

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

In the Matter of an Article 78 Proceeding

Nidia Cortes, Virgil Dantes, AnneMarie Heslop,
Curtis Witters, on Behalf of Themselves and Their
Children,

Index No. 5102-16
RJI No.: 01-16-ST8123

Petitioners-Respondents,
-against-

ROBERT MUJICA, Director, New York State
Division of Budget; NEW YORK STATE DIVISION
OF BUDGET, MARYELLEN ELIA, New York State
Commissioner of Education, NEW YORK STATE
EDUCATION DEPARTMENT,
Respondents-Appellants.

**PETITIONERS'-RESPONDENTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO VACATE THE STATUTORY
STAY AND EXPEDITE THE APPEAL**

Petitioners-Respondents Nidia Cortes, Virgil Dantes, AnneMarie Heslop,
and Curtis Witters ("Petitioners-Respondents") submit this memorandum of law
and affirmation of Wendy Lecker, Esq., with Exhibits, in support of their motion,
pursuant to C.P.L.R, 5519 (c) to vacate Respondents-Appellants' New York State
Division of Budget's ("DOB") and Robert Mujica's statutory stay of enforcement
of the order of the Supreme Court, Albany County (O'Connor, J), entered

December 28, 2016 directing Respondents-Appellants to immediately release Transformation Grant funds, illegally frozen by Respondents-Appellants DOB and Mujica, to the New York State Education Department (“NYSED”) for distribution to the schools labeled “persistently failing” in 2015 and awarded these grants for the 2015-16 and 2016-17 school-years.

PRELIMINARY STATEMENT

With this motion, Petitioners-Respondents seek to prevent the subversion of public policy and irreparable harm to public school students that will occur if the statutory stay of Justice O’Connor’s order is maintained. In 2015, the legislature passed N.Y. Education law §211-f, the “school receivership law.” Under this law, the Commissioner of Education was required to designate certain schools, those among the lowest achieving schools for ten consecutive years, as determined by student achievement on test scores and other outcomes, as “persistently failing.” N.Y. Education Law §211-f(b). Superintendents in districts with “persistently failing” schools are vested with powers of a receiver and “persistently failing” schools are given a year to make “demonstrable improvement.” N.Y. Education Law §211-f(c). At the end of the year after a school is designated “persistently failing,” the NYSED is to conduct a performance review to determine whether the school would be removed from the “persistently failing” list, continue another year

with the superintendent as a receiver or placed into the hands of an independent receiver. N.Y. Education Law §211-f(c).

In 2015, the legislature appropriated \$75 million to support the receivership law. L. 2015, ch. 53, as amended by L. 2015, ch. 61. The funds were re-appropriated in the 2016-2017 State Budget. See L.2016, ch. 53. Pursuant to the legislation, the appropriation was to be used for “transformation grants:” "school districts containing a school or schools designated as persistently failing pursuant to [Education Law § 211 (1)(b)]" are eligible to apply for "transformation grants ... pursuant to a spending plan developed by the [C]ommissioner of [E]ducation and approved by the [D]irector of the [B]udget." L. 2015, ch. 53, as amended by L. 2015, ch. 61, and reappropriated by L. 2016, ch. 53. The statute provided that the transformation grants be used to support academic, health, mental health, nutrition, counseling, legal and/or other services to students and their families; extended learning time for students; the expansion, alteration or replacement of the school's curriculum and program offerings; professional development of teaching and administrative staff; and mentoring of at-risk students. L. 2015, ch. 53, as amended by L. 2015, ch. 61.

Under the legislation, the transformation grant was to be used in the 2015-16 and 2016-17 school-years, to support improvement in schools designated as “persistently failing.” Under the appropriation legislation "for each of the

persistently failing schools, the maximum annual grant in the 2015-2016 and 2016-2017 school years [will] be established by [NYSED] ... in the spending plan for such grants," and that "[a] portion of such grants [will] be available by July 1 of each such school year" Id. The appropriation will lapse on March 31, 2018. L. 2016, ch. 53.

As mandated by the appropriations legislation, the Commissioner of Education developed a spending plan for the transformation grants. According to the plan, twenty schools, designated as “persistently failing,” were eligible to receive two-year grants. The spending plan set forth the two-year allocation amounts for each school. The spending plan stated that the goal of the transformation grants was "to support and implement a ‘persistently failing’ school’s turnaround efforts over a two-year period." Lecker Affirmation, Exhibit A, p. 22. The plan provided that the schools eligible for the grant were permitted to use the grant over a one-year or two-year period, but that in order to receive funds otherwise dedicated to the second year in the first year, a school would have to make a specific request for accelerated payment. Id., p. 6. On October 15, 2015, Respondent-Appellant Division of Budget approved the transformation grant spending plan, as required by the appropriations legislation. Id., p. 6. NYSED then made the transformation grant available to the twenty eligible schools. Id., pp 6-7.

The transformation grant applications provided that the transformation grant funds were “available ‘to support and implement turnaround efforts over a 21[-] month period.’” Lecker Affirmation, Exhibit A, p. 7 The applications included a set-off provision:

SET-OFF RIGHTS. The State shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

Lecker Affirmation, Exhibit B, p. 77.

William S. Hackett Middle School (“Hackett”), in Albany, JHS 80 Mosholu Parkway Middle School (“JHS 80”), in the Bronx and Roosevelt High School (“Roosevelt”), in Yonkers, were three of the twenty schools designated as “persistently failing” in 2015 pursuant to N.Y. Education Law §211-f eligible to apply for and receive the transformation grants. Petitioner-Respondent Curtis Witter’s child attends Hackett Middle School. Petitioner-Respondent Nidia Cortes’ child attends JHS 80. Petitioners-Respondents Virgil Dante and AnnMarie Heslop have children who attend Roosevelt High School. All three schools submitted applications for the two-year grant, plus a proposed budget for the first year,

representing half or less than half of the full two-year allocation. Lecker Affirmation, Exhibit A, p.7. NYSED approved all three applications. Id. The grants operated on a reimbursement basis. The grant monies were released to NYSED by DOB, and NYSED reimbursed the school districts pursuant to the approved budget. Lecker Affirmation, Exhibit A, p. 3.

In early 2016, NYSED issued continuation guidance regarding the transformation grant. In the guidance, NYSED noted that "all grants ... are subject to further review, monitoring and audit to ensure compliance," and that NYSED "has the right to recoup funds if the approved activities are not performed and/or the funds are expended inappropriately." Lecker Affirmation, Exhibit A, p. 7.

In February 2016, NYSED issued a press release indicating that nine of the twenty schools previously designated as "persistently failing," including Hackett, JHS 80 and Roosevelt, would be removed from the persistently failing list, effective June 30, 2016. The press release stated that the nine schools would still be eligible to receive the transformation grants in the 2016-17 school-year. Lecker Affirmation, Exhibit A, pp. 7-8.

On or about March 30, 2016, the DOB placed the entire unexpended balance of the transformation grant appropriation in "reserve" in the State Financial System, preventing NYSED from accessing the remaining year one funds and the entire \$37.5 million year two appropriation. Lecker Affirmation, Exhibit A, p. 8.

On April 1, 2016, the appropriation legislation for the transformation grant was amended. The sole amendment was an extension of the date the grant would lapse, from March 31, 2017 to March 31, 2018. see L. 2016, ch. 53, and Lecker Affirmation, Exhibit A, p. 8 fn. 9. On April 21, 2016, a DOB spokesman was quoted in a news article stating that to suggest that the nine schools removed from the “persistently failing” list “should remain eligible for the funding even though they were removed from the program is contrary to law.” Lecker Affirmation, Exhibit A, p. 8.

Both DOB and NYSED concede that neither notified any of the three schools, Hackett, JHS 80 or Roosevelt, that the transformation grant funding would be withheld for the 2016-17 school year. Lecker Affirmation, Exhibit A, p. 17. On July 28, 2016, counsel for Petitioners-Respondents wrote to Respondent-Appellant Mujica on behalf of parents in schools removed from the “persistently failing” list, inquiring whether DOB “will release funding under the [transformation grant] to those schools for the 2016-2017 school year.” Lecker Affirmation, Exhibit A, p. 8. Counsel indicated in the letter that if Respondent-Appellant Mujica did not respond to the letter within ten days, Counsel will deem the lack of response as “a statement by the Division of Budget that it is withholding [transformation grant] funding ... from these schools for the 2016-2017 school year.” Id., pp. 8-9. Respondent- Appellant did not respond to counsel’s letter. Id., p. 9. Petitioners-

Respondents filed this Article 78 proceeding on September 2, 2016. Lecker Affirmation, Exhibit C.

Hackett Middle School

Toward the end of the 2014-15 school year, Hackett Middle School was informed of its status as a “persistently failing” school. Lecker Affirmation, Exhibit D, ¶5. It was also informed it would be eligible to receive grant money in connection with this designation. Id., ¶5. In anticipation of the grant, a decision was made to lengthen the school/work day and provide an additional thirty minutes of instruction each day. Id., ¶6. The additional cost of the extended day, such as extra compensation for staff, was to be funded by the grant monies. Id., ¶6. With the additional thirty minutes each day, Hackett was able to provide all students in the school with an “Enrichment period” within the school day itself during which they received necessary and additional academic support. Id., ¶7. This academic support included help with homework, the opportunity to make up missed work, and opportunities for teachers to provide re-teaching/reinforcing of the instructional program with students on their team, with students one on one, or in small groups. Id., ¶7. The addition of the Enrichment period resulted in more students making honor roll, fewer students failing classes and a decrease in the number of student discipline issues. Id., ¶8.

Under the revised master schedule, Hackett also implemented weekly professional development workshops for all faculty and staff. The professional development was conducted by the Hackett AVID Site Team and focused on student engagement strategies. Lecker Affirmation, Exhibit D, ¶9. Teachers were introduced to strategies to increase and support students' writing, inquiry, collaboration, organization and reading skills across all content areas. Id., ¶9. The weekly professional development workshops played a critical role in improving overall classroom instruction while also providing a channel for teachers to work collaboratively and discuss strategies for rigorous curriculum development. Id., ¶9.

Owing to the freezing of the second year's installment of the Transformation Grant by the New York State Division of Budget, Hackett was unable to continue the revised master schedule in the 2016-17 school year. Lecker Affirmation, Exhibit D, ¶10. Hackett could no longer provide the extra thirty minutes of instructional time, the Enrichment Period nor the weekly professional development workshops. Id., ¶10. At this point in the school year, and owing to the complexities of changing the school master schedule, it is impossible to re-implement the revised schedule that provided for an additional thirty minutes of instruction for the 2016-17 school year. Id., ¶10. In order to restore the revised schedule for the 2017-18 school year, Hackett Middle School would need to receive assurance by May 2017 that the funds will be released. Id., ¶11. If Hackett

is not notified prior to May, the District will not be able to renegotiate the teachers' contract to permit the additional time in the school day and timely make all the scheduling changes necessary to implement a reinstatement of the enrichment period and additional professional development for the 2017-18 school-year. Id., ¶11. If the funds are released subsequent to May 2017, Hackett would not be able to use the funds for the 2017-18 school year. The transformation grant will lapse in March 31, 2018. Id., ¶12. Thus, if the funds are released subsequent to May 2017, Hackett Middle School will have forever lost the opportunity to use the remainder (i.e. the second year's installment) of the transformation grant funds permanently. Id., ¶13.

The approved budget for the first year of the Hackett's transformation grant, the 2015-16 school year, was \$1,119,568. Owing to the freezing of the transformation grant funding by the New York State Division of Budget, the school district has not been reimbursed \$545,787, which represents almost half the first year's approved allocation. Lecker Affirmation, Exhibit D, ¶14.

JHS 80

JHS 80 is a high-needs school. 80% of the students at the school are economically disadvantaged, 32% are English Language Learners and 25% have disabilities. Lecker Affirmation, Exhibit E, ¶4. Many of the students at JHS 80

face multiple challenges, including socio-economic and family and housing-related challenges that interfere with their ability to learn successfully. Id., ¶4

Owing to the needs of both students and teachers serving these students, JHS planned to use the Transformation Grant funds to support both students and teachers. Part of the grant money was to pay for a teacher to conduct at-risk mentoring for our students who face the multiple challenges described above. Lecker Affirmation, Exhibit E, ¶5. This teacher was going to work with ten to fifteen students at a time to create individualized plans to help these students improve. Id., ¶5. From Tuesdays through Fridays, JHS 80 has seventy-five additional minutes in the school day. While the New York City Department of Education (“DOE”) provides funds for teachers during the extended day, there are no funds for social workers or guidance counselors during the extended day period, which occurs four days a week. Therefore, JHS 80 intended to use part of the Transformation Grant to provide social work and guidance counseling staff, so that students would be able to receive continuity of support during that school time. Id., ¶6. Additionally, the Transformation Grant funds were going to pay for professional development. As the students’ needs are so great, professional development is a particularly critical need. Id., ¶7.

JHS 80 was submitted its final application for the two-year Transformation Grant in early 2016. JHS 80 was notified of the availability of the grant money in

May 2016. Lecker Affirmation, Exhibit E, ¶9. Thus, JHS 80 was unable to implement its proposed programs during the 2015-16 school year. Id., ¶11. Shortly thereafter, in the summer of 2016, JHS 80 was informed that the transformation grant money would be frozen and unavailable during the 2016-17 school year. Id., Id., ¶10. Owing to the freezing of the transformation grant funds by the DOB, JHS 80 was unable to implement any of the programs or services proposed in its transformation grant application and budget during the 2016-17 school year. Id., ¶11.

JHS 80 receives the budget allocation for the next school year from the DOE at the end of April or May of the current academic year. Lecker Affirmation, Exhibit E, ¶12. It is at that time that the school must make staffing and scheduling decisions for the next academic year. Id., ¶12. By mid-June, the school must notify staff of any staffing changes and/or decisions. Id., ¶12. If JHS 80 does not receive assurance that the transformation grant funds are released by June 2017, it is extremely unlikely the school be able to implement any of the programs under the grant in the 2017-18 school year. Id., ¶13.

The transformation grant funding lapses in March 2018. Thus, if JHS 80 cannot access the funds before July 1 2017 at the very latest, JHS 80 will not be able to use any of the transformation grant funding at all. Id., ¶14.

Roosevelt High School

Roosevelt High School, in Yonkers, is a high-needs school. Eighty-six percent of the students are economically disadvantaged, ten percent of the students are English Language Learners and nineteen percent of the students have disabilities. Lecker Affirmation, Exhibit F, ¶4. Roosevelt received a two-year transformation grant. Additional student support services were offered during the 2015 - 2016 academic year through the transformation grant funds. Roosevelt High School - Early College Studies (“Roosevelt”) implemented numerous student support structures to scaffold academic achievement. Data was used to assess student progress and determine the types of interventions and areas for which they were required. Id., ¶5.

The additional support for students Roosevelt was able to provide with the transformation grant funds included: an Academy of Achievers (for students with disabilities); additional sessions of the Advanced Designation Academy (designed to help students obtain an Advanced Regents Diploma); additional sessions of the Saturday Academy (providing review for the Regents exams); a senior mentoring program; a High School Academy program was implemented during the Spring Recess (where 55 students received 513 hours of extended learning time); a student reflection program; an additional social worker; mental health and health services; an additional day of Freshman orientation; additional equipment for CTE

pathways; transportation to college visits; college course on Pace University's Pleasantville campus; metro cards for weekend and extended learning times; food for weekend and extended learning times. Lecker Affirmation, Exhibit F, ¶6.

The transformation grant enabled Roosevelt to increase family engagement through: a family welcome center, including a parent coordinator who worked from 9-2:30 Mondays through Wednesdays. The parent coordinator conducted a host of parent outreach activities, such as: organizing open school nights, attending parent meetings, conducting parent outreach, serving as a liaison to the Central office, and facilitating communication between parents, the community and the school. Roosevelt also instituted family nights. Lecker Affirmation, Exhibit F, ¶7.

In addition, the transformation grant enabled Roosevelt to expand professional development. It funded the position of literacy/numeracy coach to provide targeted instructional support for our Math Department. Lecker Affirmation, Exhibit F, ¶8. The grant monies funded bi-monthly professional development sessions facilitated by various agencies during the school day and after school. Topics focused on improving student engagement and increasing academic rigor. *Id.*, ¶8. The professional development workshops were essential in improving overall classroom instruction and curriculum design while promoting collaboration among teachers. Roosevelt was also able to implement a Professional

Development Team; a Data Team and a Shared Decision- Making Committee. Id., ¶8.

With the additional academic support services, an improvement in overall scores was noted in Regents examinations across the content areas. Moreover, Roosevelt's graduation rate increased to 86% in 2015 -2016 from 79% for 2014 - 2015. Lecker Affirmation, Exhibit F, ¶9. In addition, 13 students graduated with an Advanced Regents Diploma in 2015-2016 school year as opposed to only 5 students in the 2014-2015 school year. Id., ¶9. Quarterly honor roll recognition grew to 197 students by the third marking period. The Mathematics Department recorded a 242% increase in the number of students meeting proficiency on the June 2016 Common Core Algebra NYS Regents exam over the previous year. Id., ¶9. Similarly, Common Core Geometry NYS Regents proficiency scores increased by 100%. Id., ¶9. The literacy/numeracy coach position has been an integral component of Roosevelt's academic achievements. Id., ¶9.

Owing to the freezing of funds by DOB, all of the academic support services previously offered to students were reduced or eliminated, as were the professional development opportunities. Lecker Affirmation, Exhibit F, ¶10. For example, the number of sessions for the Saturday academies were reduced from fifteen to three. Id., ¶10. The Academy of Achievers (for students with disabilities) was eliminated, as was the High School Academy. Metro Cards and food for

extended learning time was discontinued. Id., ¶10. College visits were reduced. Id., ¶10. All outside professional development services were eliminated. Id., ¶10. The literacy/math coach position was lost. Id., ¶10. Data teams and professional development teams were combined, thus limiting their ability to be effective. Id., ¶10. The district was unable to order products necessary, such as yearly software subscriptions, to maintain the CTE pathways programs at its proper level. Id., ¶10. The parent coordinator position was eliminated. Id., ¶10.

If Roosevelt does not have assurance before March 2017 that the remainder of the grant monies will be released, it will not be able to use any grant money for the remainder of the 2016-17 school-year. Lecker Affirmation, Exhibit F, ¶11. If it is released before March 2017, Roosevelt will be able to reinstitute some of the services provided pursuant to the grant for the remainder of the school year. Id., ¶11. Any grant monies released close to or after the Regents exams would not be able to be used to support the programs used to help students prepare for the Regents examinations. Id., ¶11.

If the grant monies are released before the beginning of the 2017-18 school year, Roosevelt will be able to reinstitute most of the services provided under the grant for the 2017-18 school year. Lecker Affirmation, Exhibit F, ¶12. If the grant monies are released during the 2017-18 school year, Roosevelt may be able to reinstate some of the services provided under the grant. Id., ¶12. However, the

school would not be able to provide the full panoply of services it was able to provide in the 2015-16 school year. For example, college course registration and planning of college visits must be done before the fall. Thus, any grant monies released after the beginning of the school year would not be able to be used for these programs. Id., ¶12. If the grant monies are withheld pending the appeal, Roosevelt will have forever lost the opportunity to provide the second year of these services to students and teachers; since the grant lapses in March 2018. Id., ¶12.

The approved budget for the first year of the Transformation Grant, the 2015-16 school year, was \$1,881,790. Lecker Affirmation, Exhibit F, ¶13. Owing to the freezing of the Transformation Grant funding by the New York State Division of Budget, the school district has not been reimbursed for any of the expenditures in connection with the first year of the grant. The entire \$1,881,790 amount budgeted remains unreimbursed. Id., ¶13.

Judge O'Connor's decision

Oral argument was held before Justice Kimberly A. O'Connor, New York State Supreme Court, Albany County, on September 30, 2016. All papers were submitted by October 6, 2016. Lecker Affirmation, Exhibit A, p. 3. On December 28, 2016, Justice O'Connor issued a written decision denying Respondents' - Appellants' DOB's and Mujica's motion to dismiss and ordering Respondents-Appellants to immediately release the appropriated transformation grants funds to

NYSED, making those grants available to all schools awarded transformation grants, including Hackett, JHS 80 and Roosevelt. Id., p. 24. The court found that the plain language of the appropriations statute, as well as the statutorily required spending plan approved by Respondent-Appellant DOB, demonstrated that the grants were intended to be two-year grants. Id., p. 22. The court further held that there was nothing in the statute, nor in the spending plan approved by DOB, indicating that the schools eligible to apply for the grant at the time the grant was made available would become ineligible if they were removed from the “persistently failing” list after year one of the grant period. Id., pp. 21-22. The court further noted that had the legislature desired, it could have, in the first drafting or in the re-authorization, expressly included a provision that schools must remain on the “persistently failing” list for the duration of the grant; as the legislature had done the Community Schools legislation. Id., p. 21-22. The court noted that the sole amendment to the legislation the legislature made in 2016 was an extension of the date by which the appropriation was set to lapse, from March 31, 2017 to March 31, 2018. Id., p. 8, fn.9.

The court found significant that when the DOB approved the spending plan in October, 2015, Respondents-Appellants “did not assert the position that a school’s removal from “persistently failing” status renders the school ineligible for

transformation funding and justifies withholding that funding.” Lecker Affirmation, Exhibit A, p. 22.

Thus, the court held that DOB exceeded its authority in withholding the grant monies appropriated by the legislature. The court ruled that nothing in the legislative language nor preamble language to the chapter laws permitted DOB to substitute its judgment for that of the legislature and executive in passing the 2015-16 and 2016-17 budget laws. Lecker Affirmation, Exhibit A, pp. 23-24. The court concluded that to hold otherwise “would upset the balance of power existing among the three co-ordinate and coequal branches under our constitutional form of government.” Id., p. 23.

The court also dismissed Respondents’-Appellants’ other arguments, ruling that as parents of children attending schools affected by the withholding of the grant monies, and consequential deprivation of programs and services those grant monies enabled the schools to provide, Petitioners-Respondents established harm distinct from that suffered by the general public, and that they have a legal stake in the outcome of the litigation. Lecker Affirmation Exhibit A, pp. 12-15

Furthermore, as there was no dispute that the legislation was designed to support improvement in Petitioners’ children’s schools, Petitioners’-Respondents’ interests fall within the zone of interests sought to be promoted by the appropriation legislation. Id., pp. 13-14. Moreover, the court found that even absent personal

aggrievement, Petitioners-Respondents would have standing because the determination of whether or not DOB exceeded its authority and infringed on the prerogative of the Legislature is a matter of public concern. Id., p. 15.

The court further found Respondents'-Appellants' statute of limitations argument to be without merit. As both Respondent-Appellant DOB and NYSED conceded that neither notified the three schools that the second year's installment of their transformation grants would be withheld, the court found that the earliest possible date for the statute of limitations could begin to run was June 30, 2106; the date the schools were removed from the "persistently failing" list. Lecker Affirmation, Exhibit A, p.18. Therefore, September 2, 2016, the date the Petitioners filed their Article 78 petition, falls within the four-month limitation period. Judge O'Connor's Decision was entered on January 5, 2017. Id., p. 1. On February 6, 2016, Petitioners-Respondents were served with the Respondents-Appellants Notice of Appeal and Pre-Calendar statement. Lecker Affirmation, Exhibit G.

ARGUMENT

I. THE COURT SHOULD VACATE THE STAY IN ORDER TO AVOID SUBVERSION OF PUBLIC POLICY

While CPLR § 5519 provides an automatic stay to the state or a subdivision thereof, the right to a stay is not absolute. A court "may vacate, limit or modify any stay imposed by subdivision (a)." C.P.L.R. §5519(c). Courts have vacated stays

when they impose a "hardship on a private litigant without advancing any viable public policy." Clark v. Cuomo, 105 A.D. 2d 451, 451 (3d Dep't 1984) (Weiss, J, dissenting); see also Freeman v. Lamb, 33 A.D.2d 974 (4th Dep't 1970) (vacating statutory stay which blocked seating of city councilman because public interest required city affairs be conducted in orderly fashion). It is impermissible for the City to use the statutory stay simply to avoid its obligations for the longest period of time. Matter of Troy Police Benevolent & Protective Assn. (City of Troy), 223 A.D.2d 995,996 (4th Dep't 1996) (City cannot use filing of meritless appeal simply to prolong the litigation and delay City's obligations). CPLR. §55 19(a) is designed to protect a political subdivision of the state. DeLury v City of New York, 48 A.D.2d 405 (151 Dep't 1975). It is not designed to improperly insulate that subdivision from its legal obligations.

In the instant case, maintaining the statutory stay would frustrate the Legislature's intent in enacting the transformation grant appropriations legislation, and would also contravene the constitutional notion of a sound basic education. The "status quo" that would be preserved with a statutory stay in this case is the freezing of all of the second year's installment of the transformation grant funding, plus a portion of the first year's installment that is owed to the schools that received the grant. Hackett Middle School has not received any of the second year's installment of its grant, and has not received \$545,787 in unreimbursed

costs for the first year of the grant. Roosevelt has not any of the second year's installment of its grant, and the entire first year's budget remains unreimbursed. JHS 80 has not received any of the two-year allocation due it under the grant. It is undisputed that in appropriating the funds for the transformation grant the Legislature intended to support improvement efforts in the schools designated by the Commissioner as "persistently failing." Lecker Affirmation, Exhibit A, p. 6. The trial court found that the plain language of the appropriations law and the spending plan approved by Respondent-Appellant DOB provided that this improvement was to occur over a two-year period. Id., p. 22. Representatives from the three schools at issue in this appeal attest that if the funds are not released by the end of the 2016-17 school-year, and July for JHS 80, these schools will not be able to make use of the grant in the 2017-18 school year. Lecker Affirmation, Exhibits D, E, F. Hackett and Roosevelt, the two school who were able to make use of the grant the first year, reported improvements in student achievement as a result of the grant. See, Lecker Affirmation, Exhibit D, ¶¶8-9, Exhibit F, ¶9. The appropriation legislation lapses on March 31, 2018, after which point the transformation grant funds will no longer be available. L. 2016, ch. 53. Thus, if the funds are withheld pending the appeal, Hackett and Roosevelt will have forever lost the opportunity to avail themselves of the grant monies—without having been able to implement the second year of services, programs and staff that NYSED

approved as supporting improvement in the schools. JHS 80 will have forever lost the opportunity to use both years of the grant. Moreover, Hackett and Roosevelt will have been denied reimbursement for expenses they have already incurred under the first year of the transformation grant. Maintaining the stay, which will result in freezing of all transformation grant funds pending this appeal, contravenes the express goal of the appropriations statute: supporting improvement in these schools over a two-year period.

In addition to frustrating the stated goal of the appropriations legislation, maintaining the stay contradicts the constitutional notion of guaranteeing the opportunity for a “sound basic education” for all students. This state’s highest court recognized that education is of primary public importance. Campaign for Fiscal Equity v. State (“CFE II”), 100 N.Y. 2d 893, 901 (2003) (noting the “unanimous recognition of the importance of education in our democracy” that has been embedded in the Education Article of the New York Constitution). The Court in CFE II held that the opportunity for a sound basic education under the New York Constitution must “‘be placed within reach of all students,’ including those who ‘present with socioeconomic deficits.’” CFE II, 100 N.Y. 2d at 915, quoting Campaign for Fiscal Equity, 187 Misc.2d 1, 63 (New York Co., 2001). As the Court observed, a foundational principle in New York education policy is the notion that “[a]ll children can learn given appropriate instructional, social, and

health services.” Id. at 915. The majority of students in the schools at issue in this case are economically disadvantaged. The schools have above the state average percentage of English Language Learners. These are the characteristics, according to New York State, of “at-risk” students; those students who require additional instructional and social support in order for the opportunity for a sound basic education to be placed within their reach. CFE II, 100 N.Y. 2d at 940-44. The transformation grants were designed to provide these students with precisely the academic and social supports that would enable them to access their constitutional right to an education. Lecker Affirmation, Exhibit A, p. 5. To maintain the stay would deny these needy students these necessary resources and would thus undermine the goal of providing all students, no matter what their need, with the requisite tools to avail themselves of this constitutional right.

Maintaining the statutory stay, which will permanently deprive these students of academic and social supports designed to improve their learning, violates the clear intent of the appropriations legislation and also the strong public policy in favor of providing all students educational resources to meet their needs.

II. RESPONDENTS-APPELLANTS CANNOT ESTABLISH THAT THE STAY IS WARRANTED

In deciding whether or not to vacate a statutory stay, a court must consider the likelihood of success on appeal, whether there will be irreparable injury, and a

balancing of the equities. Tucker v Toia, 54 A.D.2d 322, 324 (4111 Dep't 1976); DeLury v City of New York, 48 A.D.2d at 406.

A. Respondents-Appellants have little likelihood of success on appeal

Petitioners-Respondents need only establish that it is unlikely for Respondents-Appellants to prevail on appeal, not that it is certain. See Bingham v Struve, 184 A.D.2d 85, 88 (1st Dept. 1992) Given the strong statutory underpinnings of the court's decision, it is unlikely that Respondents-Appellants will prevail on appeal. The fundamental question in this case -- whether schools that received the transformation grant would forfeit the second year's installment of the grant if they were removed from the "persistently failing" list-- turned on basic interpretation of unambiguous language in the appropriations statute. The court found that it was apparent from the language of the statute that the grant was to be for a two-year period.

As the court further found, this conclusion was confirmed by plain language the statutorily-mandated spending plant that Respondents-Appellants DOB themselves approved without any modifications. The court also found that proper interpretation of the statutory language compelled the conclusion that schools were eligible to apply for the grant if they were designated persistently failing at the time the grant was awarded. The court held that nowhere in the language was there the requirement that schools remain on the persistently failing list throughout

the two-year grant period. By contrast, the court noted that the Community Schools grant legislation expressly required schools to be designated as either failing or persistently failing throughout the period of that grant. Lecker Affirmation, Exhibit A, pp. 21-21; see also, L. 2016, Ch. 53.

Following the basic rules of statutory interpretation, the court determined that the legislature intended to provide schools with a full two-year grant, and that there was no express provision, nor could a provision be implied, that a school would forfeit the grant awarded if its status changed halfway through the grant period. Lecker Affirmation, pp. 20-22. Thus, the court held, Respondents-Appellants exceeded their authority and infringed on the prerogative of the Legislature when it withheld monies appropriated by the Legislature under the transformation grant statute Id., pp. 23-24. The court further ruled that to find otherwise would be to upset the balance among co-equal branches of government. Id., p. 23. It should be noted that the court's decision was not only consistent with Petitioners-Appellants position but also with the position of Respondents NYSED and Commissioner of Education Elia, who also argued that the schools did not forfeit their eligibility in the second year of the grant, and that Respondents-Appellants exceeded their authority in withholding the grant monies. Lecker Affirmation, ¶34; see also, Lecker Affirmation, Exhibit A, p. 3.

As Justice O'Connor's decision demonstrates, the instant case represents the clearest form of statutory interpretation. Accordingly, Petitioners-Appellants are likely to prevail on appeal.¹

B. Petitioners'-Respondents' children will suffer irreparable harm if the stay is not lifted

Irreparable harm is harm for which money cannot compensate. DeLury v City of New York, 48 A.D.2d at 406. It is clear that if the stay is maintained, and the schools in question will therefore be unable to provide the programs and services promised by the transformation grant, the children in these schools will suffer irreparable harm. The programs and services provided pursuant to the grant are specifically designed to provide the academic and social support necessary for students in these schools to improve their learning and achievement. Educational opportunities are fleeting. Once a student passes through a grade s/he cannot recapture the learning lost as a result of not having the support necessary to access that learning.

¹ Justice O'Connor also easily dismissed Respondents'-Appellants' statute of limitations and standing arguments. Respondents-Appellants conceded that they never notified the schools of the decision to withhold the grant monies. Thus, the court found that the earliest date the limitations period could begin was the date the schools were officially removed from the persistently failing list, June 30, 2016, less than four months before Petitioners-Respondents filed their petition. The court also found that Petitioners-Respondents had standing as parents of students in the schools affected by the legislation and the withholding of funds, and by virtue of the fact that determining whether or not Respondents-Appellants exceeded their authority was a matter of public interest.

Moreover, as the Court of Appeals has observed, “education is cumulative.” Campaign for Fiscal Equity v. State, 100 N.Y.2d at 915. Thus, any deficits in learning are compounded and magnified as a student progresses through school. The opportunities these children are losing to receive the proper support for their learning not only limit their achievement this year, but they will also inhibit their educational progress as the students move through subsequent grades. These students do not get a “do-over” of their education. Therefore, the loss of the programs and services otherwise provided through the transformation grant will cause profound irreparable harm to all students in the affected schools.

C. The balance of equities overwhelmingly favors Petitioners-Respondents

In assessing whether to vacate a stay, a court must balance the equities involved. If a stay is more burdensome to the party seeking vacatur, then the balance of equities tips in that party's favor. See Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Development Corp., 70 A.D.2d 1021, 1022 (1st Dep't 1979) Courts have refused to find in favor of maintaining the status quo for a party when that party, by its wrongdoing, changed that status quo already. In re Union Endicott Cent. School Dist., 39 Misc.3d 1231(A) *5(Sup. Ct, Broome Co. 2013) (school district altered the status quo by refusing to provide health benefits, thus could not claim the status quo must be maintained). Furthermore, when a municipality cannot establish a legitimate interest in maintaining the status quo, the

balance of equities cannot favor it. Albany Basketball & Sports Corp. v. City of Albany, 39 Misc.3d 1204(A)*2 (2013) (city did not establish how status quo would advance security interests, thus balance of equities did not favor city). Moreover, when an individual's rights are at stake, cost, inconvenience or even intrusion into city policy-making do not tip the balance in favor of the government. Stauber v. City of New York, 2004 WL 1593870 *32 (S.D.N.Y. 2004) (balance of equities favored individuals seeking injunction against NYPD, even though injunction intruded into policy-making duties of the department).

In the instant case, the balance of equities overwhelmingly tips in Petitioners' - Respondents favor. Lifting the stay causes no hardship to Respondents-Appellants. In the application for the grants, there is a broad set-off provision enabling Respondents-Appellants to recoup any grant monies released to NYSED, in the unlikely even Respondents-Appellants would ultimately prevail in their appeal. Lecker Affirmation, Exhibit B, p. 77. Moreover, the continuation guidance issued to the schools by NYSED provides that NYSED can recoup any grant funding improperly spent by the schools. Lecker Affirmation, Exhibit, A p. 7. Thus the State has ample tools to recover any money released under the grant should they ultimately prevail on appeal. In addition to the clear contractual language permitting recoupment by DOB of any money improperly paid specifically under this transformation grant, New York precedent allows for

recoupment of education funding improperly paid to school districts. Matter of Rochester City School Dist. v New York State Educ. Dept., 31 A.D.3d 993 (3d Dept. 2006) (affirming order directing school district to repay education funding disallowed by NYSED); Matter of Board of Educ., Lakeland Cent. School Dist. of Shrub Oak, 135 A.D.2d 903 (3d Dept. 1987) (permitting recoupment by Comptroller of education funds improperly paid to school district). New York case law also favors repayment of funds released when a statutory stay is vacated. Matter of Schmitt v Review Comm. (Copeland Cos.), 179 A.D.2d 959 (3d Dept. 1992)

Respondents-Appellants will suffer no loss by the vacatur of this statutory stay. By stark contrast, as discussed in Point II B., above, the children in the subject schools will forever lose the educational opportunities promised by these approved and partially awarded grants. The stay will also subvert the intent of the legislature in passing the appropriations legislation. Moreover, the status quo in this case should have been the continuation of services and programs that were already one year in progress. It was the illegal action by Respondents-Appellants that altered the status quo and halted the progress of grants appropriated by a co-equal branch of government: the legislature. The illegal freezing of the funds by Respondents-Appellants also prevented reimbursement of funds for programs and services already provided in the first year of the grant. Respondents-Appellants do

not challenge the first year of the grant, yet they prevented reimbursement for expenses incurred in the first year. Thus, Respondents-Appellants should not be permitted to benefit from their actions in upsetting the status quo. There is no question that the balance of equities overwhelmingly favors vacating the statutory stay of trial court's order.

III. IN THE EVENT THE STAY IS NOT VACATED, THE APPEAL SHOULD BE EXPEDITED SO THAT THE SCHOOLS CAN USE THE GRANT MONIES IN THE 2017-18 SCHOOL-YEAR

Courts have expedited appeals in matters of important public interest. Matter of New York City School Bds. Assn. v Board of Educ. of City School Dist. of City of N.Y., 50 A.D.2d 826 (2d Dep't 1975) (three weeks between supreme court and appellate court decision in dispute regarding shortening of school day); DeLury v City of New York, 48 A.D.2d at 408 (stay conditioned upon perfecting the appeal and holding oral argument in two, in public employees' labor dispute); Rawe v. State Board of Equalization and Assessment, 286 A.D. 1062 (3d Dept 1955) (stay conditioned on perfecting appeal within thirty days). In the instant case, if the funds are released after May 2017, Hackett Middle School will be unable to use the funds in the 2017-18 school-year. Since the grant lapses in March 2018, failure to release the funds before the end of May 2017 will result in Hackett forever losing the second year's installment of the grant, as well as the money owed the school for the as yet unreimbursed amount from the first year of the

grant. Similarly, if the grant is not released by July 2017, JHS 80 will forever lose the entire grant allocation. If the grant is not released for use during the 2017-18 school-year, Roosevelt will forever lose the second year's installment of the grant, as well as the reimbursement it is owed for the entire first year. It is imperative that this appeal be resolved immediately, if the stay is not vacated. Otherwise, the legislative intent of the grant will be completely subverted, and needy children will forever lose a vital educational opportunity. Therefore, should this Court not vacate the stay, the Court should condition maintenance of the stay on Respondents-Appellants perfecting their appeal within two to three weeks. Moreover, the Court should place this appeal on an expedited schedule, so that it can be resolved in time for the schools to make use of the grant monies should Petitioners prevail on appeal.

CONCLUSION

For the foregoing reasons, Petitioners-Respondents respectfully request that the Court grant the motion to vacate the stay and/or the motion to expedite, and order any other further relief that the Court deem just and proper.

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Stamford, CT

WENDY LECKER, ESQ.
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
wlecker@edlawcenter.org
Phone: 203-536-7567
Fax: 973-624-7339
Attorney for Petitioners-Respondents