase in state education funding, in the form of foundation aid, totaling \$7 billion. This increase was to be phased in over four years, to be completed in 2011. See Plaintiffs' Amended Complaint, ¶96.

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<sup>1</sup> On a motion to dismiss pursuant to CPLR 3211, a court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. See, e.g., Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 414 (2001); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994).

After enacting the Formula, the State provided the requisite foundation aid in 2007 and 2008, but froze the aid in 2009. The State then substantially reduced foundation aid in 2010 through 2012. Specifically, the State has failed to provide \$5.5 billion in required foundation aid and cut an additional \$2.6 billion through a mechanism called the Gap Elimination Adjustment (“GEA”).<sup>2</sup> The total shortfall of foundation aid is currently at least \$7 billion. Baker Aff., ¶12.

The State’s failure to provide foundation aid at the level required by the Formula has had a significant impact on “high-need” districts, or those districts with large enrollments of poor and at-risk students that rely heavily on the state share to support their sound basic funding target. “Low need” or more affluent districts experienced a deficit of \$1,392 per pupil between the state share of their funding target and actual foundation aid. Among “high need” districts, however, the difference was nearly three times more, or \$3,931 per pupil. Baker Aff., ¶13. A similar pattern emerges when examining districts by community wealth. The “high wealth” districts would have received \$2,330 more per pupil if the State had not failed to provide the Formula-required foundation aid, while the “low wealth” districts would have received \$4,291 per pupil more. Baker Aff., ¶14.

The impact of the reductions in state foundation aid has also caused in substantial gaps between districts’ actual spending and their sound basic funding targets, as established by the Formula, with the most acute in the higher need districts. Using average expenditure data from 2009-2011 compared to the 2010 sound basic funding targets under the Formula, low need districts spend \$1,643 more per pupil than their funding targets. In sharp contrast, the high need districts spend \$5,197 per pupil less than their funding targets. Baker Aff., ¶17. The Formula funding gaps are similar when examined based on district wealth. The high wealth districts

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<sup>2</sup> The GEA, first enacted in 2009 and made permanent in 2011, is a mechanism which reduces state school aid in order to balance the overall state budget. Education Law §3602(17).

spend an excess of \$2,966 per pupil above their Formula funding targets, while low wealth districts spend \$3,639 per pupil below their targets. Baker Aff., ¶18.<sup>3</sup>

In addition to reducing Formula funding, the State also enacted the cap on local property tax revenue that is the subject of this litigation. Education Law §2023-a. This provision restricts the ability of school districts from increasing the levy on property taxes by more than 2%. To override the 2% cap, districts must obtain approval of a supermajority, or 60%, of qualified voters. If a district presents a budget and fails to obtain a simple majority, or, in the case of a budget that exceeds the cap, a supermajority, the district has the option of resubmitting the budget. If the budget fails to be approved a second time, the district is limited to the increase approved from the previous year. Education Law §2023-a(7)-(8).

Since the tax cap was enacted in 2011, few districts have attempted to override the tax cap to secure additional revenue, and far fewer have succeeded. In 2012, only 8% of districts (53) attempted to override the tax cap. In 2013, only 27 districts, or 4% of all districts in the state attempted to override the tax cap. Of those 27 districts, only 10, or less than 2% of districts statewide, have succeeded in overriding the cap. Plaintiff's Amended Complaint, ¶¶58-59.<sup>4</sup>

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<sup>3</sup> Plaintiffs allege the State's failure to provide the foundation aid required by the Formula has triggered severe reductions in essential resources for a sound basic education, including teachers, courses, at-risk programs and other services. See Amended Complaint ¶¶102-207.

<sup>4</sup> Because of the State's failure to provide foundation aid and the 2% cap on local revenue, many superintendents have warned that their districts are facing educational insolvency in the near future. See "Can't Get There From Here," 2nd Annual Survey of New York State School Superintendents on Financial Matters, Council of New York State Superintendents, November 2012, [http://www.nycoss.org/img/news/news\\_4fuzv6ohxl.pdf](http://www.nycoss.org/img/news/news_4fuzv6ohxl.pdf)



## ARGUMENT

### **PLAINTIFFS HAVE ALLEGED SUFFICIENT FACTS TO SHOW THAT THE STATE CAP ON LOCAL REVENUE PREVENTS DISTRICTS FROM PROVIDING STUDENTS A SOUND BASIC EDUCATION UNDER ARTICLE XI, SECTION 1 OF THE NEW YORK CONSTITUTION**

In the C.F.E. rulings, the Court of Appeals not only defined the substantive right of New York school children to a sound basic education under Article XI, section 1 of the State Constitution, but also explicitly identified the essential resources necessary to enable children to achieve a constitutional education. Further, the Legislature, in the 2007 Formula, has established the minimum funding level – the sound basic funding target -- required for districts to provide a constitutional education and determined the amount of state foundation aid and local revenue needed to meet their required funding targets. As Plaintiffs allege in the Amended Complaint, and as explained below, the operation of the State 2% cap on local revenue, in the context of a substantial shortfall of Formula foundation aid, effectively prevents districts from raising additional revenue necessary to provide the essential resources for a sound basic education. Plaintiffs have, therefore, established a sufficient and cognizable claim that the cap on local revenue violates N.Y. Const. art. XI, §1 and the State's motion to dismiss should be denied.

### **A. THE COURT OF APPEALS HAS ESTABLISHED THE SUBSTANTIVE DEFINITION OF A SOUND BASIC EDUCATION AND HAS IDENTIFIED THE ESSENTIAL RESOURCES TO ENABLE STUDENTS TO ACHIEVE A CONSTITUTIONAL EDUCATION UNDER ARTICLE XI, SECTION 1 OF THE NEW YORK CONSTITUTION**

It is well established that the Education Article of the New York Constitution, N.Y. Const. art. XI, § 1, requires the State to guarantee all children a sound basic education. Campaign for Fiscal Equity v. State, 86 N.Y.2d 307, 315-19 (1995) ("C.F.E. I")(citing Board of Educ., Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 17, 48). Further, in the C.F.E. rulings,

the Court of Appeals has explicitly defined the constitutional right to a sound basic education in terms of the substantive educational skills all students must acquire, along with the essential resources necessary for students to obtain those substantive skills.

In C.F.E. I, the Court equated the skills for a constitutional sound basic education with "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." Id. at 316. The Court recognized, however, that a more explicit, substantive definition of a sound basic education is necessary, but could only be "fully evaluated and resolved" after discovery and the development of an evidentiary record at trial. Id. at 317.<sup>5</sup>

Following this fact-finding stage, the Court of Appeals established the substantive definition of a sound basic education as providing students with the skills necessary to prepare them for "meaningful civic participation in contemporary society." C.F.E. v. State, 100 N.Y.2d 893, 905 (2003) ("C.F.E. II"). Meaningful civic participation includes both participation as a citizen in the democratic process and preparation for employment. Id. at 905. Further, to ensure these substantive goals are achieved, the Court made clear that a sound basic education requires, at a minimum, a "meaningful high school education" for all students. Id. at 914.

With respect to citizenship, the Court of Appeals emphasized that mere qualification to vote or sit on a jury is insufficient. Rather, the measure of productive citizenship is voting and serving on a jury "capably and knowledgeably," that is, to have skills appropriate to the task. Id., at 906 (citing C.F.E. v. State, 187 Misc.2d 1, 14 (N.Y. County 2001)).

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<sup>5</sup> The trial in the C.F.E. litigation focused on the resource and funding deficits experienced by the 1.1 million children attending New York City public schools, the CFE Plaintiffs. C.F.E. v. State, 187 Misc. 2d 1, 20 (N.Y. County, 2001).

Regarding employment, the Court of Appeals, expressly overruled the Appellate Division's determination that students need only "the ability to get a job, and support oneself, and thereby not be a charge on the public fisc." C.F.E. v. State, 295 A.D.2d 1, 8 (1<sup>st</sup> Dep't 2002). Instead, the Court made crystal clear that a more substantive education is needed for participation in contemporary New York society. Thus, the Court held that employment "require[s] a higher level of knowledge, skill in communication and the use of information, and the capacity to continue to learn over a lifetime." C.F.E. II, at 906 (stating that the "record showed that even entry-level jobs require "applicants to have had instruction that imparts these abilities, if not a specific credential"). The Court, in firm language, left no doubt that a high school education is "all but indispensable" for a substantive sound basic education. C.F.E. II, 100 N.Y.2d at 906.<sup>6</sup>

In addition to defining the substance of a sound basic education, the Court of Appeals identified those resources essential in order for students to achieve a constitutional education. In C.F.E. I, the Court established a "template" of essential resources to guide the trial court's development of a record on the alleged constitutional deficiencies in the New York City public schools, including: 1) "minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn;" 2) "minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks;" and 3) "minimally adequate teaching of reasonably up to date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas." C.F.E. I, 86 N.Y.2d at 317.

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<sup>6</sup> The Court of Appeals also emphasized that the contemporary skills necessary for a sound basic education will change with time, and that the "definition of a sound basic education must serve the future as well as the case now before us." C.F.E. II, 100 N.Y.2d at 931.

During the C.F.E. trial, the parties presented extensive evidence on the types and extent of resources essential for a sound basic education. Using the Court of Appeal's guiding template, the trial court enumerated and explicated seven categories of essential resources, as follows:

- 1) Sufficient numbers of qualified teachers, principals and other personnel;
- 2) Appropriate class sizes;
- 3) Adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum;
- 4) Sufficient and up-to-date books, supplies, libraries, educational technology and laboratories;
- 5) Suitable curricula, including an expanded platform of programs to help at-risk students by giving them "more time on task;"
- 6) Adequate resources for students with extraordinary needs; and
- 7) A safe orderly environment.

C.F.E. v. State, 187 Misc.2d at 114-15(finding these essential resources must also be examined periodically to ensure student progress and development in future years).<sup>7</sup>

On review of these determinations, the Court of Appeals concluded that the evidential record developed by the trial court properly fleshed out its "template definition" of essential resources. C.F.E. II, 100 N.Y.2d at 902. The Court reinstated the trial court's findings of fact regarding the resources required for a sound basic education, and overruled the Appellate Division's holding that these resources were not essential because a sound basic education

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<sup>7</sup> The determinations of essential resources in the C.F.E. trial were based upon an extensive record that included teacher qualifications and labor market conditions, id. at 24-37; the alignment of textbooks to curriculum, id. at 56-60; the importance of physical education and visual and performing arts in the core curriculum, id. at 37-39; and, the critical need for programs for at-risk students, such as extended learning time, summer enrichment and early literacy programs. Id. at 76-77.

necessitated only the skills “imparted between grades 8 and 9.” C.F.E. II, 100 N.Y.2d at 913. In flatly rejecting the Appellate Division's adoption of a ninth-grade education as the substantive standard for a sound basic education, the Court of Appeals made clear that a constitutional education must provide students with a “meaningful high school education,” one that enables them to be capable and knowledgeable civic participants and secure gainful employment. C.F.E. II, 100 N.Y.2d at 908(emphasis added).

**B. THE STATE'S FAILURE TO PROVIDE THE AID REQUIRED BY THE 2007 FOUNDATION FORMULA HAS DEPRIVED STUDENTS OF THE RESOURCES DEEMED ESSENTIAL FOR A SOUND BASIC EDUCATION**

In C.F.E. II, the Court of Appeals found that the resources provided to New York City children were so grossly inadequate that it amounted to a “systemic failure” of the school funding system. C.F.E. II, 100 N.Y.2d at 914. To remedy this constitutional violation, the Court ordered the State to ascertain the cost of providing a sound basic education, and enact reforms that ensure that “every school in New York City would have the resources necessary for providing the opportunity for a sound basic education.” While limiting its remedial order to New York City, the Court noted that the “State may of course address Statewide issues if it chooses.” Id. at 928(emphasis added).

In 2007, the State recognized a constitutional sound basic education, as substantively defined in the C.F.E. rulings, extends to all school children and, accordingly, accepted the Court of Appeals' invitation in C.F.E. II to “address Statewide issues” by enacting the Foundation Aid Formula. As described in the Statement of Facts, supra, the Formula was carefully designed by the Legislature to replace the past practice of allocating state school aid based almost entirely on political considerations, rather than the needs of students to meet substantive educational goals and standards. To accomplish this objective, the Formula determined the cost of providing all

students a sound basic education in each district in the form of the sound basic funding target. The Formula then calculated the amount of state foundation aid and local revenue necessary for every district to meet that funding target. Based on the cumulative cost of the Formula's funding targets for districts statewide, the State also determined that an increase of approximately \$7 billion in foundation aid, primarily to high need districts is required to support the state share of those targets. The Formula provided for a four year phase-in of this increase in foundation aid. Consequently, under the Formula, full state funding of a sound basic education would be reached by 2011, thus satisfying the State's obligation under N.Y. Const. art. XI, §1, not only for New York City children, but for children across the State.

The State, however, failed to meet the commitment in the 2007 Formula to ensure all students the essential resources for a sound basic education through the multi-year phase-in of the increase in foundation aid. In the first two years, the Legislature properly allocated the required installments of foundation aid, totaling \$2.3 billion. In the third year, 2009, aid was frozen at 37.5% of the four-year target. In 2010 and 2011, aid was cut by \$2.7 billion, thus reducing overall foundation aid below the level in 2007 when the Formula was enacted. The State further reduced foundation aid by an additional \$2.6 billion since 2009 by enacting the GEA as a means to balance the overall State Budget.

The State's actions since 2009, as described above, have resulted in a cumulative shortfall of foundation aid in excess of \$7 billion, substantially below the levels required by the Formula. Most critically, the shortfall in foundation aid has resulted in districts receiving aid at a level far below the state share to meet the sound basic funding target established by the Formula. The lowest need districts currently have a \$1,392 per pupil deficit between the state share of the districts' funding target under the Formula and actual foundation aid. The foundation aid deficit

in the highest need districts is nearly three times greater, or \$3,931 per pupil. Thus, for many districts, particularly those classified as high need, the State's failure to provide foundation aid at the levels established by the Formula has reduced district budgets far below the funding targets set by the State as necessary to enable students to achieve the constitutionally-prescribed sound basic education.

**C. THE STATE CAP ON LOCAL REVENUE PREVENTS MANY DISTRICTS FROM PROVIDING THE RESOURCES ESSENTIAL FOR A SOUND BASIC EDUCATION AND, THEREFORE, VIOLATES ARTICLE XI, SECTION 1 OF THE NEW YORK CONSTITUTION**

In the face of a substantial shortfall in state foundation aid since 2009, local revenue from the property tax is the only other source available for districts to secure additional funds to provide the essential resources for a sound basic education. However, in 2011, the Legislature, as explained below, has effectively foreclosed that avenue by enacting the 2% cap on local revenue challenged by Plaintiffs in this action. See Education Law §2023-a.

Under the tax cap statute, districts cannot raise local revenue above the 2% cap unless there is an override vote of sixty (60) percent of qualified voters. Education Law §2023-a(6) Moreover, districts are penalized under the statute for submitting a budget that fails to win approval twice. If a local district submits a budget that does not obtain a simple majority, the district can either resubmit the budget or choose to pass a budget with no increase over the previous year's levy. If the district chooses to resubmit, and that budget fails to win a majority or a supermajority if the budget exceeds the 2% cap, then the district is prohibited from any increase in the tax levy. The supermajority requirement and the sanctions on re-submission operate to deter efforts to raise revenue above the cap, even if the district, under the Formula's spending targets, has need for essential resources to enable students to achieve a constitutional sound basic education.

In the context of the substantial reductions of state foundation aid since 2009, the 2% cap on local revenue unduly restricts the ability of districts to raise additional revenue to provide the essential resources for a sound basic education. In particular, the cap has the practical effect of preventing districts from obtaining additional and necessary local revenue, particularly the highest need districts spending below their Formula-determined funding target. Put simply, the cap creates a nearly insurmountable barrier in districts that require, under the Formula, an increase in revenue to provide the essential resources for students to achieve a constitutional education.

The 2% cap also aggravates the impact of the State's failure to provide the foundation aid required by the Formula, especially in the highest-need districts. As Plaintiffs allege in their complaint, the high-need districts have a lower tax base and less taxing capacity than low-need districts. See Amended Complaint ¶119 (comparing the impact of the tax cap on Elmira, a high-need district, to its impact on Great Neck, a low-need district).

Moreover, the 2% cap also impairs the provision of essential resources for a sound basic education through its uniform, inflexible application to all districts, without regard to current resource levels relative to the Formula's funding targets or in relation to the actual level of the state and local share available to meet that target. The rigid application of the 2% cap means that high need districts generate a much smaller amount of local revenue than wealthier districts because the local levy of a high need district is capped at a much lower level than the wealthier districts. See e.g. Statewide School Finance Consortium, State Aid Formulas & NY Senate Not Making the Grade for Our Schools, Children & Communities <http://www.statewideonline.org/conf/StateAidFormulasNY%20SenateNotMakingGradeForSchoolsChildrenCommunities120111.pdf>



Further, the inflexible operation of the 2% cap fails to recognize that wealthier districts have a greater capacity to make up for reductions in state foundation aid through increases in local revenue. Indeed, wealthier districts have a lower share of state aid, thus the loss of state aid these districts is a much smaller portion of its budget than in high need districts. See Amended Complaint, ¶121 (comparing the impact of the foundation aid shortfall on the Elmira and Great Neck school districts). As a consequence, the high-need districts have greater budgetary shortfalls under the Formula; a lower levy that generates less revenue under the cap; and much higher enrollment of at-risk students with a pressing need for those resources deemed essential to enable them to achieve a sound basic education.

As discussed in the Statement of Facts, supra, the highest-need, lowest-wealth districts currently spend significantly less than the funding targets established by the Formula for a sound basic education. Despite spending far less than the constitutional minimum, only a small portion of districts attempted to override the cap, and of those, only a tiny minority succeeded. In 2013, only 27 districts, or 4% of all school districts in the state attempted to override the cap. Of those 27 districts, only 10, or less than 2% of districts statewide, succeeded in overriding the cap.

In sum, the 2% cap on local revenue, operating in the context of substantial shortfalls in foundation aid and sizable gaps between available revenue and the Formula-established funding targets, deprives districts of the ability to raise additional local revenue to provide students the resources to deliver a sound basic education to all students. These resources have been found by the Court of Appeals to be essential to the achievement of a substantive constitutional education. Thus, the cap on local revenue, by preventing districts from raising additional revenue to provide those essential resources, violates Article XI, section 1 of the New York Constitution.

## CONCLUSION

For the foregoing reasons, *Amicus Curiae* AQE urges this Court to deny Defendants' motion to dismiss and permit this matter to proceed to adjudication of Plaintiffs' Amended Complaint. Judicial resolution of the merits of the Amended Complaint is crucial to ensuring that the substantive right of New York schoolchildren to the opportunity to achieve a sound basic education under Article XI, section 1 of the New York Constitution, remains prominent and fully protected.

EDUCATION LAW CENTER, INC.

By: 

Molly A. Hunter, Esquire  
Wendy Lecker, Esquire  
60 Park Place, Suite 300  
Newark, New Jersey 07102  
Telephone: (973) 624-1815  
Facsimile: (973) 624-7339

Attorneys for *Amicus Curiae*  
Alliance for Quality Education

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