

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

DOUGLAS BECKER, et al.,

Plaintiffs,

- v. -

THE STATE OF NEW YORK; HONORABLE DAVID A.
PATERSON, as Governor of the State of New York, et al.,

Defendants.

Index No.

Assigned Justice:

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

This case is about the Governor's attempt to unlawfully arrogate to himself powers constitutionally reserved to the Legislature. Frustrated by the Legislature's decision to reject parts of his proposed deficit reduction plan, the Governor has unilaterally implemented that plan. He has done this by ordering his budget director, through the misuse of a statutory certification process, to withhold nearly \$600 million in school aid and STAR reimbursements lawfully due and payable to school districts on December 15, 2009. These monies, which are to be used by school districts to fulfill the State's constitutional obligation to provide all the State's children the opportunity for a sound basic education, were lawfully appropriated by the Legislature and signed into law by the Governor himself in April of this year. Now, by illegal executive fiat, the Governor is simply refusing to release these appropriations.

Accordingly, plaintiffs seek a declaration that defendants' are violating their constitutional duty to faithfully execute the laws of the State and to enjoin the defendants from engaging in such unconstitutional acts. An act of the Legislature is said to be the voice of the people speaking through their representatives. Under the separation of powers set forth in our State's constitution

the Legislature makes the critical policy choices, while the executive is responsible to faithfully implement those policies.

Indeed, the Governor already knows that he does not have constitutional authority to withhold this funding, but he has nevertheless chosen to do so, disregarding his solemn duty to uphold the law, the constitutional separation of powers, the rights of the school districts which are lawfully entitled to this funding and, most importantly, the welfare of the students who are the ultimate beneficiaries of this funding.

Plaintiffs are likely to succeed on the merits because the law is clear: the Governor must execute lawful appropriations. Plaintiffs are irreparably harmed given the constitutional harm the Governor has worked on the separation of powers set forth in the constitution and by the direct harm suffered by plaintiffs' school districts. Finally, the balance of the equities tip in plaintiffs' favor, given the Governor's unclean hands, as demonstrated by his premeditated and willful disregard of the constitution.

STATEMENT OF FACTS

On April 7, 2009, the Legislature passed and the Governor signed into law an appropriations bill which provided funding for education, labor and family assistance. (A.153-c/S.53-c) That appropriations bill, which became Chapter 53 of the Laws of 2009, was enacted as part of the State budget. It included specific appropriations for the "general support for public schools" to be paid from the "General Fund/Aid to Localities Local Assistance Account." In addition, the bill included other specific appropriations to aid public schools. The Program account subtotal for the Local Assistance Account in the enacted budget was \$19,249,597,000. In addition, the Legislature appropriated \$16,985,349,000 to address remaining 2008- 2009 school year obligations.

Once appropriated, funding for public education in New York is apportioned by the Commissioner of Education. The Commissioner apportions "[t]he amount annually appropriated by the legislature for the support for public schools." Education Law § 3601.

Section 3609-a (1)(a)(4) of the *Education Law* provides, in relevant part, as follows:
Fixed fall payments. Of the moneys apportioned remaining to be paid to school districts for the current year after deductions are made for the purpose of subparagraph one of this paragraph, districts shall be eligible to receive payments determined as follows: ... (iii) on or before December fifteenth, an estimated twenty-five percent of such remaining amount minus the sum of the amounts paid pursuant to clauses (i) and (ii) of this subparagraph and subparagraph two of this paragraph. Such amounts shall be payable only to the extent that reports due the commissioner have been filed.

The largest of the fixed fall payments is the December 15 payment comprising twenty-five percent (25 %) of the State aid payments due for the year. In addition, a payment of school tax relief aid, known as "STAR," was due on or before December 15, 2009 pursuant to Education Law § 3609-e(2)(f) and State Finance Law § 54-f. Education Law § 3609-b (2)(1) also provides for excess cost aid. A payment of excess cost aid was due on or before December 15.

On November 10, 2009, the Governor called the Legislature into extraordinary session to address budget issues. He proposed a deficit reduction plan. On November 25, 2009, while in extraordinary session, the Governor submitted a bill to the Legislature that would have allowed him to authorize the director of the budget to reduce payment of certain appropriations including the aid to localities. (S.66017/A.40017). That bill was not enacted. The extraordinary session concluded on December 2, 2009, with the enactment of an Article VII bill and an appropriations bill incorporating some, but not all, of the Governor's proposed budget cuts. The Governor signed the enacted deficit reduction plan into law.

Despite this, the Governor expressed dissatisfaction with the "choice" made by the Legislature, and declared his intent to unilaterally withhold local aid to school districts and other localities. On December 2, 2009, the Governor issued a statement, in part, that "[i]n the coming days, I will direct the Division of the Budget to reduce State aid payments administratively." He also stated that he would meet with Budget Director Robert Megna to assess the situation and afterwards he would announce the specific local assistance reductions that he would make "unilaterally." The Governor further specified his intention to take unilateral action on December 9, 2009. He stated that he had directed the Director of the Division of the Budget to withhold appropriations from the Local Assistance Account thereby withholding the aid to localities and, thus, to public education.

On Sunday, December 13, 2009, the Governor issued a press release detailing the funds that he was directing the Director of the Budget to withhold. The Governor announced that he would reduce school aid - - namely the fixed fall payments and excess cost aid due on December 15, 2009 - - by ten percent (10%)(\$146 million) and that he would reduce the STAR aid due on December 15,

2009 by nineteen percent (19%)(\$436 million) for a total reduction of \$582 million applicable to school districts.

ARGUMENT

POINT I

THE COURT SHOULD GRANT PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION GIVEN THE IRREPARABLE CONSTITUTIONAL HARM AND DIRECT HARM SUFFERED BY THE PLAINTIFFS, THE LIKELIHOOD THAT PLAINTIFFS WILL SUCCEED ON THE MERITS AND THE BALANCE OF THE EQUITIES TIPPING IN PLAINTIFFS' FAVOR

“A preliminary injunction may be granted under CPLR Article 63 when the party seeking such relief demonstrates: a likelihood of ultimate success on the merits: the prospect of irreparable injury if the provisional relief is withheld and a balance of the equities tipping in the moving party’s favor.” *Doe v. Axelrod*, 73 N.Y.2d 748 (1988).

Aid to Localities Payments Due December 15

Plaintiffs bring this action to redress defendants’ violations of their constitutional duty to faithfully execute the laws of the State, by impounding the aid to localities funds and STAR reimbursements that were due and payable to school districts on December 15, 2009 pursuant to article 73 of the Education Law and appropriations made by chapter 53 of the Laws of 2009 with appropriations bill A153c/S53c.

The Legislature passed and, on April 7, 2009, the Governor approved chapter 53 of the laws of 2009, including an appropriation bill known as A.153-c/S. 53-c. Among other things, chapter 53 appropriated funds for the general support for public schools to be paid from the general fund’s aid to localities local assistance account - 001. The funds appropriate for the general support for public

schools by chapter 53 of the laws of 2009 were to be apportioned by the Commissioner of Education and paid to school districts pursuant to article 73 of the *Education Law*.

Pursuant to Education Law § 3609-a(1)(a)(4), the Commissioner of Education is mandated to apportion funds to public school districts for the so-called “fixed fall payment.” One of those payments was due and payable on or before December 15, 2009. That payment is the largest of the fixed fall payments, comprising twenty-five (25%) of the state aid payments due for the year after the application of the payment formula. In addition to the “fixed fall payment” due on or before December 15, 2009, payment for school tax relief aid, known as “STAR” aid, was due to be paid on or before December 15, 2009, pursuant to Education Law § 3609-e(2)(f). Excess cost aid was due on December 15, 2009 as well.

In his December 13, 2009 press release, the Governor announced that he had directed the Division of the Budget to withhold \$146 million of the school aid due to be paid to school districts and \$436 million in STAR aid to school districts due on or before December 15, 2009. Thus, with virtually no prior notice to the affected school districts, the Governor and the Director of the Budget are unilaterally withholding \$582 million in State aid that was lawfully appropriated by the Legislature and apportioned by the Commissioner of Education as being due and payable on or before December 15, 2009.

The Governor’s withholding of such funds will have a substantial and material impact on the ability of public school districts to meet their financial obligations for the 2009-10 school year.

As the sole rationale for his ability to withhold funds, the Governor, in his December 13, 2009 press release, cites to a subsection of the appropriations bill in the enacted State budget for 2009-2010. The bill, A.153-c/S. 53-c, at section 1, paragraph g provides the following:

g) No moneys appropriated by this chapter shall be available for payment until a certification of approval has been issued by the director of the budget, who shall file such certificate with the department of audit and control, the chairperson of the senate finance committee and the chairperson of the assembly ways and means committee.

That language, however, was also included in the enacted State budget for 2008-2009 and in budgets prior thereto. It was not unique to the 2009-2010 budget. It is used in the State Finance Law and in the administrative code applicable to the Division of the Budget. See, State Finance Law § 49; 9 NYCRR § 135.10.

On its face, the language does not give the Governor or the budget director the discretion to impound funds that were lawfully appropriated by the Legislature in an enacted budget approved by the Governor. In fact, it does not give any authority at all to the Governor. It certainly does not give the Governor the authority to order his budget director to effectively overrule constitutionally enacted policy decisions about appropriations, based on the Governor's unilateral decision that certain appropriations should be cut by various percentages.

The cited language can only be interpreted to give the director of the budget a ministerial function, in accordance with Article IV of the State Finance Law, to ensure that any amounts paid are paid in the correct amount, at the correct time and pursuant to the correct appropriation.

Nearly identical arguments by the Executive Branch have been rejected by the Court of Appeals. In *County of Oneida v. Berle*, 49 N.Y.2d 515 (1980), the appropriation language stated; in part, that, "...the moneys hereby appropriated shall be available for payment of state aid . . . and shall be apportioned in accordance with regulations promulgated by the commissioner of environmental conservation and as approved by the director of the budget." 49 N.Y.2d at 520 (1980). Based on this language, budget director argued that "the appropriation statute invested the director with discretionary authority to withhold funds designated for the ...aid program." *Id.* The

Court of Appeals expressly rejected this argument, stating that “the appropriation did not confer unfettered discretion upon the director to withhold all or any portion of the appropriation.” 49 N.Y.2d at 524. The Court found that “[s]uch a legislative delegation would be drastic indeed, and may not be inferred from ambiguous language.” *Id.* The Court continued its discussion stating, significantly, that “this is especially so in instances where the Legislature has provided no guidelines for the exercise of discretion.” *Id.*

Clearly, as in *Oneida*, neither this Governor nor his budget director has the authority to withhold the aid to localities payments due in December 2009 pursuant to any alleged certification powers or otherwise. Rather, the Governor’s constitutional duty is to faithfully execute the laws of the State. The Governor and his budget director have a clear legal duty to make the payments as appropriated by the Legislature – and as approved by the Governor himself – in chapter 53 of the laws of 2009 and to pay them as apportioned by the Commissioner of Education pursuant to article 73 of the Education Law.

Had the Governor wanted to reduce the funds now at issue, he could have used the veto power he has under Article VII of the Constitution, but he did not do so. He approved the appropriation on April 7, 2009. If finances subsequently changed to the extent that the Governor believed that appropriations or payment schedules should be modified, his recourse was to call the Legislature into Extraordinary Session pursuant to Article IV § 3, and submit Article VII bills and appropriation bills to the Legislature for its consideration pursuant to Constitutional Article VII § 3.

This, in fact, is exactly what he did – calling the Legislature into extraordinary session on November 10 to address the State’s budgetary issues. He proposed his deficit reduction plan at that

time. In a press release dated November 5, 2009, he touted the components of his deficit reduction plan as including “across-the-board spending reductions.” The Governor concluded such extraordinary session on December 2, 2009 with the enactment of an Article VII bill and an appropriations bill incorporating a deficit reduction plan.

In his presentation on December 9, 2009, however, the Governor expressed his dissatisfaction with the amount of reductions that the Legislature passed during the extraordinary session in its deficit reduction legislation -- despite his approval of it -- and declared his intent to unilaterally withhold aid to locality payments to school districts and other localities. In so doing, the Governor overstepped his Constitutional bounds.

The Constitutional Separation of Powers

The People of the State of New York have an interest in maintaining the separation of powers that are set forth in the *New York* Constitution. “The safety of free government rests upon the independence of each branch and the even balance of power between the three... [i]t is not merely for convenience in the transaction of business that they are kept separate by the Constitution, but for the preservation of liberty itself.” *New York State Bankers Ass’n v. Wetzler*, 81 N.Y.2d 98(1993), quoting, *People ex. rel. Burby v. Howland*, 155 N.Y. 270 (1898). There are three co-equal branches of government in New York. “The legislative power of this state shall be vested in the senate and the assembly.” N.Y. Const. Art. III, §1. “The executive power shall be vested in the governor.” N.Y. Const. Art. IV, §1. For example, the Governor, and his subordinates such as the budget director, are duty bound to take care that appropriations are faithfully executed. *County of*

Oneida v. Berle, 49 N.Y.2d 515(1980). The Legislature makes the critical policy choices, while the executive is responsible to implement those policies. *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003).

The third branch, of course, is the judiciary, “a unified court system for the state.” N.Y. Const. Art. VI, §1. The judiciary “will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of government.” *King v. Cuomo*, 81 N.Y.2d 247 (1993).

Likelihood of Success on the Merits

In the case at bar, the Governor is exercising legislative power, not executive power, and he is thus illegally usurping the Legislature’s constitutional powers. Some may characterize the Governor’s action in unilaterally reducing lawful school aid appropriate as wise and necessary to address a budget deficit. Others may characterize his actions as self-serving or political. Legally, the Governor’s motives are irrelevant. The Governor is simply and plainly prohibited by the constitution and authoritative decisional law from withholding appropriations that were passed by the Legislature -- and that he himself approved.

Irreparable Harm

Of the harms to be restrained and enjoined, the Governor’s intentional disregard for the constitutional separation of powers must rank high on the list. While in some ways intangible, this

harm is nevertheless great and irreparable. “An ‘act of the legislature is the voice of the People speaking through their representatives.’” *New York State Bankers Ass’n v. Wetzler*, 81 N.Y.2d 98, (1993), quoting, *Matter of Sherrill v. O’Brien*, 188 N.Y.185, 199 (1907). That courts have held that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Bowden v. Iona Grammar School*, 284 A.D.2d 357, 357, 726 N.Y.S.2d 685, 687 (2d Dep’t 2001). Although the Supreme Court in *Elrod* addressed First Amendment rights, it enjoined the politically expedient act of patronage dismissals because it violated the United State Constitution.

Here, an analogous constitutional right is at stake: a right which the Court of Appeals described as the voice of the people. *New York State Bankers Assn v. Wetzler*, 81 N.Y.2d 98 (1993). Such right is not a mere convenience for the transaction of business, but rather the balance of power between the three branches of Government is the pillar upon which “the safety of free government rests.” *Id.* The Governor’s actions deny the right of every voter and taxpayer to speak and make State policy and spending decision through their elected representatives. The harm imposed by an executive who unilaterally overrules the expressed voice of all the people is certainly as great, and as irreparable, as the loss of the free speech rights of a single individual. The denial of such rights for even a minimal period of time, constitutes irreparable injury. See, *Elrod*, 427 U.S. 347.

In addition to the constitutional harm set forth above, there is the practical, very real and very serious harm that will be suffered by the State’s public school districts and public school students. This harm is described in detail in the various affidavits submitted to this Court by school board members, school Superintendents and administrators, teachers, and by the attorneys and Associations who represent them.

As these affidavits show, this sudden unanticipated and illegal cut in funding will certainly force some districts to reduce services, programs and staff, causing disruption in the education provided to their students. Some districts may need to cut after school programs, field trips and transportation services. Some districts may need to delay paying their obligations, such as payments to vendors and debt payments, and incur more debt in order to pay those obligations, putting their bond ratings at risk and causing them to need additional aid in the future. Nearly all affected districts will suffer a critical cash flow problem if the withholdings are short-term and will need to restructure their budgets if the withholdings are long-term. Moreover, if the Governor's newly asserted authority to be the final arbitrator of whether, when and how much legislatively approved local school aid will actually be paid, is allowed to stand, how will local school boards ever be able to effectively carry out their already difficult responsibilities to plan their own budgets?

These districts, upon information and belief, already have undergone belt tightening to make it through the last fiscal year, are under intense pressure to meet the unfunded mandates of the federal *No Child Left Behind Act* and the State regulations implementing that *Act* in New York. And, they are anticipating that they will receive much less in State aid and other revenues for the 2010-11 school year. Simply directing the Governor to make the withheld payments at some later date will not make the District's whole and is not adequate relief.

Balance of the Equities Tip in Favor of Plaintiffs

If the Court does not enjoin the Governor, he only will be emboldened to continue to act unilaterally and illegally, further unbalancing the three coordinate branches of government. Indeed,

the Governor has unclean hands in this matter.

The Governor is well-aware that his actions violate the Constitution but he seems intent on carrying through with them regardless of his constitutional obligations. Evidence of his awareness is twofold.

First, the Governor submitted a program bill during the November-December extraordinary session stating, in part, that “the director of the budget shall be authorized, upon approval of the Governor, to direct reduction of payments of part of any appropriation for fiscal year 2009-10” (Reilly’s Affidavit, Exhibit “E”). That bill would have given the Governor the very power that he now seeks to exercise. The Legislature, however, did not pass that bill, instead it referred the bill to committee. Given that he proposed the program bill and knows that the Legislature did not pass it, the Governor is certainly aware that he does not have the power to unilaterally reduce appropriations.

Second, during his presentation on December 9, 2009, the Governor candidly admitted that he knew he would be sued for his actions in reducing appropriations.

Thus, the Governor is acting in reckless and total disregard of the separation of powers set forth in our Constitution. In fact, on December 2, 2009, the very same day that he approved the Article VII bill and appropriations bill enacted by the Legislature for its deficit reduction plan, the Governor stated, in part, that “I have been and will continue to meet with Budget Director Robert L. Megna and Comptroller Thomas DiNapoli to assess the current cash-flow and revenue situation. Once that assessment is complete, I will announce the specific local assistance reductions I will implement unilaterally.”

Clearly, the Governor has now implemented “unilaterally” the reductions that he believed

the Legislature should have enacted in budget or Article VII bill, but did not. In other words, he as governor intends to perform a function of the legislature, in contempt of the Constitution.

Balanced against the Governor's intentional, illegal actions, are the interests the plaintiffs seek to protect. These include preserving the constitutional separation of powers, and insuring that lawfully mandated funding for the education of New York's school children is provided in the time, manner and amount mandated by law. There can be little question that the equities tip decisively in plaintiffs' favor.

POINT II

THE NEW YORK CONSTITUTION DOES NOT PROVIDE THE EXECUTIVE WITH EXPRESS OR INHERENT POWER TO IMPOUND FUNDS WHICH HAVE BEEN APPROPRIATED BY THE LEGISLATURE

Neither that the Governor nor the budget director has any lawful authority or discretion to impound funds appropriated by statute. See *County of Oneida v. Berle*, 49 N.Y.2d 515 (1980).

One of the fundamental principles of government underlying our Constitution is the distribution of governmental power into three branches -- the executive, the legislative and the judicial. This prevents too strong a concentration of authority in any person or body. *Under 21, Catholic Home Bur. for Dependent Children v. City of New York*, 65 N.Y.2d, 344, 355(1985) The Court of Appeals has consistently recognized that this separation of powers among the three branches is included by implication in the pattern of government adopted by the State of New York. (*Id.*, at 65 N.Y.2d at 355-356). It is a fundamental principal of law that each department of government should be free from interference, in the lawful discharge of duties expressly conferred, by either of the other branches. *People ex rel Burby v. Howland*, 155 N.Y. 270, 282(1898).

Plaintiffs ask this Court to resolve a dispute concerning the scope of the authority granted by the constitution to the Executive and Legislative branches. *Korn v. Gulotta*, 72 N.Y.2d 363, 369 (1988); *Saxton v. Carey*, 44 N.Y.2d 545 (1978); *see also Wein v. Carey*, 41 N.Y.2d 498, *rearg. denied* 42 N.Y.2d 910(1977); *People v. Tremaine*, 281 N.Y. 1 (1939). Plaintiffs ask for this review of the acts of the Legislature and the Executive to protect rights, not to make policy. *Matter of New York State Inspection, Sec. & Law Enforcement Empls., District Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 239-240 (1984).

The legislative power of this State is vested in the Senate and Assembly. N.Y. Const. Art. III, §1. The Executive power is vested in the Governor. N.Y. Const. Art IV, §1. The Legislature is responsible for making critical policy choices, while the Executive is responsible for implementing those policies. *Saratoga County Chamber of Commerce v. Pataki*, 10 N.Y.2d 801 (2003).

Thus, once the policy decisions have been made by the Legislature and an appropriation is approved, the Governor and his subordinates are duty bound "to take care that [it is] faithfully executed. N.Y. Const. Art IV, §3. *Oneida*, 49 N.Y.2d at 523. The executive branch may not override enactments of the Legislature. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 588 (1952). Under the State Constitution, the Executive possesses no express or inherent power based upon its view of sound fiscal policy withhold funds which have been appropriated by the Legislature. Such usurpation of the legislative function should not receive judicial sanction. *Oneida*, 49 N.Y.2d at 523, 524.

The Governor has asserted that he has an obligation to manage the State's financial resources and that there is implied in that obligation constitutional authority to withhold funds which have been appropriated by duly enacted statute. The constitutional argument, while simple, is fatally flawed.

It is true that the courts have recognized the Executive's constitutional obligation to propose a balanced budget. *Oneida*, 49 N.Y.2d at 521; *Wein v. State of New York*, 39 N.Y.2d 136, 141 (1976). The Court of Appeals, however, has recognized the impossibility of a perfectly balanced budget, making the Governor's assertion of implied or inherent constitutional authority baseless. *Oneida*, 49 N.Y.2d at 521. In the case at bar, no matter how it is characterized, the Executive is engaged in an illegal withholding and diversion of State funds that were appropriated for a specific

constitutionally mandated purpose – aid to education. See *Childs v. Bane*, 194 A.D.2d 221, *lv. dismissed* 83 N.Y.2d 846, *lv. denied* 83 N.Y.2d 760 (1994); *Community Serv. Socy. v. Cuomo*, 167 A.D.2d 168 (1990).

Any claim that the budget director has acted lawfully under his statutory power to certify appropriations should be rejected. First, as noted, a virtually identical claim has been rejected by the Court of Appeals in *Oneida, supra*.

Second, the facts demonstrate that the actions of the Governor and budget director are not the result of any good faith application of a budget certification process. If the local school aid payments and STAR payments were illegal then, presumably, the budget director could certify no part of them -- he would need to deny payment of 100% of them, not 10% or 19% dictated by the Governor. If, on the other hand, the State truly had no money to pay these appropriations, presumably all State spending would be stopped or curtailed, not simply the particular appropriations targeted by the Governor. But what really happened here could not be more apparent - - when the Legislature exercised its constitutional authority not to approve the Governor's proposed deficit reduction plan in toto, the Governor simply ordered the budget director to use the certification process to reduce those expenditures identified by the Governor in an amount determined by the Governor. This usurpation of the Legislature's policy making power and the misuse of the certification process could not be clearer.

No Proper Delegation of Legislative Authority

The defendants may argue that there has been a delegation of legislative authority by which

the Governor, and the director of the budget could assert the power to withhold a portion of the December 15, 2009 payment of \$582 million due to school districts. Such an argument should be rejected.

In order to properly delegate power, the Legislature must do so with reasonable safeguards and standards to the entity charged with administering the law as enacted by the Legislature. See *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987); and *Oneida*, 49 N.Y.2d at 524.

The certification authority cited by the defendants, when viewed with the specific provisions of Education Law § 3609 and the appropriation bill, provides no basis for a viable argument of proper delegation of legislative authority to the Governor or the director of the budget to contravene the express statutory language.

Only the courts now safeguard the constitutional separation and balance of powers between the Executive and Legislative branches. A declaration of illegality and an injunction mandating that the Governor faithfully executed the law should issue.

POINT III

DEFENDANTS HAVE ACTED IN VIOLATION AND THE CONSTITUTION'S EDUCATION ARTICLE, ARTICLE XI, § 1 AS WELL AS EDUCATION LAW § 3609-a

Ironically, the Governor has not only chosen to illegally overrule the spending decisions made by the Legislature in its initial Article VII and appropriations bill, as well as in the later deficit reduction plan (both of which he approved) – he has chosen to impound education funding. Such funding fulfills a specific constitutional duty and therefore has special constitutional significance. *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 902 (2003).

New York Article XI, § 1, requires the State "to offer all children the opportunity of a sound basic education." *Campaign for Fiscal Equity, Inc., v. State of New York* , 86 N.Y.2d 307, 316 (1995). When the State fails to provide for the maintenance and support of the public school system, the Education Article is implicated. *Paynter ex. rel. Stone v. State of New York*, 290 A.D.2d 95, *app. dismissed*, 98 N.Y.2d 644, *lv. to appeal granted* 98 N.Y.2d 613, *aff'd* 100 N.Y.2d 434 (2003).

The withholding of aid to localities and the resulting loss of aid to education, by defendants, could well cause systemic, district-wide educational deficiencies attributable to the lack of funding by the State. *Payne v. State*, 39 A.D.3d 290 (2007). The drastic cuts in education aid may necessitate the layoff of teachers, teaching assistants and teacher aides. Programs that are not funded cannot be sustained. Without educational professionals to provide services, and without funding for programs, students are deprived of their constitutionally protected right to a sound basic education. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 316 (1995); N.Y.Const, Art. XI, §1.

Any inadequacy in schools funding can result in deficient “inputs” -- teaching, facilities and instrumentalities of learning. This leads to deficient outputs such as test results and graduation rates;

this failure is causally connected to the illegal withholding by the Executive of the legislatively appropriated funding of the system. *Paynter v. State of New York*, 100 N.Y.2d 434 (2003) quoting *Board of Education, Levittown UFSD v. Nyquist*, 57 N.Y.2d 27, 48 (1982), *appeal dismissed* 459 U.S. 1138 (1983); *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, at 318 (1995); *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 909-918 (2003).

Further, Education Law § 3609-a sets forth a statutory schedule for fixed payments to school districts in October, November and December of each year. This statutory schedule is not discretionary. It establishes a fixed schedule upon which school districts in the State rely in planning their budgets for the remainder of the school year. The Governor has no constitutional, statutory or other authority to take action which delays or denies the payments set forth in this law.

CONCLUSION

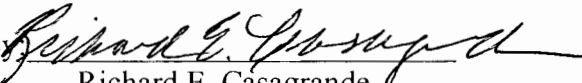
For all of the reasons set forth above, as well as in the complaint and affidavits attached herewith, the motion should be granted including the declaratory and injunctive relief requested in the Complaint and such other relief as this Court may deem to be just and proper.

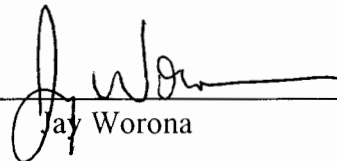
Dated: December 16, 2009

Respectfully submitted,

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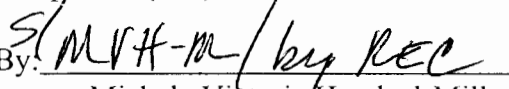
By: 
Richard E. Casagrande
Susan W. Fuller
Robert T. Reilly
Elizabeth R. Schuster

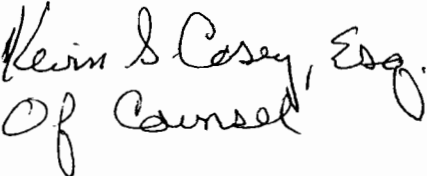
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