

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

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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.

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Affirmation in Support of  
Motion to Vacate Stay  
and/or Expedite the  
Appeal

State of Connecticut     )  
  s.s.:  
County of Fairfield     )

WENDY LECKER, ESQ., of the Education Law Center, an attorney duly  
admitted to practice law in the Courts of the State of New York, hereby affirms the  
following to be true, under penalties of perjury:

1. I am counsel for Petitioners-Respondents and as such am fully familiar with  
the facts and circumstances of this proceeding.

2. I submit this affirmation in support of Petitioners-Respondents' motion to vacate the statutory stay of enforcement of Judge O'Connor's order dated December 28, 2016, and/or to expedite the appeal. A copy of Judge O'Connor's order and decision is attached hereto as Exhibit A.

3. In 2015, the legislature passed N.Y. Education law §211-f, the "school receivership law." Under this law, the Commissioner of Education is 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)

4. Superintendents in districts with "persistently failing" schools are vested with powers of a receiver and "persistently failing" schools were given a year to make "demonstrable improvement." N.Y. Education Law §211-f(c).

5. At the end of the year after a school is designated "persistently failing," the New York State Education Department ("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).

6. In 2015, the legislature appropriated \$75 million to support the receivership law (see 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).

7. 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 re-appropriated by L. 2016, ch. 53.

8. 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.

9. 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.” Exhibit A, p. 22; see also L. 2015, ch. 53.

10. The appropriation for the transformation grants will lapse on March 31, 2018. L. 2016, ch. 53.

11. 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. Exhibit A, p. 6.

12. On October 15, 2015, Respondent-Appellant Division of Budget (“DOB”) approved the transformation grant spending plan, as required by the appropriations legislation. Exhibit A, p. 6. In approving the spending plan, DOB did not assert that a school’s removal from the “persistently failing” status renders the school ineligible for transformation grant funding and/or justifies withholding that funding. Exhibit A, p. 22. NYSED then made the transformation grant available to the twenty eligible schools. Exhibit A, pp. 6-7. A copy of the transformation grant application is attached hereto as Exhibit B.

13. The transformation grant applications provided that the transformation grant funds were “available ‘to support and implement turnaround efforts over a 21[-] month period.’” Exhibit A, p. 7; Exhibit B, p.1.

14. 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.

Exhibit B, p. 77.

15. 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. Exhibit B, p. 3.

16. 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. See, Verified Petition, ¶¶2-5. Copies of the Order to Show Cause and Verified Petition are attached hereto as Exhibit C.

16. 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. Exhibit A, p.7. NYSED approved all three applications. Id.

17. 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. Exhibit A, p. 3.

18. 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." Exhibit A, p. 7.

19. 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.

20. 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. Exhibit A, p. 8.

21. 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 Exhibit A, p. 8 fn. 9.

22. 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.

23. 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. Exhibit A, p. 17.

24. 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." 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." Exhibit A, pp. 8-9.

25. Respondent- Appellant did not respond to counsel’s letter. Exhibit A, p. 9. Petitioners-Respondents filed this Article 78 proceeding on September 2, 2016. Exhibit C.

26. Attached hereto as Exhibit D, is an affidavit from Albany Interim Superintendent Kimberly Wilkins. The affidavit sets forth, inter alia, the uses to which Hackett Middle School put the transformation grant funds, the effect of the grant on student and staff performance, the impact of DOB’s freezing of the funds, the amount still due Hackett Middle School from the first year of the grant, and the date by which

the funds must be released in order to enable Hackett Middle School to use the remainder of the grant monies.

27. Attached hereto as Exhibit E, is an affidavit from Emmanuel Polanco, principal of JHS 80 Mosholu Middle School. The affidavit sets forth, inter alia, the uses to which JHS 80 Mosholu Middle school planned to put the transformation grant funds, the impact of DOB's freezing of the funds, and the date by which the funds must be released in order to enable JHS 80 Mosholu Middle School to use the remainder of the grant monies. In his affidavit, Mr. Polanco refers to the transformation grant as the "Persistently Struggling School Grant ("PSSG"). Another shorthand name for the transformation grant is the "Persistently Struggling School Grant ("PSSG"). They are one and the same.

28. Attached hereto as Exhibit F, is an affidavit from Yonkers Superintendent Edwin Quezada. The affidavit sets forth, inter alia, he uses to which Roosevelt High School put the transformation grant funds, the effect of the grant on student and staff performance, the impact of DOB's freezing of the funds, the amount still due Roosevelt High School from the first year of the grant, and the dates by which the funds must be released in order to enable Roosevelt High School to use the remainder of the grant monies.

29. The majority of students in all three schools are economically disadvantaged, and each school has a percentage of English Language Learners higher than the state average. Exhibit D, ¶4; Exhibit E, ¶4; Exhibit F, ¶4.

30. The services provided with the grant monies in Hackett and Roosevelt, and those JHS 80 planned to provide, included: extended learning time, academic intervention, social work and counselors, mentoring, family outreach and professional development for teachers. See Exhibit D, ¶¶6,7,9; Exhibit E, ¶¶ 5-7; Exhibit F, ¶¶5-8. These services are tailored to improve learning for the majority at-risk students in the schools.

31. The services provided through the transformation grant funding at Hackett were stopped for the 2016-17 school year as a result of the DOB's freezing of the funds. Exhibit D, ¶10. Roosevelt had to eliminate or curtail the services provide through the transformation grant funding for the 2016-17 school year. Exhibit F, ¶10. JHS 80 has not yet been able to implement any of the planned services. Exhibit E, ¶11. Students at these school have already lost at least a year of services designed to improve their learning.

32. If the grant money is withheld throughout the appeal period, the students at Hackett and Roosevelt will forever lose the opportunity to benefit from a second year of services, and JHS 80 students will forever lose the opportunity to benefit from two years of the services under this grant. Exhibit D, ¶13; Exhibit E, ¶14; Exhibit F, ¶12.

33. 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. Exhibit A, p. 3.

34. At oral argument, counsel for NYSED supported petitioners' position that DOB exceeded its authority in withholding the second year of grant funding to those schools removed from the "persistently failing" list. Counsel for NYSED argued, inter alia, that the schools did not forfeit their eligibility for the remainder of the grant by virtue of being removed from the "persistently failing" list halfway through the grant period and that the court should order the funds released to NYSED.

35. 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. Exhibit A., p. 24.

36. 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. Exhibit A, pp. 22, 24.

37. 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. Exhibit A, p. 21.

38. 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. Exhibit A, pp. 21-22.

39. The court also found that nothing in appropriation legislation permits the DOB director to substitute his judgment for that of the legislative and executive branches in passing the 2015-16 and 2016-17 budgets. Exhibit A, p. 23.

40. Thus, the court held that DOB exceeded its authority in withholding the grant monies appropriated by the legislature. Exhibit A, p. 24. The court concluded that to hold otherwise “would upset the balance of power existing among the three coordinate and coequal branches under our constitutional form of government.” Exhibit A, p. 23.

41. 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. Furthermore, as there was no dispute that the legislation was designed to support improvement in Petitioners'-Respondents' children's schools, Petitioners'-Respondents' interests fall within the zone of interests sought to be promoted by the appropriation legislation. Exhibit A, pp. 13-14.

42. 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. Exhibit A, p. 15.

43. 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. Therefore, September 2, 2016, the date the Petitioners-Respondents filed their Article 78 petition, falls within the four-month limitation period. Exhibit A, pp. 17-19.

44. On January 5, the decision was entered in the Albany County Clerk. See Exhibit A, p. 1.

45. On February 6, Plaintiffs-Respondents received Respondents'-Appellants' Mujica's and DOB's Notice of Appeal and Pre-Calendar Statement, a copy of which is attached hereto as Exhibit G.

Dated: March 6, 2017  
Albany, New York

Respectfully submitted,

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WENDY LECKER