SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of an Article 78 Proceeding

Nidia Cortes, Virgil Dantes, AnnMarie Heslop, Curtis Witters, On Behalf of Themselves and their Children,

Index No. 05102-16

Hon. Kimberly O'Connor

Petitioners,

-against-

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

Respondents.

NYSED RESPONDENTS' MEMORANDUM OF LAW IN LIMITED OPPOSITION TO THE PETITION

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PRELIMINARY STATEMENT

The petitioners in this CPLR Article 78 proceeding are parents of children who attend three schools which were among the lowest performing in the State and were therefore awarded a portion of $75 million in transformation grant monies appropriated by the Legislature to support turnaround efforts over a two-year period. They seek an order compelling the Division of Budget and its Director ("DOB respondents") to release to the New York State Education Department ("NYSED") the grant funds which have been frozen by the DOB respondents since a determination by NYSED that such schools were no longer priority schools under the State's federal accountability system. Petitioners also seek an order directing NYSED to immediately release such monies to the three schools.

This Memorandum of Law is respectfully submitted by NYSED and its Commissioner ("the NYSED respondents") in very limited opposition to the Petition. Because we agree that the grants were clearly intended to provide funding over a two-year period and were not dependent on the schools' year-two designation, i.e., we agree with petitioners' argument that the withholding of the funds by the DOB respondents is contrary to law and in excess of the limited discretion extended to DOB by the Legislature in this instance, the NYSED respondents do not oppose the primary relief sought by the petitioners and we support the issuance of an order directing the DOB respondents to lift the freeze and release the funds. For these schools to lose the funding at issue would be to punish them for success and would be inconsistent with the law under which the grants were awarded, contrary to the expenditure plan developed by NYSED and expressly approved by the DOB respondents, and also at odds the with the way in which, for example, the federal government continues to allow schools to receive school improvement grants even after a school returns to good standing.

The NYSED respondents' only opposition to the Petition is to that portion of the relief requested which seeks to compel the NYSED respondents to *immediately* release the funds to the recipient schools after the funds are unlocked by the DOB respondents. These are not grants which involve a lump sum payment. Instead, budgets must be submitted and approved and expenditures thereafter reimbursed to the schools by NYSED after further review and approval in the normal course.

STATEMENT OF FACTS

Education Law §211-f – Takeover and restructuring of failing schools

In order to aid in improving the lowest performing schools within the State, the Legislature in April 2015 enacted Subpart E of Part EE of Chapter 56 of the Laws of 2015, thereby creating a new section of State Education Law ("§211-f") pertaining to school receivership. As relevant to this case, the law generally provides that schools identified as "Priority Schools" under federal law and which have been among the lowest performing in the State and therefore in the most severe accountability status since the 2006-07 school year, are designated as "persistently failing schools" (referred to in §100.19[a][2] of the Commissioner's regulations [8 NYCRR] and hereafter as "persistently struggling schools") (see, §211-f(1)(b)).[1] The law also vests the superintendent of the district in which the school operates with the powers of a receiver (§211-f(1)(c)). See, Affidavit of Ira Schwartz sworn to September 27, 2016 ("Schwartz Aff."), at ¶¶7-8.

§211-f vests in the receiver new authority to, among other things, convert schools to community schools providing wrap-around services; reallocate funds in the school's budget;

1 Pursuant to §211-f(1)(b), persistently struggling schools include those that that have been identified as priority schools in each applicable year from the 2012-2013 school year to the 2014-2015 school year as well as those that have been identified as priority schools in each applicable year of such period except one year in which the school was not identified because of an approved closure plan that was not implemented.

expand the school day or school year; establish professional development plans; order the conversion of the school to a charter school consistent with applicable state laws; remove staff and/or require staff to reapply for their jobs in collaboration with a staffing committee; and negotiate collective bargaining agreements, with any unresolved issues submitted to the Commissioner for decision. The superintendent is given an initial one-year period to use the enhanced authority of a receiver to make demonstrable improvement in student performance at the persistently struggling school or the Commissioner will direct that the school board appoint an independent receiver and submit the appointment for approval by the Commissioner. §211-f(1)(c)(i) provides that a school may be removed from the list of persistently struggling schools – and therefore no independent receiver would be appointed – based upon a determination of the Commissioner upon annual review. Schwartz Aff., ¶9-10.

Promulgation of Regulations to Carry out §211-f

The law expressly contemplated and therefore directly authorizes the Commissioner, through the Board of Regents, to adopt regulations to carry out its provisions. See e.g., §211-f(15). To this end, at the May 2015 Board of Regents ("Board") meeting, NYSED presented the Board with draft regulatory terms to implement §211-f. At that meeting, the Board directed SED staff to consult with stakeholders regarding the new draft regulations in order to solicit their feedback and recommendations prior to Department staff submitting proposed emergency regulations to the Board of Regents at its June meeting for consideration for adoption. At that time, the draft regulations presented for discussion and feedback included the following provisions providing that priority schools within the meaning of §211-f "shall mean a school identified as a priority school pursuant to section 100.18(g) of this Part" and that, in reviewing the performance of such schools, the commissioner "shall remove the designation of persistently

failing or failing from any school that has met the criteria for removal from priority school status pursuant to section 100.18(i)(1) of this Part...". See, Schwartz Aff., ¶12; May 15, 2015 Board of Regents – P-12 Education Committee item (respondents' Exhibit A).

Subsequent to the May 2015 Board meeting, NYSED staff began engaging with various stakeholders as directed by the Board of Regents. In addition to this stakeholder engagement, the NYSED respondents consulted with staff from the Governor's Office and the Assembly to discuss the draft regulations, which contained the provision referenced above, and implementation of the statute. Schwartz Aff., ¶13.

At the Board's June 2015 meeting, SED staff presented draft regulations that were adopted by the Board on an emergency basis to ensure that the regulations implementing Education Law §211-f were in place at the beginning of the 2015-2016 school year. It was noted in the materials presented to the Board at that meeting that "clarification has been provided that at the end of a school year in which a school has been removed from Priority School status, the Commissioner shall remove the school's designation as persistently struggling or struggling, except [in limited circumstances pertaining to removal of schools that have been placed under independent receivership, which is not the case in the instant proceeding]...". Similar to the draft regulatory provisions provided to the Board in May, Section 100.19 of the Commissioner's regulations, which was adopted by the Board on an emergency basis at the June meeting, contained the following provision:

> (6) With respect to a performance review conducted in accordance with paragraph (5) of this subdivision: (i) **at the end of a school year in which a school has been removed from priority school status, pursuant to section 100.18(i)(1) of this Part, the commissioner shall remove the school's designation as persistently struggling or struggling**, except that, for a school that has been placed into independent receivership, the independent receiver

> shall continue to implement the school intervention plan consistent with subdivision (h) of this section;...

See, Schwartz Aff., ¶14; June 15, 2015 Board of Regents – P-12 Education Committee item (respondents' Exhibit B) (emphasis added).

Revisions to the 8 NYCRR §100.19 regulation, after additional consultation with stakeholders and assessment of public comment, were adopted in September 2015, October 2015 (to add procedures for the Commissioner's resolution of collective bargaining issues in receivership) and then December 2015, all without changes to the provisions mentioned above. See, Schwartz Aff., ¶15; September 8, 2015, October 22, 2015 and December 7, 2015 Board of Regents – P-12 Education Committee items (respondents' Exhibits C, D and E).

Relationship to 8 NYCRR §100.18 and to Federal Law

Under the Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. section 6301, et seq.) ("ESEA"), the State, through NYSED, obtained certain waivers ("ESEA waiver") from the Secretary of the U.S. Department of Education ("USDOE") to allow for flexibility in favor of the State and to avail itself of federal funding, including School Improvement Grants awarded by the USDOE pursuant to section 1003(g) of the ESEA, as amended, and awarded by NYSED to local educational agencies as a subgrant with the emphasis on schools having a "priority school" designation. The Commissioner's regulations regarding implementation of the ESEA waiver are at 8 NYCRR §100.18. Schwartz Aff., ¶16.

As set forth above, under §211-f and the regulations at §100.19(a)(2), persistently struggling schools are defined as those identified by the Commissioner as "priority schools" for a certain length of time and which, since the 2006-07 school year, had the most advanced Federal accountability designation (i.e., restructuring schools for the period prior to the Department beginning to designate schools as priority in accordance with its ESEA waiver). Schwartz Aff.,

¶17.

While §100.18 and federal law speak to evaluation of priority schools, §100.19 and §211-f(1)(c) speak to persistently struggling schools and set forth criteria for removal of such schools at the end of an academic year for schools subject to a superintendent receiver. Specifically, as described above, with respect to a performance review conducted in accordance with §211-f(1)(c) and §100.19(d)(5), at the end of a school year in which a school has been removed from priority school status, the school's designation as persistently struggling or struggling shall be removed (§100.19(d)(6)(i)). If a school's priority school status has not been removed, and such school has made demonstrable improvement pursuant to the annual performance review, such school will continue under school district operation with the superintendent vested with the powers of a receiver (§100.19(d)(6)(ii); §211-f(1)(c)). Schwartz Aff., ¶18.

It should be noted that the criteria for removal from priority school status are more stringent than the criteria for removal from persistently struggling school status. For example, in order to be removed from priority school identification, a school must make priority school progress for two consecutive years and have met certain minimum student achievement standards in the second year in English language arts and mathematics and, for high schools, graduation rate. In addition, the school must have at least 95% of each subgroup of students for which it is accountable participate in state assessments in English language arts and mathematics, which is not a requirement for persistently struggling schools in order to make demonstrable improvement. Making priority school progress generally requires a higher level of student achievement in English language arts and mathematics as well as for graduation rate than is required for making demonstrable improvement. In addition, persistently struggling schools may choose a variety of non-academic indicators to be incorporated into the Commissioner's

determination of whether a school has made demonstrable improvement. In other words, removal from priority school status requires a higher percentage of students to be partially proficient or proficient in English language arts and mathematics as well as higher graduation rates than does making demonstrable improvement for comparable indicators, while demonstrable improvement determinations may include other indicators, such as school climate, that are not explicit factors in making priority school determinations. Schwartz Aff., ¶19.

Transformation Grants for Persistently Struggling Schools

Through the 2015 Budget Bill, specifically, Ch. 61 of the Laws of 2015 (effective April 13, 2015), which amended Section 1 of Ch. 53 of the laws of 2015 (hereafter referred to as "Chapter 53"),[2] the Legislature appropriated $75,000,00.00 for transformation grants for school districts with persistently struggling schools subject to the provisions of §211-f to allow them to provide additional staff, services and programs to support improvement. The relevant portion of Chapter 53 provides:

> For persistently failing schools transformation grants to school districts pursuant to a spending plan developed by the commissioner of education and approved by the director of the budget.
>
> Eligibility for such grants shall be limited to school districts containing a school or schools designated as persistently failing pursuant to paragraph (b) of subdivision 1 of section 211-f of the education law, provided that separate applications shall be required for each such school for which the school district requests a grant.
>
> Such grants shall support activities including but not limited to the following: (i) use of school buildings as community hubs to deliver co-located or school-linked academic, health, mental health, nutrition, counseling, legal and/or other services to students and their families;

[2] Although not relevant for purposes of this matter, the law was further amended by Chapter 53 of the Laws of 2016 to extend the date upon which the appropriation lapses from March 31, 2017 to March 31, 2018.

(ii) expansion, alteration or replacement of the school's curriculum and program offerings; (iii) extension of the school day and/or school year; (iv) professional development of teachers and administrators; (v) mentoring of at-risk students; and (vi) the actual and necessary expenses of the external receiver of the school. Provided that the commissioner shall confirm that any such eligible activity is aligned with the school's approved intervention model, comprehensive education plan or school intervention plan.

In determining the amount of such grants, the commissioner shall consider factors including but not limited to the enrollment of the school. Provided that for each of the persistently failing schools, the maximum annual grant in the 2015-16 and 2016-17 school years shall be established by the state education department in the spending plan for such grants. A portion of such grants shall be available by July 1 of each such school year. Notwithstanding section 40 of the state finance law or any provision of law to the contrary, this appropriation shall lapse on March 31, 2017 75,000,000

See, Schwartz Aff., ¶¶20-23; copy of relevant excerpt of Ch. 53 of the Laws of 2015, as amended by Ch. 61 of the Laws of 2015 (respondents' Exhibit F).

Chapter 53 provides that the monies were to be distributed pursuant to a spending plan developed by the Commissioner of Education and approved by the Director of the Budget and that eligibility is limited to school districts "containing a school or schools designated as persistently failing pursuant to paragraph (b) of subdivision 1 of section 211-f of the education law." Id. Chapter 53 then goes on to provide limitations on the types of activities that may be supported by the grant, giving the Commissioner authority to confirm that eligible activities are aligned with the schools' approved intervention model, comprehensive education plan or school intervention plan, and also the authority to determine the amounts of such grants. Id.

On July 16, 2015, NYSED issued a press release announcing Commissioner Elia's identification, pursuant to §211-f, of 124 struggling and 20 persistently struggling schools, and explaining that the latter "...will be eligible for a portion of $75 million in state aid to support and implement its turnaround efforts over a two-year period." Schwartz Aff., ¶24; Press Release (respondents' Exhibit G).

Approval of Expenditure Plan & Grant Awards

In October 2015, the Department, in accordance with Chapter 53, submitted for approval by the Director of the Division of Budget a Persistently Struggling Schools/Transformation Grant Expenditure Plan for the period July 1, 2015 – March 31, 2017. Schwartz Aff., ¶25; Expenditure plan (respondents' Exhibit H). The expenditure plan was approved by the Director of the Division of Budget, through his designee, by email to NYSED on or about October 15, 2015. See, Schwartz Aff., ¶26. Petition ¶19; email provided as Petitioners' Exhibit C.

The expenditure plan as approved by DOB identified twenty schools (including the three schools with students whose parents are presently before the Court) as the then-current Priority Schools and therefore the "persistently struggling schools" under §211-f that were eligible for a portion of the $75 million in grant funds made available by the Legislature to support and implement turnaround efforts "over a two year period." Schwartz Aff., ¶¶26-27; Expenditure plan (respondents' Exhibit H), at pp. 1-3. The expenditure plan as approved by DOB set forth the "full allocation" amount over a two-year period for each school and provided that schools should anticipate receiving no more than 50 percent of the total transformation grant allocation in the 2015-16 school year unless an application for accelerated funding was made and approved to allow funds "otherwise dedicated to the second year to be advanced to the first year." Schwartz Aff., ¶28; Expenditure plan, respondents' Exhibit H, at pp. 3-5.

NYSED accordingly made available to the twenty schools a Persistently Struggling Schools Grant Application (See, copy provided at Petitioners' Exhibit B). The application indicated that the monies were available to "support and implement turnaround efforts over a 21 month period" from July 1, 2015 to March 31, 2017. The Yonkers City School District ("Yonkers") submitted a Persistently Struggling Schools Grant Application on behalf of Roosevelt High School on or about November 12, 2015 (copy provided at Petitioners' Exhibit D) for the full amount of $3.763 million available over two years and covering proposed activities during both the 2015-16 and 2016-17 school years. Yonkers, on behalf of Roosevelt High School, also submitted to NYSED a proposed budget in this regard for activities in the first (15-16) school year (copy provided at petitioners Exhibit F) totaling $1.881 million (half of the two-year amount). NYSED approved both the application and the proposed year one budget for Roosevelt High School. Schwartz Aff., ¶¶29-31.

The New York City Department of Education ("NYCDOE") submitted a Persistently Struggling Schools Grant Application on behalf of JHS 80 – Mosholu Parkway also on or about November 12, 2015 (copy provided at Petitioners' Exhibit G) for the full amount of $3.058 million available over two years and covering proposed activities during both the 2015-16 and 2016-17 school years. NYCDOE, on behalf of JHS 80, also submitted to NYSED a proposed budget in this regard for activities in the first (15-16) school year (copy provided at Petitioners' Exhibit H) totaling $1.358 million (half of the two-year amount). NYSED approved both the application and the proposed year one budget for JHS 80. Schwartz Aff., ¶32-33.

The Albany City School District ("Albany") submitted a Persistently Struggling Schools Grant Application on behalf of William Hackett Middle School also on or about November 12, 2015 (copy provided at Petitioners' Exhibit I) for the full amount of $2.625 million available

over two years and covering proposed activities during both the 2015-16 and 2016-17 school years. Albany, on behalf of Hackett, also submitted to NYSED a proposed budget in this regard for activities in the first (15-16) school year (copy provided at Petitioners' Exhibit J) totaling $1.119 million (less than half of the two-year amount). NYSED approved both the application and the proposed year-one budget for Hackett. Schwartz Aff., ¶¶24-35.

Grant monies to recipients can only be paid by NYSED, after appropriate review and approval, if NYSED has access to such monies – that is, if respondent DOB allocates and therefore makes available the cash corresponding with such appropriations to NYSED in the State Financial System ("SFS"). Schwartz Aff., ¶36. After approval of the expenditure plan, DOB initially allocated and made available in the SFS $37.5 million for the Persistently Struggling Schools Transformation Grant program. NYSED thereafter made partial grant payments to the approved schools as recipients of the transformation grants in the regular course of business. Id., at ¶¶37-38.

Removal of Priority School Designation

In December 2015, President Obama signed into law the Every Student Succeeds Act of 2015 ("ESSA") (Public Law 114-95) that reauthorizes the ESEA (described above), under which, pursuant to NYSED's ESEA waiver, schools were designated as priority schools (thereby leading to them being correspondingly designated as persistently struggling schools under §211-f). Pursuant to NYSED's ESEA waiver, NYSED was required to submit updated priority and focus school lists to USDOE in January 2016. In furtherance of the ESSA transition, all states implementing ESEA waivers were required to make an election in January 2016 as to whether they would "freeze" their lists of priority schools or would update their lists thereby "exiting" those priority schools that met approved criteria and identifying new priority schools and if

creating a new list to submit it to USDOE by March 1, 2016. See, Schwartz Aff., ¶39; U.S. Department of Education "Dear Colleague" letter dated December 18, 2105 (respondents' Exhibit I).

Consistent with the Commissioner's regulations at §100.18 for priority schools and because NYSED's initial list of priority schools was based primarily on data from the 2010-11 and 2009-10 school years, the State elected to update its list of priority schools [based upon the then most recent data available] and submit a new such list to USDOE by March 1, 2016. See Schwartz Aff., ¶40; email correspondence to USDOE (respondents' Exhibit J).

On February 26, 2016, the NYSED respondents published the new list of priority schools, which did not include Roosevelt, Hackett and JHS 80. See Schwartz Aff., ¶41; NYSED press release at Exhibit K; list of Priority Schools effective February 2016 at Exhibit L. Such schools were correspondingly removed from the list of persistently struggling schools and from receivership status effective at the end of the school year (June 30, 2016) as required pursuant to 8 NYCRR §100.19(d)(6)(i) and consistent with §211-f(1)(c)(i), which provides that a school may be removed from the list of persistently struggling schools based upon a determination of the Commissioner upon annual review. Schwartz Aff., ¶41; letters dated July 1, 2016 so advising the three school districts at issue in this proceeding at respondents' Exhibit M. Schools removed from priority school designation are nonetheless required to complete implementation of the whole school reform models that the schools had begun to implement while identified as priority schools, including those strategies that were identified for implementation in the 2016-17 school year using transformation grant funds. Id.

Throughout this same time, NYSED issued continuation plan guidance to schools in anticipation of year two transformation grant budgets being submitted and approved covering the

second portion of the 21-month grant period. See, Schwartz Aff., ¶42; Petitioners' Exhibit K.

On or about March 29, 2016, however, respondent DOB accessed the SFS and "reserved" $69,015,135 of the persistently failing schools transformation grant appropriation – i.e., all but $5,984,865 of the total appropriation - and, to date, has continued such restriction thereby making unavailable the remaining year-one funds and the entire $37.5 million year two appropriation. Accordingly, NYSED's ability to pay claims for this $75 million program has been limited to only $5,984,865. Schwartz Aff., ¶43. As a result, submission of year-two budgets for the 2016-17 school year for the three schools at issue in this proceeding have been delayed and are not approved pending review and additional documentation as necessary. To be clear, however, no schools (even those remaining on the list of priority schools and persistently struggling schools) are able to be reimbursed by NYSED presently due to the freeze of funding. Id., at ¶44. Further, because NYSED's ability to pay claims for this $75 million grant program has to date been limited to only $5,984,865, most schools whose year one grant applications and budgets were approved have outstanding year one claims that have not been paid. Id., at ¶45.

This special proceeding follows and seeks to compel DOB to release the monies at issue and to compel NYSED to immediately make payments to the subject schools.

SUMMARY OF LEGAL ARGUMENT

The NYSED respondents do not oppose those portions of the Petition that allege that the freezing of the grant funds at issue by the DOB respondents was contrary to law and seek to compel the DOB respondents to release to NYSED the transformation grant monies at issue. Indeed, we submit that granting such relief would be proper inasmuch as, among other things, the grants – as were described in the NYSED respondents' expenditure plan that was expressly approved by DOB in October 2015 - were clearly for a 2-year period and eligibility for which was dependent, as relevant here, only on the schools' status at the inception of the grant period. The 2-year grant was in no way conditioned upon the schools that received such awards remaining on the list of persistently failing schools for the second year of the grant period.

The NYSED respondents oppose the Petition only to the extent that it seeks to compel NYSED to *immediately* release those funds to the schools at issue if and when such funds are properly un-frozen by the Court or the DOB respondents. NYSED, given the nature of the grants and the Department's oversight and administrative responsibilities in that regard, can only review and approve or reject in due course these schools' grant plans/budgets, expenditures and reimbursements in accordance with applicable laws and procedures.

POINT I

THE COURT MAY COMPEL THE DOB RESPONDENTS TO RELEASE THE GRANT MONIES BECAUSE THE GRANT WAS NOT CONDITIONED UPON THE SCHOOLS REMAINING ON THE PERSISTENTLY FAILING LIST FOR THE SECOND YEAR, THE FREEZING OF THE FUNDS WAS IN EXCESS OF THE LIMITED DISCRETION GRANTED TO DOB IN THIS REGARD BY THE LEGISLATURE AND, THOUGH IT SHOULD NOT BE AT ISSUE IN THIS PROCEEDING, NYSED'S DETERMINATION TO REMOVE THE SCHOOLS FROM THE PERSISTENTLY FAILING LIST WAS IN ALL RESPECTS PROPER

A. NYSED's transformation grant expenditure plan, as expressly approved by DOB, was clearly for a 2-year period and eligibility was dependent only on the schools' status at the inception of the grant.

It is well-settled that the NYSED respondents' decisions on matters of statutory construction and interpretation are to be given great weight as the Commissioner is the one charged with the duty of enforcing the Education Law. See, Board of Education of the City of New York v. Mills, 250 A.D.2d 122, 125 (3rd Dept. 1998); England v. Commissioner of Education of State of New York, 169 A.D.2d 868 (3rd Dept. 1991). This deference to NYSED's interpretation of the laws and its own regulations (see, Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009)) is especially appropriate when such interpretation involves matters of education policy which are matters particularly within the NYSED respondents' area of expertise. See e.g., Malverne Union Free School District v. Sobol, 181 A.D.2d 371, 375-76 (3rd Dept. 1992); Board of Education v. Sobol, 161 Misc.2d 393, 395 (Sup. Ct., Albany Co. 1993).

Regardless of whether the appropriate deference to NYSED's position is afforded, we submit that the Court should nevertheless determine that the NYSED respondents have reasonably and properly construed the budget bill (Chapter 53 of the Laws of 2015 as amended by Chapter 61 of the Laws of 2015 ["Chapter 53"]) language of "containing a school or schools designated as persistently failing pursuant to paragraph (b) of subdivision 1 of section 211-f of

the education law" to mean that a school must have been so designated at the time of the grant award, and not that the school must remain in such status throughout the second year of the grant.

First in this regard, the language in Chapter 53, in our view, clearly contemplates funding over a two-year period in that it authorizes the Department to establish "the maximum annual grant in the 2015-16 and 2016-17 school years" in the spending plan approved by Director of the Budget, and further states that a "portion of such grants shall be available by July 1 of each school year" (emphasis added). Such express language should not be overlooked by the Court. "The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction." Frank v. Meadowlakes Dev. Corp., 6 N.Y.3d 687, 692 (2006); Statutes § 94. The "starting point for legislative intent is the language in the statute itself." Yutauro v. Mangano, 17 N.Y.3d 420, 426 (2011).

This plain meaning interpretation is also wholly consistent with not only the grant applications approved by NYSED for each of the three schools before the Court, but also the expenditure plan expressly approved by DOB (Exhibit H), all of which cover the entire period of July 1, 2015-March 31, 2017, were expressly designed to "support and implement turnaround efforts over a two year period," and contain no requirement, express or implied, that the schools remain in persistently struggling status during the entire grant period.

Indeed, where and when the Legislature has chosen to condition grants upon a recipient remaining in a certain designated status for each year of the grant, it has expressly so provided. For example, that portion of Chapter 53 of the Laws of 2016 which makes and governs appropriations for "community schools grants" renders eligible only school districts with schools

designated by the Commissioner of Education pursuant to §211-f (a) or (b) "throughout the 2016-17 school year". See, Schwartz Aff., ¶53; Exhibit N (pp. 194-195 of Ch. 53 of the Laws of 2016 (emphasis added)). Again, the relevant portion of Ch. 53 of the Laws of 2015 pertaining to persistently struggling schools transformation grants contains no such restriction and no language to suggest that the Legislature intended to require that the schools need to remain on the persistently struggling schools list for the entire period of the 2-year grant. Accordingly, the Court should construe the Legislature's omission of any "stay on the list" requirement in the persistently struggling schools grant bill as intentional. See e.g., Pajak v. Pajak, 56 N.Y.2d 394, 397, 437 N.E.2d 1138 (1982) ("The failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended"); Statutes, § 74.

Moreover, NYSED's position is also consistent with federal guidance on School Improvement Grants ("SIG") under ESEA, which supplies direct correlation since it is the federal priority status that initially controlled the schools' designation as persistently struggling under state law. The United States Department of Education's ("USDOE") guidance notes that nothing in the law prevents states from renewing a "priority" school's SIG funding even if that school may have exited improvement status during the period of availability of SIG funds or after the initial award of SIG funds to implement a school intervention model. See, Schwartz Aff., ¶¶55-56; Exhibit O (U.S. Department of Education: Guidance on School Improvement Grants). Indeed, as described by USDOE, the SIG program "is intended not to serve as a long-term funding stream but, rather, to provide a short-term infusion of funds for comprehensive and rapid school turnaround." Id. Under this analogous federal grant administered by NYSED, $95 million was recently awarded to priority schools over the course of five years, even though it is expected that that schools reach good academic standing and be removed from priority status

within the next three years. See, Schwartz Aff., ¶57; Exhibit P (September 12, 2016 press release). Like the SIG program, the provisions of §211-f, including the continuation of local operation of designated schools for only up to two years, are geared toward facilitating the rapid improvement of student achievement in these schools with increased state oversight and support. Id.

Therefore, the rationale for NYSED's position under both the state law at issue in this proceeding and the related federal law is educationally sound and cannot be overemphasized – a school showing improvement in student achievement should be supported rather than penalized, and actions should not be taken that would hamper the school's ability to achieve the grant's intended purpose and to continue the improvement activities beyond the grant period. Consistent with the law, regulation and sound educational practice, it is the NYSED respondents' position that despite the progress these schools have made, they still need a great deal of oversight and support. It makes no sense to take away funding from schools that have just started to show progress and that need all the support and resources we can give to keep them from backsliding. For these schools to lose their funding would be to punish them for success, and is inconsistent with the plain language of the budget bill, the expenditure plan expressly approved by DOB, and also with the way in which the federal government allows schools to continue to receive school improvement grants even after a school returns to good standing.

B. DOB's freezing of the funds was in excess of its discretion.

A judgment in a mandamus proceeding may, in appropriate circumstances, direct the payment of money by a state agency. See e.g., Fehlhaber Corp. v. O'Hara, 53 A.D.2d 746, 747 (3rd Dept. 1976). It is an appropriate remedy to compel payment by a state agency when the remaining duties of such agency are ministerial in nature, do not involve further discretion, and

where the agency's purported reason for withholding payment is unjustified, arbitrary and based on such agency's addition of contingencies for payment which are neither supported by the law nor the record. Id. Two analogous cases involving prior instances of DOB's improper impounding of appropriated funds best illustrate why the Court should reject any suggestion that it was within DOB's discretion to withhold the funds at issue.

In County of Oneida v. Berle, 49 N.Y.2d 515 (1980), the Court of Appeals construed language in an appropriation bill (identical to what Chapter 53 states here) containing the words "as approved by the director of the budget" to mean that the law only requires DOB approval for the proposed *apportionment* of the funds by a state agency and does not vest the executive with power to impound the funds. At issue in County of Oneida was $7 million appropriated by the Legislature to aid municipalities in operating and maintaining sewage treatment works, but impounded by the DOB Director as agent of the Governor under what the Court of Appeals ultimately held was in excess of his authority and an improper invasion of the legislative domain. Id., at 520-22. The Court of Appeals explained that the separation of powers does not empower the Governor to refuse to expend appropriated funds, as that would be inconsistent with our constitutional form of government. Id., at 523. Further, the appropriation statute did not provide the Budget Director with discretionary authority to withhold funds designated for the sewage treatment aid program, despite language providing, as Chapter 53 does here, for DOB approval of an expenditure plan developed by a state agency. Id. Such a drastic legislative conferral of "unfettered discretion" may not be inferred from statutory language identical from that at issue here. Id., at 524. Accordingly, the withholding of the appropriated aid funds in County of Oneida was declared to be an unconstitutional impoundment well in excess of the DOB Director and the Governor's authority. Id.

Similarly, in City of New York v. NYS Division of the Budget, 160 Misc.2d 1028 (Sup. Ct., New York Co., 1994), the Supreme Court followed County of Oneida to likewise determine that DOB had no authority to withhold funds. As here, in City of New York, the state agency at issue (Department of Social Services – "DSS") had no objection to release of the withheld sums and DOB had openly criticized DSS for representing that the funds should be released to the petitioners. Id., at 1031. The Supreme Court rejected DOB's adopted position that it must concur in the proposed release of funds by DSS to the local districts due to the district's alleged failure to comply with the state's standards for homeless shelters and a delay in correcting identified deficiencies. Id., at 1032. The court read State Finance Law §49, as relied upon by the Budget Director, as "at most" creating a situation where DOB has authority to approve a schedule for the distribution of the funds. It was held to be beyond DOB's asserted authority, however, to withhold funds under the guise of the Budget Director's review of determinations of DSS as to whether a local district was not in compliance with agency regulations. Those were matters specifically placed by the legislature in the control of the other state agency (DSS) and were therefore found to be beyond DOB's "particular scope and discretion." Id., at 1034. This was especially the case given that "the duty to care for the needy is so important that it often overrides financial concerns." Id., at 1034.

Based on these authorities, the NYSED respondents respectfully submit that any suggestion that the impounding of the transformation grant funds at issue was within DOB's discretion should be rejected, especially given the importance of assisting the schools at issue with continued improvement so that they may better educate the children of this state. Just as the budget bill language in County of Oneida and the State Finance Law in City of New York were read as only giving the DOB Director very limited discretion to approve particular allocations or

schedules proposed by the state agencies, so too should the plain language of Chapter 53 be read as requiring only the DOB Director's approval of the expenditure plan developed by NYSED, which plan and its two-year term was so approved. Chapter 53 cannot be read to grant DOB discretion to impound the funds at issue in this proceeding. In this regard, it should also be noted that, unlike DSS in City of New York, NYSED is not an Executive agency that is under the control of the Governor (see NYS Constitution, Art V, §4).

C. The determination to remove the schools from the persistently struggling list was proper.

The petitioners do not challenge NYSED's determination to remove the schools at issue from the lists of priority schools and persistently struggling schools and, for the reasons set forth above, it is beyond the authority of the DOB respondents to call such determination into question. Nevertheless, for the sake of judicial economy and to make the record entirely clear, the NYSED respondents submit that our determination in this regard was wholly proper and the regulation under which we did so was well within NYSED's authority.

Education Law §211-f clearly contemplates that schools will be removed from the list of persistently struggling schools and does so in the context of the question of whether an independent receiver would be appointed for the school if it did not improve. Education Law §211-f(1)(c)(i). The statute also expressly contemplates and therefore directly authorizes the Commissioner, through the Board of Regents, to adopt regulations to carry out its provisions. Education Law §211-f(15). To that end, the Board, after engagement of stakeholders including consultation with the Governor's office, discussed and then promulgated emergency and permanent regulations at 8 NYCRR §100.19 which provide that, with respect to such performance reviews, "at the end of a school year in which a school has been removed from priority school status, pursuant to section 100.18(i)(1) of this Part, the commissioner shall

remove the school's designation as persistently struggling or struggling..." See Schwartz Aff., ¶¶11-15.

The authority to promulgate this provision in §100.19 was further based on two additional provisions in §211-f. First, the designation of schools as failing or persistently failing under §211-f is based solely on their status as priority schools under the state's federal accountability system for defined periods of time (see 8 NYCRR §100.18[g]). Second, §211-f clearly contemplates that both failing and persistently failing schools could be removed from such designations. With respect to persistently struggling schools, §211-f(1)(c)(i) provides that, at the end of the school year in which a superintendent has been vested with the powers of a receiver, NYSED is required to conduct a performance review in consultation and cooperation with the district and school staff to determine, based on the performance metrics in the school's model or plan, whether (1) the designation of persistently failing should be removed; (2) the school should remain under continued school district operation with the superintendent vested with the powers of a receiver; or (3) the school should be placed into receivership. A similar provision exists for failing schools, in which the performance review is to be conducted at the end of two school years (§211-f[1][c][ii]).

In accordance with these statutory provisions, the regulation permits NYSED to remove schools from designation as persistently failing or failing at the end of the school year in which their designation as priority schools has been removed. Since the reason for a school's designation as persistently failing or failing – the fact that such school was designated as a priority school for a certain length of time – no longer exists for these schools, it is appropriate that, as §211-f contemplates, they be removed from receivership status at the end of that school year. NYSED's regulation is rationally based, within its authority and wholly consistent with

§211-f, as were the NYSED respondents' determinations thereunder with respect to the schools at issue.[3]It should also be noted that the criteria for removal from priority school status are more stringent than the criteria for removal from persistently struggling school status. For example, in order to be removed from priority school identification, a school must make priority school progress for two consecutive years and have met certain minimum student achievement standards in the second year in English language arts and mathematics and, for high schools, graduation rate. In addition, the school must have at least 95% of each subgroup of students for which it is accountable participate in state assessments in English language arts and mathematics, which is not a requirement for persistently struggling schools in order to make demonstrable improvement. Making priority school progress generally requires a higher level of student achievement in English language arts and mathematics as well as for graduation rate than is required for making demonstrable improvement. In addition, persistently struggling schools may choose a variety of non-academic indicators to be incorporated into the Commissioner's determination of whether a school has made demonstrable improvement. In other words, removal from priority school status requires a higher percentage of students to be partially proficient or proficient in English language arts and mathematics as well as higher graduation

[3] Even assuming, arguendo, that NYSED's regulation goes beyond the text of §211-f, such regulation is, as described herein, rational and reasonable and wholly consistent with the statutory language and purpose. See e.g., Greater N.Y. Taxi Assn. v. New York City Taxi & Limousine Commn., 25 N.Y.3d 600, 608 (2015) ("an agency can adopt regulations that go beyond the text of [its enabling] legislation, provided they are not inconsistent with the statutory language or its underlying purposes."); Sullivan Financial Group, Inc. v. Wrynn, 94 A.D.3d 90, 94 (3d Dept. 2012) (a regulation promulgated by respondent, even one that goes beyond the text of the enabling legislation, "if not irrational or unreasonable, will be upheld in deference to [respondent's] special competence and expertise..."). See also, Agencies for Children's Therapy Services, Inc. v. NYS Department of Health, 136 A.D.3d 122 (3d Dept. 2015) (upholding agency's challenged regulations while noting that: "where an agency has been endowed with broad power to regulate in the public interest, courts generally will uphold reasonable acts that further the regulatory scheme", and that: the central theme of this analysis is that an administrative agency only "exceeds its authority when it makes difficult choices between public ends, rather than finding means to an end chosen by the Legislature."); County of Westchester v. Board of Trustees of State University of New York, 9 N.Y.3d 833 (2007) (declaring that regulations limiting sponsor's role in fiscal decisions were valid and had a rational basis and were not contrary to the Education Law under which they were promulgated - rejecting petitioner's arguments that regulations were inconsistent with the law and its intended purpose of increasing sponsor oversight).

rates than does making demonstrable improvement for comparable indicators, while demonstrable improvement determinations may include other indicators, such as school climate, that are not explicit factors in making priority school determinations. Schwartz Aff., ¶19.

Finally, any suggestion that NYSED improperly took the schools at issue off of the persistently struggling schools list is, we submit, dubious for the following additional reasons. First, as mentioned above, it is NYSED which is entitled to deference in matters of both education policy and the proper construction of Education Law §211-f and the Commissioner's regulations thereunder, not DOB. Moreover, DOB's actions in "reserving" the majority of the transformation grant monies cannot logically and reasonably be linked to the removal of these schools from the priority schools list. The updated list was not effective until June 30, 2016, yet the DOB respondents froze the funds in March 2016. Further, DOB has frozen not just the year-two monies for the nine schools removed from the persistently struggling schools list but the majority of the year one monies and all year two monies for all schools, even those that remain on the persistently struggling schools list for the 2016-17 school year.

POINT II

EVEN IF UNFROZEN BY THE COURT OR DOB, THE COURT CANNOT COMPEL NYSED TO "IMMEDIATELY" RELEASE THE GRANT FUNDS TO THE SCHOOLS AT ISSUE.

As set forth in the cases cited in POINT I(b), above, mandamus to compel payment of money is not appropriate where the agency retains lawful discretion before making payment. See also, Stutzman v. Fahey, 62 A.D.2d 1070 (3rd Dept. 1978) (mandamus to compel a state agency to make payment is inappropriate where agency's ultimate payment requires non-ministerial and discretionary review); Galvin & Morgan v. McCall, 251 A.D.2d 869 (3rd Dept. 1998) (same).

Here, the transformation grant monies can only be paid by NYSED after multiple necessary reviews and approvals. Schwartz Aff., ¶36. Indeed, as a result of the events giving rise to this proceeding, year two budgets have neither been submitted nor approved for the 2016-17 school year for the three schools at issue in this proceeding. Schwartz Aff., ¶44. The NYSED respondents therefore must oppose the Petition only to the extent that it seeks to compel NYSED to immediately release those funds to the schools at issue if and when such funds are properly un-frozen by the Court or the DOB respondents. NYSED, given the nature of the grants, the State funding system, and the Department's oversight and administrative responsibilities in that regard, can only review and approve or reject in due course these schools' grant plans/budgets, expenditures and reimbursements in accordance with applicable laws. Schwartz Aff., ¶50.

This is the NYSED respondents' only opposition to the relief requested.

CONCLUSION

In light of the foregoing, the NYSED respondents do not oppose and therefore submit that it would be proper to grant that portion of the requested relief that seeks an order compelling DOB to "un-freeze" the transformation grant monies.

Dated: September 29, 2016
Albany, New York

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