

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

UNIQUE BROWN by her parent and natural guardian Denise Stevens; FINA BELL, SIRMANUEL BELL, and MARK BELL by their parents and natural guardians Russell and Tammy Bell; SAMANTHA CRUZ by her parent and natural guardian Maria Dalmau; GISELLE ALOMA JACOBS by her parent and natural guardian Ingrid Johnson-Jacobs; TISHAWN WALKER by his grandmother and legal guardian Michelle Emanuel; and NORTHEAST CHARTER SCHOOLS NETWORK, INC.,

Plaintiffs,

-against-

THE STATE OF NEW YORK; ANDREW M. CUOMO, as Governor of the State of New York; NEW YORK STATE ASSEMBLY; NEW YORK STATE SENATE; ROBERT L. MEGNA, as Budget Director of the State of New York; NEW YORK STATE DIVISION OF THE BUDGET; NEW YORK BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK; and JOHN B. KING, JR. as Commissioner of Education and President of the University of the State of New York,

Defendants.

Index No.:

Date Purchased: September __, 2014

SUMMONS

Plaintiffs designate Erie County as the place of trial.

The basis for venue is CPLR § 503(a).

TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned to answer the Complaint for Declaratory and Injunctive Relief in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on Plaintiffs' attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of

New York); and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York
September 15, 2014

HERRICK, FEINSTEIN LLP

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Summons To: **See Exhibit A**

Exhibit A

1. State of New York
c/o New York State Office of the Attorney General
NY State Capitol Building
Albany, NY 12224
2. The Honorable Andrew M. Cuomo
Governor of New York State
NY State Capitol Building
Albany, NY 12224
3. State Assembly
NY State Capitol Building
Albany, NY 12224
4. State Senate
NY State Capitol Building
Albany, NY 12224
5. Robert L. Megna, as Budget Director of the State of New York
Division of the Budget
254 Washington Avenue
Albany, NY 12210
6. New York State Division of the Budget
254 Washington Avenue
Albany, NY 12210
7. New York Board Of Regents Of The University Of The State Of New York
89 Washington Avenue
Board of Regents, Room 110 EB
Albany, NY 12234
8. John B. King, Jr. As Commissioner of Education and President of the University of the
State of New York
New York State Education Department
89 Washington Avenue
Albany, NY 12234

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COUNTY OF ERIE

UNIQUE BROWN by her parent and natural guardian Denise Stevens; FINA BELL, SIRMANUEL BELL, and MARK BELL by their parents and natural guardians Russell and Tammy Bell; SAMANTHA CRUZ by her parent and natural guardian Maria Dalmau; GISELLE ALOMA JACOBS by her parent and natural guardian Ingrid Johnson-Jacobs; TISHAWN WALKER by his grandmother and legal guardian Michelle Emanuel; and NORTHEAST CHARTER SCHOOLS NETWORK, INC.,

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Defendants.

Index No.:

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiffs Unique Brown by her parent and natural guardian Denise Stevens; Fina, Sirmanuel, and Mark Bell (collectively the “Bells”) by their parents and natural guardians Russell and Tammy Bell; Samantha Cruz by her parent and natural guardian Maria Dalmau; Giselle Aloma Jacobs by her parent and natural guardian Ingrid Johnson-Jacobs; Tishawn Walker by his grandmother and legal guardian Michelle Emanuel, and Northeast Charter Schools Network, Inc. (“Plaintiffs”), by their attorneys, Herrick, Feinstein LLP and Connors & Vilardo,

LLP, for their complaint against defendants the State of New York; Andrew M. Cuomo as Governor of the State of New York; New York State Assembly; New York State Senate; Robert L. Megna, as Budget Director of the State of New York; New York State Division of the Budget; New York Board of Regents of the University of the State of New York; and John B. King, Jr., as Commissioner of Education and President of the University of the State of New York, allege as follows:

PRELIMINARY STATEMENT

1. In this Complaint, seven Plaintiffs from Buffalo and Rochester, New York and the Northeast Charter Schools Network, Inc., an advocacy organization for its member New York charter schools, seek declaratory relief declaring the State of New York's inequitable funding scheme for students in public charter schools unconstitutional and in violation of the State's obligation to provide a "sound basic education" to every student and ensure equal protection under the laws and freedom from racial discrimination, as well as injunctive relief enjoining Defendants from unconstitutionally withholding facilities funding from charter schools.

2. The guarantees of equitable funding for public education and freedom from discrimination are enshrined in the New York State Constitution.

3. In *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307 (1995) ("*CFE* 1995") and in *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 ("*CFE* 2003"), the New York Court of Appeals held that all students are constitutionally entitled to a "sound basic education" which specifically includes minimally adequate facilities, instrumentalities of learning and teaching:

Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs,

pencils, and reasonably current textbooks. Children are also entitled to 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.

CFE 1995 at 317 (emphasis added).

4. Further, the Court found that a “sound basic education” must be measured in accordance with the demands of “modern society and include some preparation for employment.” *CFE* 2003 at 905.

5. For all but the most privileged families, Buffalo and Rochester are educational deserts that starve our most vulnerable children of all meaningful access to the American dream.

6. In these cities, a “sound basic education” is in short supply, and public charter schools offer a glimmer of hope for many families, but the ability of these charter schools to meet this profound need is stymied by an unconstitutional State funding scheme.

7. The State’s unconstitutional method of funding public charter schools results in the average student in a Buffalo-based charter receiving only 60 cents on every dollar when compared to funding for students in traditional district schools. On average, that translates to roughly \$13,700 for the charter school student, compared to roughly \$23,500 for the average student in the district—a disparity of about \$9,800 per pupil.¹ In Rochester, the disparity is similar.²

8. These disparities are exacerbated by the fact that State law lacks regular facilities funding for public charter school students in Buffalo and Rochester to cover the cost of renting, purchasing, renovating, constructing or repairing school buildings. As a result, charter schools in

¹ M. Batdorff, et al., *Charter School Funding: Inequity Expands*, University of Arkansas, Dep’t for Educ. Reform, p. 17, (April 2014), available at <http://www.uaedreform.org/wp-content/uploads/charter-funding-inequity-expands.pdf> (last visited Sept. 9, 2014).

² NORTHEAST CHARTER SCHOOL NETWORK, *Charter School Funding Inequality in New York*, available at http://www.necharters.org/charter_school_funding_inequality_in_new_york (last visited Sept. 11, 2014).

these cities must further deplete their already unequal funds to pay real estate costs, imposing significant financial burden on charters schools, instead of investing directly in students and classrooms.

9. The lack of a reliable source of public funding for the physical infrastructure of charter schools means that many charter schools lack facilities that are essential in affording students a sound basic education, like sufficient classrooms, gymnasiums, libraries, science labs, computer labs, cafeterias, common rooms, employee offices, and athletic fields.

10. The lack of funding further hinders the ability of charter schools to invest in new professional development initiatives and curriculum programs, both of which are needed to provide students with a sound basic education in light of the recently enacted Common Core³ assessment standards. Charters are forced to divert scarce dollars away from preparing students to meet the enhanced rigor of these new assessment standards, and the academic proficiency of charter school students suffers as a result.

11. This lack of funding also limits the ability of charter schools to admit and serve thousands of waitlisted students, almost all of whom attend failing traditional public schools in Buffalo and Rochester. Each of the four charter schools attended by the Plaintiffs has a waitlist in excess of one hundred students. In aggregate, these four schools are forced to turn away hundreds of applicants each year, the vast majority of whom are forced to return to woefully underperforming traditional public schools that provide no hope of a sound basic education.

³ Common Core State Standards are a set of standards defining the knowledge and skills that students from pre-kindergarten to 12th grade need to master each year to be prepared for the next grade, and ultimately college or work. See COMMON CORE STATE STANDARDS INITIATIVE, *About the Standards available at* <http://www.corestandards.org/about-the-standards/> (last visited Sept. 9, 2014).

12. When the New York State Legislature passed the New York State Charter School Act of 1998 (the “Act”) (codified at N.Y. Educ. Law. §§ 2850-2857) then-Governor Pataki hailed charter schools “[as] the single greatest improvement in education in state history.”⁴

13. The law states that charter schools, which are public schools, were created “to provide opportunities for teachers, parents, and community members to establish and maintain schools that operate independently of existing schools and school districts in order to accomplish the following objectives: (a) Improve student learning and achievement; (b) Increase learning opportunities for all students, with special emphasis on expanded learning experiences for students who are at-risk of academic failure; (c) Encourage the use of different and innovative teaching methods; (d) Create new professional opportunities for teachers, school administrators and other school personnel; (e) Provide parents and students with expanded choices in the types of educational opportunities that are available within the public school system; and (f) Provide schools with a method to change from rule-based to performance-based accountability systems by holding the schools established under this article accountable for meeting measurable student achievement results.” N.Y. Educ. Law § 2850.

14. Despite these important objectives and the State’s constitutional mandate to provide minimally adequate facilities, instrumentalities of learning, and teaching to all public school students in New York under the *CFE* decisions, the funding scheme for charter schools violates the State Constitution by failing to provide equitable funding to charter school students as compared to the funding provided to traditional public schools students and to the extent needed to provide these students with a sound basic education.

⁴ Clifford J. Levy, *Senate Passes Charter Plan for Schools*, N.Y. TIMES, Dec. 18, 1998, <http://www.nytimes.com/1998/12/18/nyregion/senate-passes-charter-plan-for-schools.html> (last visited Sept. 9, 2014).

15. The United States Department of Education acknowledges that charter schools constitute one of the fastest growing areas of school reform and that they are providing students with “meaningful opportunities to receive a high-quality education. In communities throughout the nation, numerous charter schools are developing unique learning environments, spurring innovation, engaging parents and other stakeholders, and improving educational opportunities for students.”⁵ New York charter schools play an essential role in the State’s public education system today, yet, they are denied equitable funding.

16. This funding disparity further prevents charter schools from providing the constitutionally required adequate facilities, instrumentalities of learning, and instruction that they would otherwise be able to provide if they received equitable funding. Additionally, because the funding disparity forces charter schools to divert operational funds to cover facilities costs, there is a limit to how many students charter schools can accommodate. Accordingly, expansion of charter schools is stymied and thousands of applicants are waitlisted and ultimately forced to return to failing traditional public schools.

17. Moreover, because charter students are far more likely to be Black or Latino and the Act encourages schools to serve these students, the State’s unequal funding scheme has a racially disparate impact on minorities in violation of the State Constitution and other laws.

⁵ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, May 14, 2014 Open Letter, *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf> (last visited Sept. 9, 2014).

THE PARTIES

18. Unique Brown is twelve years old and attends King Center Charter School in Buffalo, New York (“King Center”). Unique Brown brings this action by her mother Denise Stevens. Denise Stevens resides with Unique in the City of Buffalo, New York.

19. Fina, Sirmanuel, and Mark Bell are seven, ten, and eleven years old respectively, and attend King Center. The Bells bring this action by their parents Russell and Tammy Bell. The Bell family resides in the City of Buffalo, New York.

20. Samantha Cruz is eight years old and attends Eugenio Maria de Hostos Charter School (“EMH”). Samantha Cruz brings this action by her mother Maria Dalmau. Maria Dalmau resides with Samantha in the City of Rochester, New York.

21. Giselle Aloma Jacobs is eight years old and attends Elmwood Village Charter School in Buffalo, New York (“Elmwood Village”). Giselle Aloma Jacobs brings this action by her mother Ingrid Johnson-Jacobs. Ingrid Johnson-Jacobs resides with Giselle in the City of Buffalo, New York.

22. Tishawn Walker is fourteen years old and currently attends BASCS. Tishawn brings this action by his grandmother Michelle Emanuel. Michelle Emanuel resides with Tishawn in the City of Buffalo, New York.

23. The Northeast Charter Schools Network (“The NECSN”) is an advocacy organization with its principal place of business at 915 Broadway, Suite 110, Albany, New York 12207. NECSN is a membership organization suing in its representative capacity on behalf of its members. Its mission is to support New York and Connecticut charter schools and help schools operate more effectively. NECSN has many New York member charter schools, including charter schools in the cities of Buffalo and Rochester.

24. Defendant the State of New York is responsible for the education system in New York.

25. Defendant Andrew M. Cuomo is the Governor of the State of New York and is sued herein in his official capacity.

26. The New York State Assembly is part of the New York State legislature. It is empowered to make law including the education law of the State.

27. The New York State Senate is part of the New York State legislature. It is empowered to make laws including the education law of the State.

28. Robert L. Megna is the Budget Director of the State of New York and is sued herein in his official capacity.

29. New York State Division of the Budget (DOB) assists the governor in preparing his Executive Budget proposal, offers fiscal policy advice to the governor's office, and also administers and monitors expenditures authorized by the final Enacted Budget including funding allocations for the state's education system.

30. New York Board of Regents is the governing body of the University of the State of New York and exercises legislative and policy making powers of the state educational system and establishes rules and regulations for carrying out the State's laws and policies relating to education.

31. John B. King, Jr. is the President of the University of the State of New York and Commissioner of Education of the State of New York, and as such, is the chief executive officer of the Board of Regents and the State Education Department. He is sued herein in his official capacity.

JURISDICTION AND VENUE

32. This Court has jurisdiction because many of the Plaintiffs reside in Erie County and the Defendants exercise their responsibilities throughout the State of New York, including in Erie County.

33. This Court has jurisdiction to grant a declaratory judgment and appropriate injunctive relief pursuant to N.Y. CPLR §§ 3001 and 3017(b).

FACTUAL ALLEGATIONS

History of Charter Schools in New York

34. The first charter school legislation was passed in 1991 in Minnesota. Many states followed, and in 1998, the New York State Legislature passed the Act which governs all aspects of establishing and maintaining charter schools in the State.

35. In passing the Act, the Legislature stated that “[t]he powers granted to a charter school under [the Act] constitute the performance of essential public purposes and governmental purposes of this state.” (Educ. Law § 2853(1)(d)).

Charter Schools Are Public Schools

36. In New York State, charter schools are independent public schools that operate under a contract or charter granted by the Board of Regents. (Educ. Law § 2851(3)). A charter school must design its educational programs to meet or exceed the same student performance standards adopted by the Board of Regents that traditional public schools are subject to, as well as the student performance standards contained in the charter. (Educ. Law § 2854(1)(d)). Additionally, a charter school must meet the same health and safety, civil rights, and student assessment requirements applicable to traditional public schools. (Educ. Law § 2854 (1)(b)).

37. Indeed, charter schools are “within the public school system” (Educ. Law § 2850(2)(e)), and any child who is eligible for admission to a public school is qualified for admission to a charter school. (Educ. Law § 2854(2)(b)). In the event that there are more applications than available seats, students are admitted via blind lottery process.

38. A charter school cannot charge tuition or fees for admission, and must be nonsectarian in its programs, admission policies and employment practices. It is also forbidden from engaging in any form of discrimination. (Educ. Law § 2854(2)(a)).

Charter Schools Are Held to High Accountability Standards

39. Under the Act, teachers, parents, school administrators, community residents or any combination thereof, may submit an application to establish a charter school. (Educ. Law § 2851(1)). Once the application of the proposed charter school has been approved, a written agreement—the “charter”—is entered establishing the organization and operation of the charter school. (Educ. Law § 2852(5)). Further, the charter must include the specific commitments of the charter entity⁶ relating to its obligations to oversee and supervise the charter school.” *Id.* The Board of Regents, as the agency responsible for issuing all charters, can block or refuse to grant a charter if the Board concludes that the applicant has failed to show that it can meet the obligations and requirements needed to be granted a charter. (Educ. Law §§ 2851(3); 2852(5), (5-a)(5-b)).

40. Because they are autonomous public schools, independent from the district public school system, charter schools have greater flexibility to develop a unique academic program, choose staff, set educational goals, offer a longer school day and school year, and establish their

⁶ “Charter entity” is defined as (a) The board of education of a school district eligible for an apportionment of aid . . . ; (b) The board of trustees of the state university of New York; or (c) The board of regents. Educ. Law § 2851(3).

own standards for student behavior. Failure to satisfy the educational and outcome requirements set forth in the charter may be grounds for revocation of the charter and closure of the school.

41. Unlike traditional public schools, charter schools are reauthorized every five years, contingent upon performance outcomes. If a charter school fails to demonstrate high achievement, its charter will not be reauthorized and the school will close. (Educ. Law § 2853 (1)(a)).

42. In addition to being subject to inspection by the Board of Regents, the charter entity and the local school district, a charter school must submit an annual report to both the Board of Regents and to its charter entity. These reports include a charter school report card that outlines the measures of the comparative academic and fiscal performance of the school. (Educ. Law § 2857(2)(a)). These “measures shall include, but not be limited to, graduation rates, dropout rates, performance of students on standardized tests, college entry rates, total spending per pupil and administrative spending per pupil. Such measures shall be presented in a format that is easily comparable to similar public schools.” (Educ. Law § 2857(2)(a)).

Charter Schools by the Numbers

43. As of the 2013-14 school year, there were approximately 6,400 charter schools, serving over 2.5 million students nationwide.⁷

44. The Act originally capped the number of charter schools in New York State at 100 schools. In 2007, the Legislature raised the charter school cap to 200. In 2010, as a means to improve student performance as a part of the federal government’s Race to the Top⁸ initiative,

⁷ NAT’L ALLIANCE FOR CHARTER SCHOOLS, Feb. 2014, *available at* <http://www.publiccharters.org/wp-content/uploads/2014/02/New-and-Closed-Report-February-20141.pdf>. (last visited Sept. 9, 2014).

⁸ Race to the Top is a \$4.35 billion grant program introduced in 2009 by the United State Department of Education, created to spur innovation and reforms in state and local district K-12 education. *See* http://en.wikipedia.org/wiki/Race_to_the_Top (last visited Sept. 9, 2014).

and in response to the high demand for charter schools, the Legislature again lifted the cap, this time to 460 charter schools statewide.

45. New York currently has 250 active charter schools, located in 19 different cities and towns throughout the State.

46. During the current 2014-2015 school year, approximately 106,590 students are expected to attend New York's 250 charter schools. An estimated 79% of students enrolling in charter schools are low-income, and 93% are students of color.⁹

Funding of Charter Schools

47. Charter schools are publicly funded. The Act requires that the "school district of residence shall pay directly to the charter school for each student enrolled in the charter school who resides in the school district the charter school basic tuition." (Educ. Law § 2856 (1)(a)).

48. When comparing the charter school base tuition to the amount received by students in traditional public schools, charter schools statewide only receive roughly 60 to 80 cents on every dollar of spending per pupil in a traditional public school.¹⁰

49. In April 2014, the University of Arkansas published the most comprehensive nationwide study to date comparing funding for charter school students to traditional public school students. This research shows that New York State charter school students receive nearly 25% less per pupil per year. The gap grows to more than 30% when charters are compared to districts with similar demographics. Charter schools in Western New York receive nearly 42% less in per pupil funding per year. As a State with a disparity of at least 25%, New York received a grade of "F" for its funding of charter schools. The authors concluded that the

⁹ NORTHEAST CHARTER SCHOOLS NETWORK, Fact Sheet: Charter schools and the 2014-15 New York State Budget.

¹⁰ See generally M. Batdorff, et al., *Charter School Funding: Inequity Expands*, University of Arkansas, Dep't for Educ. Reform (April 2014), available at <http://www.uaedreform.org/wp-content/uploads/charter-funding-inequity-expands.pdf> (last visited Sept. 9, 2014).

persistent and growing inequities in charter funding are the result of structural problems in State education policy. In New York, charters that are not located in public facilities do not receive any facilities funding or support—a major factor in why the funding gap is so large.¹¹

50. In 2008, New York restructured its funding formula for traditional public schools. Under the new formula, roughly 8% of the funding comes from the federal government, 40% from the State government, and 52% from the local school district. The formula specifies a per pupil expense for which the State and local districts provide funding. In addition, the State provides funds for building aid, transportation aid, educational technology, excess costs aid for special education, prekindergarten and other additional costs. The State also provides funds to the school districts of the five largest cities in New York and transition aid for districts that have significant declines in enrollment due to increasing charter school enrollment.¹²

51. Funding of charter schools is determined by a formula based on the amount of per pupil operational funding the student's home school district receives. Referred to as the Approved Operating Expense, the calculation *excludes capital and debt service*, transportation costs, and certain other costs.

52. Although they are public schools, charter schools cannot access certain categories of State education funding under the current statutory funding scheme. Specifically, charter schools receive considerably less funding than traditional public schools because they do not receive building aid for construction and renovation of school buildings.

53. Acknowledging the funding disparity suffered by charter schools, in the spring of 2014, the State passed legislation which provides either rent-free facilities access or additional

¹¹ See *Charter School Funding: Inequity Expands -- New York*, by Larry Maloney, available at <http://www.uaedreform.org/wp-content/uploads/2014/charter-funding-inequity-expands-ny.pdf> (last visited Sept. 9, 2014).

¹² See *id.*; see also 2012-13 State Aid Handbook at p. 4, available at https://stateaid.nysed.gov/publications/handbooks/handbook_2012.pdf (last visited Sept. 9, 2014).

per pupil funding to new or growing charter schools, but which only benefited a limited subset of schools located in New York City. The new law did not provide any facilities funding to New York City charter schools in private space or any charter schools outside the city, such as the charter schools in Buffalo and Rochester.

54. Because the State does not provide charter schools with funding for minimally adequate facilities as mandated by the Court of Appeals in *CFE 1995* and *CFE 2003*, many charter schools are forced to divert millions of dollars that would have been spent on instruction to cover facility costs. For example, for FY 2011-2012, charter schools statewide reported spending approximately \$2,025 per student on facility costs from their operational budget.¹³ For an average sized school of approximately 250 students, this adds up to a yearly funding gap of over \$500,000 -- enough to pay for salary and benefits for six more teachers or enough money to buy thousands of new library books, for example.¹⁴

55. Furthermore, without funding to cover the cost of facilities, charter schools are tremendously constrained in terms of the number of students they can admit. Although the demand for charter school education is extremely high, without equitable funding charter schools are unable to expand their capacity and admit waitlisted students, almost all of whom are fleeing failing traditional public schools.

56. The system of charter schools was implemented to improve education in the State. The State's unconstitutional funding scheme undercuts this purpose, prevents charter schools from investing adequately in curricula and professional development to meet the challenging standards required by the Common Core, and is therefore without rationale. Moreover, the lack

¹³ New York City Charter School Center *et al.*, *Building Inequality: How the Lack of Facility Funding Hurts New York's Public Charter School Students* ("Building Inequality"), 2013, p. 8, Ex. 2 available at <http://www.nyccharterschools.org/sites/default/files/resources/BuildingInequality.pdf> (last visited Sept. 9, 2014).

¹⁴ *See id.* at p. 8.

of facilities funding exacerbates this problem and further presents obstacles to opening more schools and to expanding enrollment opportunities for students in failing school districts.

57. The lack of sufficient facilities funding has resulted in charters with large class sizes and inadequate facilities, such as cafeterias with no kitchens, cramped classrooms with insufficient windows and lighting, and inadequate desk and seating space. The lack of funding has also resulted in the inadequacy or absence of key resources, such as science labs, computer rooms, libraries, gymnasiums, art and music rooms, and theater space. In addition, every year hundreds of students are turned away or waitlisted at charter schools in Western New York and are forced to return to failing district schools, which do not provide even a semblance of a sound basic education. Without equitable funding, the charter schools in Western New York will not be able to grow to among other things create new options to help these waitlisted students.

58. While *CFE 2003* outlined that certain instrumentalities of learning, such as libraries or computer labs, are constitutionally required to deliver a sound basic education, because the State does not provide funding for minimally adequate facilities to charter schools, many charter schools lack constitutionally required instrumentalities of learning. In one recent charter school survey, only one-third of charter school respondents had a computer lab; only half of the respondents had a library; and only half of the respondents had a science lab.¹⁵

59. As more and more parents choose charter schools for their children, the systematic inequality in funding is an unconstitutional barrier to their children's rights to a "sound basic education."

60. Buffalo's 15 charter schools serve over 8,000 students and receive no facilities funding. Buffalo suffers the worst funding inequality in the State, with \$9,811 less spent on a

¹⁵ *Building Inequality*, p. 11, Ex. 8.

charter school student compared to a district student each year – a 41.7% gap.¹⁶ Several of Buffalo’s charter schools are NECSN member schools.

61. Rochester’s 14 charter schools serve over 4,000 students and also receive no facilities funding. A charter school student in Rochester receives \$6,633 less than his or her peers in district schools in that city – a 32% gap.¹⁷ Several of Rochester’s charter schools are NECSN member schools.

State of Public Education in Buffalo and Rochester

62. While enrollment in a charter school versus a traditional public school is a voluntary choice, because the traditional public schools in both Buffalo and Rochester are failing and are constitutionally inadequate in terms of their outputs – including test results and graduation rates (*see CFE 2003 at 908*), parents and students in fact have no choice that affords their children a public sound basic education. Accordingly, many students enroll in charter schools with the hope of receiving a better education, though still constitutionally inadequate, and sacrifice the benefits attendant to facilities funding that is available to traditional public schools. By making the choice, offered by the State, to pursue better educational opportunities, these students are forced to do without important educational facilities and instrumentalities, including computer and science labs, gymnasiums or outdoor spaces, art and music rooms, auditoriums, cafeterias, quality curriculum programs that will ensure optimal success on Common Core assessments, and in-school special education services available at the traditional public schools that these students would otherwise attend.

¹⁶ M. Batdorff, et al., *Charter School Funding: Inequity Expands*, University of Arkansas, Dep’t for Educ. Reform, p. 17 (April 2014), available at <http://www.uaedreform.org/wp-content/uploads/charter-funding-inequity-expands.pdf> (last visited Sept. 9, 2014).

¹⁷ NORTHEAST CHARTER SCHOOL NETWORK, *Charter School Funding Inequality in New York*, available at http://www.necharters.org/charter_school_funding_inequality_in_new_york (last visited Sept. 11, 2014).

63. In August of 2013, the New York State Department of Education (“DOE”) published the New York State English Language Art (“ELA”) and Math exam results for the 2012-2013 school year.

64. The aggregate results of Buffalo City School District students in grades 3 through 8 demonstrate that only 9.63% of students tested proficient on the Math exam and only 11.45% of students in grades 3 through 8 tested proficient on the ELA exam. In contrast, the aggregate results of Buffalo charter schools demonstrate that the charter schools are outperforming the district schools: 18.88% of students in grades 3 through 8 tested proficient on the Math exam and 14.94% tested proficient on the ELA exam.

65. In August of 2014, the DOE published the ELA and Math exam results for the 2013-2014 school year. The aggregate results of Buffalo City School District students in grades 3 through 8 demonstrate that only 13.16% of students tested proficient on the Math exam and only 11.96% of students in grades 3 through 8 tested proficient on the ELA exam. The charter schools continue to outperform the district schools. The aggregate results of Buffalo charter schools demonstrate that 22.94% of students in grades 3 through 8 tested proficient on the Math exam and 17.72% of students tested proficient on the ELA exam.

66. Rochester City schools fared even worse. Only 4.93% of students in grades 3 through 8 tested proficient on the Math exam, and only 5.41% of students in grades 3 through 8 tested proficient on the ELA exam for the 2012-2013 school year. The Rochester charter schools performed significantly better in the aggregate: 18.82% of students in grades 3 through 8 tested proficient on the Math exam, and 18.17% of students in grades 3 through 8 tested proficient on the ELA exam.

67. Similarly, only 7.45% of students in grades 3 through 8 in the Rochester City schools tested proficient on the Math exam, and only 5.36% of students in grades 3 through 8 tested proficient on the ELA exam for the 2013-2014 school year. In contrast, 24.67% of students in grades 3 through 8 at Rochester charter schools tested proficient on the Math exam, and 16.65% tested proficient on the ELA exam.

68. Inarguably, students in the Buffalo and Rochester City School Districts are not receiving a “sound basic education.” Charter schools, such as NECSN member schools, were created to help remedy these problems. The State does not remedy this violation of constitutional rights by making available an option without sufficient funding to provide “minimally adequate facilities and classrooms.”

69. At the high school level, in 2013, only 56% of students attending Buffalo’s traditional public schools graduated in four years. Only 43% of students attending Rochester’s traditional public schools graduated in four years. The graduation rates of charter school students as compared to the host district are remarkable. Buffalo region charter schools’ aggregate graduation rate was 83.6%. The one charter high school in Rochester which has been in existence long enough to have had a graduating class has an 81% graduation rate.

70. A student who remains enrolled in a traditional Buffalo or Rochester elementary public school is more than 90% likely to fail basic proficiency exams. A student who remains enrolled in a traditional Buffalo or Rochester high school has only approximately a 50% chance of graduating within four years.

71. Because of the deplorable state of the traditional public schools in Buffalo and Rochester, most parents and student in these cities have no option for a constitutionally adequate public education. Either they attend the district schools where they have less than a 10% chance

of receiving a “sound basic education” at the lower school level or where they are only 50% likely to graduate from high school in four years, or they enroll in a charter school, which is surpassing district school performance -- but at the expense of constitutionally guaranteed adequate facilities and other instrumentalities of learning.

Charter Schools Outperform Traditional Public Schools and Demand Far Exceeds Supply

72. Numerous academic studies have confirmed that charter schools, on average, achieve better academic results than traditional public schools serving a similar student demographic.¹⁸ Indeed, some of the best schools in the State are charter schools.¹⁹

73. As charter schools outperform traditional public schools, demand for charter schools cannot keep pace with supply, nor can charter schools hope to meet their constitutional requirement to provide students with adequate facilities, instruction, and instrumentalities of learning, especially under the new rigor of the Common Core.

74. While over 100,000 students are expected to attend charter schools in 2014-2015, thousands of students are waitlisted each year.

75. Due to limited supply, even students who want to transfer to a charter school, and are entitled to do so under New York and federal law, are unable to transfer. In 2013, the DOE informed the Buffalo Board of Education that the district must find space for every student who wants to be transferred out of a failing school and into a better one.²⁰ Despite this mandate,

¹⁸ NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS, *Public Charter School Success: A Summary of the Current Research on Public Charters’ Effectiveness at Improving Student Achievement* (April 2013), available at http://www.publiccharters.org/wp-content/uploads/2014/01/NAPCS_2013_Research_Summary_20130424T145509.pdf (last visited Sept. 8, 2014).

¹⁹ See, e.g., Aaron Short, *Success Academy makes up top 7 of 15 of the state’s top-scorers*, New York Post, August 16, 2014, available at <http://nypost.com/2014/08/16/success-academy-makes-up-top-46-of-states-top-scorers/> (last visited Sept. 9, 2014).

²⁰ Under No Child Left Behind (Pub. L. 107–110, 115 Stat. 1425, enacted January 8, 2002), a school district that does not have sufficient capacity at its good schools, must somehow expand the good schools, or consider other options including opening new charter schools or working with private schools or neighboring districts to provide students with seats in non-failing schools. 20 U.S.C. § 6316(b)(1)(E). In New York, lack of capacity is not an

thousands of students will not be transferred because space in non-failing traditional public schools and better performing charter schools in the district are at their limits. New charters face the obstacle of finding space sufficient for the purpose of educating students without any public funding. In the meantime, a generation of students is falling behind and has no opportunity to catch up.

76. As reported in *School District Struggles Over State Ruling on Students Right to Transfer* (June 2013), 45 of Buffalo's 57 public schools are failing under DOE Standards.²¹ Specifically, almost every school in the district has been designated as a "Priority School" -- meaning its performance is among the lowest 5% in the State based on combined ELA and Math results. Those schools that have not been designated as Priority Schools, with a few rare exceptions, are designated as "Focus Schools," which are schools located in a Focus district -- those districts that either have the lowest achieving students or lowest graduation rate. This means that 27,000 out of the 34,700 students in the Buffalo school district are entitled to transfer. Buffalo is unable to accommodate all of the transfer requests, however. Moreover, the few high schools that are in "good standing" all have testing admission requirements.²²

77. Facilities funding would aid in the expansion of charter school options and enable students in failing traditional public schools more opportunity to transfer to better performing charter schools. It would also help charter schools reinvest funds now spent on facilities into

acceptable reason to deny students the option to transfer to another school. 8 NYCRR §120.3.

²¹ See Sandra Tan, *School District Struggles Over State Ruling on Students Right to Transfer*, June 4, 2013 (Buffalo News) available at http://www.buffalonews.com/20130604/school_district_struggles_over_state_ruling_on_students_x2019_right_to_transfer.html (last visited Sept. 9, 2014).

²² The State Department of Education is investigating racial bias in admission in these five admission based public high schools. See Mary Pasciak, *U.S. Department of Education to probe racial bias in Buffalo Public Schools admissions*, The Buffalo News, March 13, 2014, available at <http://www.buffalonews.com/city-region/buffalo-public-schools/us-department-of-education-to-probe-racial-bias-in-buffalo-public-schools-admissions-20140313> (last visited Sept. 9, 2014).

their academic program, better preparing them for the demands of the Common Core state standards.

Plaintiffs Enrolled at Buffalo Charter Schools Sacrifice Facilities Funding

78. Plaintiffs in this action were forced to choose between traditional public schools which clearly fail by any measure to provide a “sound basic education” and charter schools that are outperforming the traditional public schools, but operate with constitutionally inadequate facilities and instrumentalities of learning due to inequitable funding.

79. Plaintiff Unique Brown is a twelve year old African-American student entering the seventh grade at King Center, a NECSN member school. Unique has attended King Center since kindergarten.

80. Denise Stevens, Unique’s mother, enrolled Unique at King Center because of the serious problems she experienced with her son, Unique’s older brother, who attended traditional Buffalo public schools. Ms. Stevens saw how the traditional Buffalo public schools failed to provide her son with a basic education as her son was promoted from grade to grade without evidencing actual learning. Ms. Stevens wanted to ensure that Unique did not experience the same failures.

81. Plaintiffs Fina, Sirmanuel, and Mark Bell are African-American siblings in the second, fifth, and sixth grade, respectively, at King Center. The Bells were enrolled at King Center approximately three years ago by their parents, Russell and Tammy Bell, who elected not to enroll their children in Buffalo’s traditional public school system because of their keen awareness that the traditional public schools were failing and because of their personal experience with their older children who had attended traditional Buffalo public schools.

82. Because students attending the traditional public school system have serious challenges to success, Mr. and Mrs. Bell and Ms. Stevens chose to enroll their respective children at King Center. Mr. and Mrs. Bell and Ms. Stevens observed that the teachers at King Center approached educating each student with care and attention.

83. Despite the many efforts of King Center teachers and administrators, resource constraints codified in State law have prevented King Center from providing the Bells and Unique with the kinds of facilities and instrumentalities of learning that a sound basic education require.

84. King Center lacks science labs, adequate athletic space, and a cafeteria and kitchen. King Center's computer education program is also limited. Many of the school's computers are outdated and the school does not have enough computers to support the needs and demands of its students. Additionally, due to financial and facilities constraints, the school has not been able to offer consistent arts education, and the provision of such services varies from year to year.

85. King Center's library is also under resourced. The library is comprised of donated, second hand books which are of disparate quality and insufficient to promote significant academic enrichment.

86. Plaintiff Giselle Aloma Jacobs is an eight year old, African-American student enrolled at Elmwood Village in Buffalo, New York, a NECSN member school. Giselle began the second grade in the fall of 2014, and she has been enrolled at Elmwood Village for one year. Prior to enrolling at Elmwood Village, Giselle attended Buffalo Public School 32, the Bennett Park Montessori School ("PS 32").

87. PS 32 has extensive facilities, resources, and amenities. PS 32 houses a large and recently renovated library, several computer labs, ample theater space, a large gymnasium, a full-size cafeteria with an onsite kitchen, several science labs equipped with recently updated equipment, and a wide array of sports teams, clubs, and extracurricular activities.

88. Despite these facilities and features, PS 32 is a consistently poor performing school, and officially categorized as a Focus School by the DOE. For the 2013-2014 school year, only 11.5% of students at PS 32 were proficient in ELA and only 8.5% of students were proficient in Math.

89. Ingrid Johnson-Jacobs, Giselle's mother, withdrew Giselle from PS 32 because she knew that the school was unlikely to provide Giselle with an adequate education.

90. Specifically, Ms. Johnson-Jacobs observed inadequate teaching at PS 32. She noted the teachers' inability to maintain proper classroom control and took issue with the school's ineffective use of resources.

91. At Elmwood Village, Giselle is regularly encouraged to explore her creative interests, developing a love for writing and an affinity towards the arts. The teachers at Elmwood Village consistently apprise Ms. Johnson-Jacobs of Giselle's progress, and take active strides to involve Ms. Johnson-Jacobs in planning for and assessing Giselle's academic progress.

92. Despite the many efforts of Elmwood Village teachers and administrators, resource constraints codified in State law have prevented the school from providing Giselle with the kinds of facilities and instrumentalities of learning that a sound basic education require.

93. Elmwood Village recently invested in upgrades to its facilities and sacrificed a great deal to make these renovations. As a result, the school is unable to invest the funds needed for its facility into its academic program.

94. The average class size for Elmwood Village is large. This large class size makes it more challenging for teachers to provide students with the proper attention needed for a sound basic education.

95. Elmwood Village's computer lab is also inadequate. Elmwood Village's computer lab is a small space comprised of a handful of computers in the back of the school's library. An entire class of students cannot be instructed collectively, and computer instruction cannot be effectively conducted while the library is in use as a library.

96. Plaintiff Tishawn Walker is a fourteen year old, African-American student entering the ninth grade at BASCS, a NECSN member school. Tishawn has attended BASCS for two years and was enrolled in BASCS at the start of seventh grade by his grandmother Michelle Emanuel. Prior to attending BASCS Tishawn attended Buffalo Public School 59, the Drew Science Academy ("PS 59").

97. PS 59 is one of the worst performing schools in Buffalo. For the 2013-2014 school year, only 3.3% of PS 59 students were proficient in ELA and only 4.2% of students were proficient in Math. In 2013, PS 59 was designated as a Priority School by the DOE.

98. While Tishawn was enrolled at PS 59, there were more than 30 students in each of his classes and Tishawn's teachers failed to provide him with even a modicum of basic education. Because PS 59 was utterly failing to provide a sound basic education to Tishawn, Ms. Emanuel enrolled Tishawn in BASCS.

99. Since enrolling in BASCS Tishawn's academic performance has improved. The teachers at BASCS make a conscious effort to cover curriculum material thoroughly and to ensure that students effectively grasp the material being taught.

100. Despite the many efforts of BASCS teachers and administrators, resource constraints codified in State law have prevented the school from providing Tishawn with the kinds of facilities and instrumentalities of learning that a sound basic education requires.

101. As BASCS only serves students in grades 7 through 12, the vast majority of students enter from traditional public schools in Buffalo. Like Tishawn, almost all of these students come from poor performing traditional public schools and enter BASCS far below proficiency levels, requiring extensive academic remediation.

102. The lack of adequate funding seriously curtails the amount that BASCS can invest in hiring additional teachers to help students transition from failing schools and procuring needed resources to effectively accommodate these students with effective remediation so they will graduate on time.

103. Additionally, although BASCS places a strong focus on science education, the school does not have space for science labs of the quality needed to provide a sound basic education.

104. Furthermore, BASCS's financial constraints restrict its ability to provide needed transportation services to its students who participate in afterschool programs to catch up in areas where they are academically deficient. Many students, unable to find a way home for various reasons, are unable to take advantage of these programs and fall further behind academically. With funding, BASCS could provide supplemental transportation to meet this need.

105. Without additional financial support BASCS will continue to struggle to ensure that it provides students, especially students like Tishawn, coming to BASCS from failing schools in the Buffalo City School District, what they need for a sound basic education.

Plaintiffs Enrolled at Rochester Charter Schools Sacrifice Facilities Funding

106. Plaintiff Samantha Cruz is an eight year old student. Samantha has begun the third grade at Eugenio Maria de Hostos Charter School (“EMH”), a NECSN member school. Samantha began attending EMH as a kindergartener.

107. Prior to enrolling Samantha in EMH, Samantha’s mother, Maria Dalmau, researched the schools in the Rochester City District Schools. Ms. Dalmau observed that almost all of the district’s schools were failing, and that the performance statistics for students of color were especially poor.

108. Recognizing that Samantha would likely fail to learn if she attended a traditional public school, Ms. Dalmau sought better options for her daughter and enrolled Samantha in EMH.

109. Ms. Dalmau was born and raised in Puerto Rico, and Spanish is her primary language. EMH is a bilingual school, with a Hispanic population of over 60%. EMH’s status as a bilingual school allows Ms. Dalmau to communicate with Samantha’s teachers and school administrators with ease and comfort.

110. Despite the many efforts of EMH teachers and administrators, resource constraints codified in State law have prevented the school from providing Samantha with the kinds of facilities and instrumentalities of learning that a sound basic education require.

111. EMH does not have a library, computer lab, or gymnasium. EMH also has no music, art, or theater programs. Students are therefore forced to go without these critically important amenities and the benefits they afford in advancing student development and promoting a sound basic education.

112. Moreover, EMH's classrooms are small and under-resourced. EMH's average class size is 25 students.

113. EMH also has an outdated heating and ventilation system, and as a result EMH has no control over the excessive heat that is pumped into the building. Without the financial capability to improve this system, the school is forced to rely on oscillating fans donated by parents or teachers.

114. EMH also lacks the proper facilities and funding to expand its services to offer eighth grade and high school programs. This will continue to force students like Samantha to return to failing schools in the Rochester City School District.

115. Without additional funding to further upgrade its facilities, improve its resources, and provide better professional development training, EMH cannot offer its students the sound basic education they are constitutionally obliged to provide.

116. NECSN has many member schools in Buffalo and Rochester, including King Center, Elmwood Village, BACSC, and EMH. To varying degrees, all of NECSN's member schools in New York are damaged as a result of the unconstitutional State's funding scheme as they are forced to divert substantial operations and instruction funds to cover the costs of facilities. Many of the schools lack science labs, computer labs, adequate library facilities, adequate classroom space, cafeterias and auditoriums, gymnasiums, and arts and theater space. These facilities and instrumentalities of learning are critical to the provision of a sound basic education. Yet, these schools serve thousands of New York children who are being deprived of a sound basic education as a result of the State's unconstitutional funding scheme which deprives charter schools of facilities funding.

117. Plaintiffs have sacrificed adequate facilities and instrumentalities of learning in exchange for the better education offered at these charter schools, although still constitutionally inadequate, as compared to the failing traditional public schools in Buffalo and Rochester.

**The Current Funding Scheme Unconstitutionally Deprives
Students of a Sound Basic Education**

118. The New York State Constitution states that: “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” (N.Y. Const., Art. XI, § 1). This clause is not a mere platitude, nor is it an abstract ambition which the State has no obligation to fulfill. It is a mandate that the State is constitutionally obliged to execute and accomplish for all New York school children.

119. The State is violating this mandate by maintaining an education financing system that fails to afford public school children the opportunity guaranteed by the Constitution.

120. A sound basic education, as required under the Education Article includes “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.” *CFE 1995* at 316.

121. In defining the essentials for a sound basic education, the Court of Appeals stated:

Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to 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.

CFE 1995 at 317 (emphasis added).

122. The essentials for a sound basic education include adequate (1) teaching, (2) facilities, and (3) instrumentalities of learning. While the charter schools attended by Plaintiffs

are outperforming the traditional public schools, they are still striving for increased student proficiency, especially under the Common Core. If the State provided facilities funding, the funds now being diverted away from instruction and programming to cover capital costs in charter schools could be redirected to provide their students with constitutionally guaranteed educational inputs and further improve educational outcomes.

123. The State's unconstitutional funding scheme that fails to include facilities funding causes: (1) inadequate teaching in the form of insufficient numbers of teachers to accommodate the ever increasing number of students seeking admission into charter schools; (2) inadequate facilities in the form of insufficient classroom space, unsatisfactory space for physical exercise, and inadequate cafeterias; and (3) inadequate instrumentalities of learning in the form of a lack of libraries, computer labs, quality curriculum programs to meet Common Core standards, and other resources, because funds must be diverted to pay for facilities.

The Current Funding Scheme Denies Equal Protection of the Law

124. The funding disparity to Plaintiffs on a per pupil basis, as compared with similarly situated students in traditional public schools, violates New York's equal protection clause.

125. New York State Const., Art. I, § 11 provides:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

126. In New York, education is an essential civil right. N.Y. Exec. Law § 291(2) ("The opportunity to obtain education . . . without discrimination because of age, race, creed, color, national origin, sex orientation, military status, or marital status, as specified in section two hundred ninety-six of this article, is hereby recognized as and declared to be a civil right.").

There is no rationale for the State to create a system of public education to provide the important goals outlined in Paragraph 13, *supra*, without a facilities allocation. *See* Educ. Law § 2850.

127. The six legislative purposes of charter schools (*see* Paragraph 13, *supra*) cannot rationally be achieved without public funding for facilities.

128. New York's funding system for public schools is unequal, unfair, and discriminatory, and there is no compelling or even rational State interest in a school financing scheme that creates gross disparities in the educational facilities and instrumentalities of learning in charter schools, as compared to students attending failing traditional public schools. Charter school students in this State are shortchanged by millions of dollars annually as their administrators divert operating funds from classrooms, curriculum, teachers, psychologists, counselors, and other critical needs, simply to pay the rent. Likewise charter schools are constrained to small facilities which they cannot afford to upgrade. This situation is untenable and legally indefensible as a matter of educational equality.

129. New York's funding scheme for charter schools violates the constitutional rights of Plaintiffs to equal educational opportunities in violation of New York State Const., Art. I, § 11. Plaintiffs have been denied equal treatment under the law and have been damaged by New York's unequal and discriminatory public school funding scheme.

**The Current Funding Scheme Has a Disparate Impact on
Racial and Ethnic Minority Students**

The Act Targets Minorities

130. Under New York law, the opportunity to obtain an education, without discrimination, is a civil right.

131. The unequal funding scheme, denying facilities funding to charter schools, while providing such funding to traditional public schools has a discriminatory impact on minority

students because charter school students are more likely to be minority because the Act targets “at-risk” populations including English language learners (“ELL”) ²³ and those eligible for free and reduced price lunch (“FRPL”).

132. Indeed, over 90% of students attending charter schools in the State of New York are minorities, most of whom are at-risk and qualify for FRPL, and many of whom are ELLs.

133. By contrast, only 40.74% of students attending all public schools in the State of New York are minorities.

134. Specifically, the Act is designed to, *inter alia*, “[i]ncrease learning opportunities for all students, with special emphasis on expanded learning experiences for students who are at-risk of academic failure.” (Educ. Law § 2850(2)(b)).

135. The Act further provides: “In reviewing applications, the charter entity is **encouraged to give preference** to applications that demonstrate the capability to provide comprehensive learning experiences to students identified by the applicants as **at risk of academic failure.**” (Educ. Law § 2852(2)(d) (emphasis added)).

**Charter Schools Serve a Large Proportion of Minority Students
Because Minority Students Comprise a Large Proportion of the
“At-Risk” Populations Charter Schools Are Encouraged to Target**

136. There are several methods by which a potential charter operator may apply for charter authorization, including application to the Board of Regents, to SUNY, and to the local Board of Education. Regardless of the charter entity, each application emphasizes that the Act targets “at-risk” populations and that a school which is designed to meet these parameters is more likely to be authorized.

²³ English Language Learners (“ELL”) are pupils with limited English proficiency, meaning students who by reason of foreign birth or ancestry, speak a language other than English, and (1) either understand and speak little or no English; or (2) score below a state designated level of proficiency, on the New York State Identification Test for English Language Learners (NYSITELL) or the New York State English as a Second Language Achievement Test (NYSESLAT).

137. Specifically, the 2014 Board of Regents New Charter School Application (the “BR Application”) includes a “New York State Statutory Priority Scoring Rubric.” Each objective of the charter school is assigned a weight of either one or two points. Of the eight listed objectives, only two are weighted more heavily -- being assigned a value of two. The first two-point objective is that the charter school focus on “at-risk” populations, including those “at risk of not obtaining a high school diploma, re-enrolled high school drop-outs and students with academic skills below grade level”; the other two point objective is that the charter school demonstrates support from the local school district.²⁴

138. The BR Application further explains that the New York State Education Department will review applications for charter schools and recommend to the Board of Regents for approval those charter schools that have a detailed and complete school design plan that satisfies six goals — the very first listed goal is a charter school application that “includes a clear plan to meet or exceed enrollment and retention targets for students with disabilities, students who are English language learners, and students who are eligible to participate in the federal free reduced-price lunch program.”²⁵

139. Similarly, SUNY’s Request for Proposals for charter schools explains that charter schools should focus on “at-risk” students:

The SUNY Charter Schools Institute’s (Institute’s) work in this regard is designed to support the SUNY Trustees’ commitment to the **guiding principles of the Act**: to establish schools that operate in an academically, fiscally, and legally sound manner that provide outstanding educational opportunities for all students, **especially those at-risk of academic failure**. . . .(emphasis added).²⁶

²⁴ 2014 CHARTER SCHOOL APPLICATION KIT, NEW YORK STATE EDUCATION DEPARTMENT (2014), pp. 52-53, available at <http://www.p12.nysed.gov/psc/startcharter.html> (last visited Sept. 9, 2014).

²⁵ *Id.* at p. 8.

²⁶ JANUARY 2014 SUNY REQUEST FOR PROPOSALS (RFP), SUNY CHARTER SCHOOLS INSTITUTE (Jan. 6, 2014), p. 2, available at <http://www.newyorkcharters.org/create/request-for-proposals/> (last visited Sept. 9, 2014).

140. In evaluating the application, SUNY will consider whether the proposal will expand learning experiences for students who are at risk of academic failure.²⁷

141. Moreover, SUNY will “award **preference points**” if a proposed school will meet any of eleven specified goals. Such “preferences” are recognized where a charter school will “increase high school graduation rates for students **particularly at risk of not graduating**”; “meet the enrollment and retention targets to be established by the SUNY Trustees for students with disabilities, **students who are ELLS [English Language Learners], and students who are eligible to participate in the [Free and Reduced Price Lunch] program**”; or “locate in a region of the state with limited educational alternatives.”²⁸ Many of the other “preference” objectives include indicators that further establish that serving at-risk students is preferred.²⁹

**Minority Students Are Overwhelmingly Represented in the “At-Risk”
Populations Charter Schools Are Encouraged to Serve**

142. The Act gives clear preference to a charter school that targets “at-risk” populations including students who are ELLs, those receiving FRPL (a proxy for poverty), and those at risk of academic failure, such as students with disabilities and students in low performing schools.

143. Each of these categories of students are dominated by minority populations.

144. ELLs are more likely to be minorities. According to data published by the DOE, 63% of all ELLs in New York State are Spanish speakers, as of May 2011.³⁰ Additionally,

²⁷ *Id.* at p. 14.

²⁸ *Id.* at pp. 15-16.

²⁹ *Id.* at pp. 17-19.

³⁰ *English Language Learners in NY*, NEW YORK STATE EDUCATION DEPARTMENT, p. 3, available at <http://www.p12.nysed.gov/biling/docs/DecRegPPPart154PDF.pdf> (last visited Sept. 9, 2014).

69.2% of ELLs in New York City, for example, receive free and reduced price meals, as explained below, further indicating that many ELLs are minorities.³¹

145. Students receiving FRPL are also more likely to be minorities. The National Center for Education Statistics explains that the National School Lunch Program is a federally assisted meal program and that eligibility for the FRPL program is often used as a proxy measure of poverty.³² According to the U.S. Department of Education Institute for Educational Science's National Center for Educational Statistics, "Black and Hispanic students are overrepresented in high-poverty schools. In 2008-2009, Blacks made up 17 percent of students overall and 34 percent of students in high-poverty schools, and Hispanics made up 21 percent of students overall and 45 percent of students in high-poverty schools." High poverty schools are defined as public schools where more than 75% of the students are eligible for FRPL.³³

146. Because the Act targets students living in poverty, any funding disparity has a disproportionate effect on minorities as poverty rates for Black and Hispanic families are three times the rate for White families.³⁴

147. The New York State Community Action Association published a New York State Poverty Report in 2013. The State's overall poverty profile by race is: 10.9% of Whites are living in poverty; 23% of Blacks are living in poverty; and 25.8% of Hispanics/Latinos are living

³¹ 2013 Demographic Report, NEW YORK CITY DEPARTMENT OF EDUCATION (2014), available at http://schools.nyc.gov/NR/ronlyres/FD5EB945-5C27-44F8-BE4B-E4C65D7176F8/0/2013DemographicReport_june2013_revised.pdf (last visited Sept. 9, 2014).

³² *Status and Trends in the Education of Racial and Ethnic Minorities*, NATIONAL CENTER FOR EDUCATION STATISTICS (Sept. 2007), available at http://nces.ed.gov/pubs2007/minoritytrends/ind_2_7.asp (last visited Sept. 9, 2014).

³³ *Id.*

³⁴ Russell W. Rumberger, *Poverty and High School Dropouts: The Impact of Family and Community Poverty on High School Dropouts*, AMERICAN PSYCHOLOGICAL ASSOCIATION (May 2013), available at <http://www.apa.org/pi/ses/resources/indicator/2013/05/poverty-dropouts.aspx> (last visited July 14, 2014).

in poverty.³⁵ In the City of Buffalo, for example, 19.7% of Whites live in poverty while 40.2% of Blacks and 49% of Hispanics/Latinos live in poverty.³⁶

148. Likewise, students with disabilities are more likely to be minority students. Black and Hispanic students are overrepresented in special education, meaning that there is a disproportionate amount of minority students in special education compared to that race/ethnicity's enrollment in the schools.³⁷ In 2014, Black and Hispanic students constituted just over 40% of the total district public school population in New York. However, this same group of students accounted for approximately 52.2% of students with learning disabilities.³⁸

149. Low performing schools are also more likely to be serving minority populations. Collectively, 81% of the students attending New York's 210 Priority schools, the worst performing schools in the State, are African-American or Hispanic.

The Current Funding Scheme Has a Discriminatory Impact on the Education of Minority Students

150. New York State prioritizes charter school authorization and funding for the "at-risk, minority student."³⁹

151. As a result, the inequitable charter school funding law which denies facilities funding and forces schools to reallocate operational funding to cover facilities, is clearly having

³⁵ See *New York State Poverty Report*, NEW YORK STATE COMMUNITY ACTION ASSOCIATION (Mar. 2013), available at http://ams.nyscommunityaction.org/Resources/Documents/News/NYSCAAs_2013_Poverty_Report.pdf (last visited Sept. 9, 2014).

³⁶ *Id.*

³⁷ CANDACE CORTIELLA & SHELDON H. HOROWITZ, ED.D., *THE STATE OF LEARNING DISABILITIES: FACTS, TRENDS AND EMERGING ISSUES* (New York: Nation Center for Learning Disabilities, 3rd ed. 2014) at p. 12, available at <http://www.nclld.org/images/content/files/stateofd2014/2014%20State%20of%20LD%20FINAL%20FOR%20REL%20EASE.pdf> (last visited Sept. 9, 2014).

³⁸ *Id.*; See also LAUREN M. RHIM, *Educating Students with Disabilities: History, Trends, and Best Practices*, STAND FOR CHILDREN LEADERSHIP CENTER (June 2012) available at <http://standleadershipcenter.org/sites/standleadershipcenter.org/files/media/WWSF-SPED.pdf> (last visited Sept. 9, 2014) (nationally, students from Black and Hispanic racial/ethnic minorities are overrepresented in special education).

³⁹ See Richard D. Kahlenberg & Halley Potter, *Diverse Charter Schools* (May 2012) available at http://tcf.org/assets/downloads/Diverse_Charter_Schools.pdf (last visited Sept. 9, 2014).

a disproportionate impact on the education of minority students. The decrease in operational funding directly impacts the instruction and instrumentalities of learning available to the almost entirely minority populations attending charter schools.

152. Research demonstrates that “on average, aggregate measures of per pupil spending are positively associated with improved or higher student outcomes.”⁴⁰ Additionally, money matters in educational outcomes: “Schooling resources which cost money, including class size reduction or higher teacher salaries, are positively associated with student outcomes.”⁴¹ And, “[w]hile money alone may not be the answer, more equitable and adequate allocation of financial inputs to schooling provide[s] a necessary underlying condition for improving the equity and adequacy of outcomes.”⁴² There is now “empirically-grounded confidence that funding does matter.”⁴³

153. Accordingly, the Act’s funding provision which deprives students attending charter schools of significant education funding has a direct impact on education outcomes and is unconstitutionally discriminatory.

FIRST CLAIM FOR RELIEF
Educational Adequacy
Asserted Against All Defendants
(Violation of New York State Const. Art. XI, § 1)

154. Plaintiffs repeat and reallege each of the allegations set forth in the preceding paragraphs of the Complaint as if set forth here in full.

⁴⁰ *Revisiting that Age-Old Question: Does Money Matter In Education?* THE ALBERT SHANKER INSTITUTE (2012) available at http://www.shankerinstitute.org/images/doesmoneymatter_final.pdf (last visited Sept. 9, 2014).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

155. The New York State Constitution states that: “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” (N.Y. Const., Art. XI, § 1).

156. The State has failed to satisfy this mandate.

157. Specifically, the State is violating this mandate by maintaining an education financing system that fails to afford public school children enrolled in charter schools the opportunity for an education guaranteed by the Constitution.

158. The New York Court of Appeals has construed the Education Article to require that all New Yorkers are entitled to the provision of a “sound basic education,” which equates 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.” *CFE 1995* at 316.

159. The essentials for a sound basic education include adequate (1) teaching, (2) facilities, and (3) instrumentalities of learning. *CFE 1995* at 317.

160. The State’s unconstitutional withholding of facilities funding causes New York’s charter school students to be deprived of adequate teaching, facilities, and instrumentalities of learning because operational funds must be diverted to cover facilities costs.

161. Accordingly, the public education funding scheme which denies capital and facilities funding to charter schools across the State, including Buffalo and Rochester, is unconstitutional and in violation of the State’s obligation to provide a “sound basic education” to every student.

SECOND CLAIM FOR RELIEF
Equal Protection
Asserted Against All Defendants
(Violation of New York State Const. Art. I, § 11)

162. Plaintiffs repeat and reallege each of the allegations set forth in the preceding paragraphs of the Complaint as if set forth here in full.

163. New York State Const., Art. I, § 11 provides:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

164. In New York, education is an essential civil right. N.Y. Exec. Law § 291(2).

165. The public education funding scheme which denies facilities funding to charter schools across the State, including in Buffalo and Rochester, but affords such funding to similarly situated students attending traditional public schools is unconstitutional and in violation of the New York State Constitution's guarantee of equal protection under the law.

166. New York's funding system for public schools is unequal, unfair, and discriminatory, and there is no compelling or rational basis for the State's school financing scheme, which creates gross disparities in the educational facilities and instrumentalities of learning in charter schools, as compared to students attending traditional public schools.

167. Accordingly, New York's funding scheme for charter schools violates the constitutional rights of Plaintiffs to equal educational opportunities in violation of New York State Const., Art. I, § 11. Plaintiffs have been denied equal treatment under the law and have been damaged by New York's unequal and discriminatory public school funding scheme.

THIRD CLAIM FOR RELIEF
Disparate Impact
Asserted Against All Defendants

168. Plaintiffs repeat and reallege each of the allegations set forth in the preceding paragraphs of the Complaint as if set forth here in full.

169. Under New York law, the opportunity to obtain an education, without discrimination, is a civil right.

170. Over 90% of students attending charter schools in the State of New York are minorities, most of whom are at-risk and qualify for FRPL, and many of whom are ELLs.

171. By contrast, only 40.74% of students attending all public schools in the State of New York are minorities.

172. The State's unequal funding scheme, denying facilities funding to charter school students, while providing such funding to traditional public schools has a discriminatory impact on minority students because the Act targets, and charter schools primarily serve, "at-risk" populations including ELL and FRLP eligible students, a large proportion of whom are racial and ethnic minorities.

173. The Act is specifically designed to encourage the growth of charter schools to serve students who are "at-risk of academic failure," students with disabilities, ELLs, and those receiving FRPL.

174. Statistics and research demonstrate that these categories of students are dominated by minority populations.

175. As a result, the inequitable charter school funding law which denies capital and facilities funding to charter schools has a disparate and disproportionate impact on the education of minority students and is therefore unconstitutionally discriminatory.

WHEREFORE, Plaintiffs demand an order and judgment as follows:

A. On the first cause of action, issuing declaratory judgment and injunctive relief in favor of Plaintiffs and against Defendants declaring that the State's funding scheme which denies facilities funding to charter schools violates the New York State Constitution Education Article and enjoining the Defendants from unconstitutionally withholding facilities funding from charter schools;

B. On the second cause of action, issuing declaratory judgment and injunctive relief in favor of Plaintiffs and against Defendants declaring that the State's funding scheme which denies facilities funding to charter schools violates the New York State Constitution Equal Protection clause and enjoining the Defendants from unconstitutionally withholding facilities funding from charter schools;

C. On the third cause of action, issuing declaratory judgment and injunctive relief in favor of Plaintiffs and against Defendants declaring that the State's funding scheme which denies facilities funding to charter schools is unconstitutionally discriminatory and enjoining the Defendants from unconstitutionally withholding facilities funding from charter schools;

D. Awarding Plaintiffs all costs and fees associated with bringing this action, including attorneys' fees and costs; and

E. Together with such other and further relief as this Court may deem just and proper.

Dated: New York, New York
September 15, 2014

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