STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of an Article 78 Proceeding

NADIA CORTES, VIRGIL DANTES, ANNMARIE HESLOP, CURTIS WITTERS, on behalf of themselves and their Children

Petitioner,

Index No. 05102-16
RJI No.: 01-16-ST8123

-against-

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

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS ROBERT MUJICIA'S AND NEW YORK STATE DIVISION OF BUDGET'S MOTION TO DISMISS BASED ON OBJECTIONS IN POINT OF LAW

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Dated: September 29, 2016

INTRODUCTION

Respondents Robert Mujica, Director of the New York State Division of Budget ("Director Mujica") and the New York State Division of Budget ("DOB") (collectively referred to as "DOB") by and through their attorneys, Harris Beach PLLC, submit this Memorandum of Law seeking dismissal of the Verified Petition filed by Petitioners Nidia Cortes, Virgil Dantes, AnnMarie Heslop, and Curtis Witters, and on behalf of their children (collectively, "Petitioners").

Petitioners in this action are wrongfully attempting to compel the DOB to authorize payments to school districts from a particular appropriation commonly known as the "Transformation Grant appropriation" to nine New York schools that were previously categorized as "Persistently Failing" schools within the State's receivership schools program. The State's school receivership program, created by Education Law ("EL") § 211-f, was enacted on April 13, 2015 (see Chapter 56 of the Laws of 2015, Part EE, Subpart H, Section 1) and was supported by the $75 million appropriation in the 2015-2016 State Budget (see Chapter 53 of the Laws of 2015, as amended by Chapter 61 of the Laws of 2015), as reappropriated in the 2016-2017 State Budget (see Chapter 53 of the Laws of 2016).

Specifically, the Transformation Grant appropriation and reappropriation authorized the provision of funds (the "Transformation Grant funds") upon application of school districts containing "Persistently Failing" schools, to support qualified activities (see Chapter 53 of the Laws of 2015, as amended by Chapter 61 of the Laws of 2015 and Chapter 53 of the Laws of 2016). EL § 211-f required the New York State Education Department ("SED") to develop and maintain the list of schools in New York State that SED determined, based on certain criteria, to be designated a "Persistently Failing" school. The Transformation Grant appropriation and the

accompanying spending plan stated that only schools designated as "Persistently Failing" could apply for and become eligible for Transformation Grant funds.

In July 2015, SED designated 20 schools, including the nine schools discussed in the Petition, as "Persistently Failing" schools. This categorization rendered those 20 schools eligible for Transformation Grant funding upon approval by SED of their applications. In furtherance of the legislative directive contained in Chapter 53 of the Laws of 2015, as amended by Chapter 61 of the Laws of 2015, SED submitted and DOB approved the requisite spending plan for this program (the "Spending Plan"). As a result, consistent with the Spending Plan, funds were awarded to school districts containing approved "Persistently Failing" schools during the State's FY 2015-2016.

On February 26, 2016, SED announced that it had voluntarily updated its "Priority Schools" list, which resulted in the nine schools identified in the Petition being removed from the category of "Persistently Failing" schools for the 2016-2017 school year. The removal of those schools "Persistently Failing" designation rendered those schools ineligible for further Transformation Grant funds for the 2016-2017 school year since the Transformation Grant appropriation and reappropriation contains a condition precedent before DOB is legally able to release and SED is able to spend Transformation Grant funds. In order for a school district to receive Transformation Grant funding, the statutory prerequisite is that a school be designated as a "Persistently Failing" school. Simply put, SED's removal of the "Persistently Failing" designation abrogated eligibility for such funding for the 2016-2017 school year.

Petitioners have brought this proceeding in an attempt to force DOB to do what it does not have the authority to do – make Transformation Grant funds available from the Transformation Grant appropriation and reappropriation to school districts for schools that are

not qualified to receive such Transformation Grant funds pursuant to the plain language of the Transformation Grant appropriation and reappropriation statute and related spending plan.

Not only does Petitioners' prayer for relief exceed DOB's legal and statutory authority, this proceeding is further procedurally flawed, requiring the dismissal thereof. Those procedural deficits include: (1) DOB's determination that it lacked statutory authority to release Transformation Grant funds to be paid to school districts for the subject schools for the 2016-2017 school year was not a ministerial act and, therefore, mandamus relief is inappropriate in this action; (2) Petitioners failed to commence this proceeding within the statute of limitations prescribed in CPLR § 217 (1), and (3) Petitioners, as parents, have not suffered any injury unique enough to challenge DOB's decision that it was not legal to release Transformation Grant funds to be paid to school districts for the removed schools for the 2016-2017 school year, and, as a result, Petitioners do not have standing to bring this Article 78 proceeding.

Accordingly, DOB respectfully requests that this Court dismiss this proceeding, with prejudice.

STATEMENT OF FACTS

1. The Passage of New York State Education Law § 211-f and the Transformation Grant Appropriation

On April 13 2015, Subpart H of Part EE of Chapter 56 of the Laws of 2015 added section 211-f to the Education Law ("EL") (see Chapter 56 of the Laws of 2015, Part EE, Subpart H, Section 1). Section 211-f establishes a process for the appointment of a receiver for schools, denoted "Persistently Failing," that fail to make a "demonstrable improvement" within a prescribed time frame (EL § 211-f). Under EL § 211-f, schools that have been identified on the State's federal accountability system to be among the lowest achieving public schools in the state, also currently known as "Priority Schools," for 10 or more years are subject to designation

by SED as a "Persistently Failing" school (EL § 211-f [1] [b]). The "Priority Schools" designation stems from the Federal Elementary and Secondary Education Act of 1965 ("ESEA") (see 20 USC §§ 6301–8961 et. seq.). Should a "Persistently Failing" school not make demonstrable progress within the initial one-year time frame, § 211-f mandates that an Independent Receiver be appointed to assume control of the school for a period of up to three years (id, § 211-f [c][i]).

Chapter 53 of the Laws of 2015 was amended by Chapter 61 of the Laws of 2015 to include a $75 million appropriation entitled "Persistently Failing Schools Transformation Grants," to support schools categorized as "Persistently Failing" under EL § 211-f (see Conroy Aff., Ex. B). The Transformation Grant appropriation and reappropriation (see Chapter 53 of the Laws of 2016) dictates that Transformation Grant funds can be distributed only in accordance with "a spending plan developed by the [C]ommissioner of [E]ducation and approved by the [D]irector of the [B]udget", and are available only 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 [E]ducation [L]aw" for eligible expenditures at such schools (see id [emphasis added]).[1] Such designation is of primary importance since not all schools in New York qualify for Transformation Grant funding. This highly-specialized aid is available exclusively to "Persistently Failing" schools. Such was the Legislature's policy determination.

2. Designation of Persistently Failing Schools by SED and Approval of Spending Plan

[1] In this case, the appropriation restricts the availability of the funding to school districts containing schools designated as "persistently failing," and further restricts the use of such funding solely to designated expenses at those specific schools. Accordingly, SED indicates in its Spending Plan an amount anticipated to be made available on behalf of each individual school. The reference to the school *district* within the appropriation reflects the necessary role of the school district in the financial management and governance of its individual schools (including submission of an application in accordance with DOB approved spending plan and the statute acceptable to SED), and based upon both the appropriation and the Spending Plan, the classification of the individual school as "Persistently Failing" (or not) is a critical requirement for eligibility for funds.

In accordance with the federal ESEA, SED has been responsible for designating schools as "Priority Schools" since 2012 (see 8 NYCRR § 100.18 [eff. July 1, 2012]). Furthermore, consistent with EL § 211-f, SED is also responsible for identifying schools from the "Priority Schools" list that qualify as "Persistently Failing" (see EL § 211-f [1] [a], [b]). To carry out this responsibility, SED adopted rules and regulations entitled "[t]akeover and restructuring of failing and persistently failing schools" (see 8 NYCRR § 100.19 [eff. June 23, 2015]). SED's regulations provide that "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 [which outlines ESEA "Priority Schools" standards], the [C]ommissioner [of State Education] shall remove the school's designation as persistently struggling[2]" (see 8 NYCRR 100.19 [d] [6] [i]).

In exercising authority under EL § 211-f and 8 NYCRR 100.19, Respondent Commissioner of Education Maryellen Elia ("Commissioner Elia") designated 20 schools as "Persistently Failing" in July 2015 (see Affirmation of Wendy Lecker, dated August 31, 2016 ["Lecker Aff."], Ex. B at 1, 3). Thereafter, SED submitted a draft Transformation Grant Spending Plan ("Spending Plan") to then DOB Director Mary Beth Labate for approval. The proposed Spending Plan described the process by which Transformation Grant funds would be expended in accordance with the limitations of the Transformation Grant appropriation.

After review between the two state entities, and several revisions, on or about October 15, 2015, DOB approved the final Spending Plan (see Lecker Aff., Exs. C; Conroy Aff., at ¶ 11). The Spending Plan states, "Education Law 211-f requires that the Transformation Grant funds be appropriated for the *exclusive purpose* of providing additional services to Persistently [Failing] Schools" (see Lecker Aff., Ex. A [emphasis added]). The Spending Plan acknowledges that

[2] SED refers to "Persistently Failing" schools as "persistently struggling" schools. Though they are one-in-the-same, for uniformity, this Memorandum shall refer only to "Persistently Failing" schools.

"Persistently Failing" schools are defined by § 211-f and SED's Regulation 100.19 (see id). Approximately $6 million of the Transformation Grant funds have already been disbursed for the 2015-2016 school year (see Conroy Aff., at ¶ 16) [3]

3. SED Re-Designation of Priority Schools

On December 10, 2015, President Barack Obama signed into law the Every Student Succeeds Act ("ESSA"), which reauthorized ESEA (see Conroy Aff., Ex. E, at 1) and required "many States" to submit updated Priority School lists to the United States Department of Education ("DOE") by January 2016 (see id, at 3). Recognizing that an update to the "Priority Schools" lists at mid-academic year could cause a disorderly transition in some States, the DOE allowed States the following options with respect to maintenance of "Priority Schools" lists. States could either:

i. Freeze their "Priority Schools" list as of December 10, 2015 and continue to implement those schools' approved interventions through the 2015-2016 and 2016-2017 school year, resulting in the first change to the "Priority Schools" list occurring after the 2016-2017 school year; or

ii. Update their "Priority Schools" list by March 1, 2016, exiting schools that meet the State's approved exit criteria and identify any new priority schools (see id).

States were given until January 29, 2016 to inform DOE whether they chose to freeze or update their "Priority School" lists (see id).

SED chose the latter option and elected to update New York's "Priority Schools" list. On February 26, 2016, prior to the completion of the State's FY 2016-2017 budget cycle, SED and

[3] Transformation Grant funds are intended to reimburse school districts for Transformation Grant expenditures. Accordingly, after a school district spends monies pursuant to an approved Transformation Grant application, the school district can request Transformation Grant funds from SED. Provided and to the extent that DOB makes funds available for payment under the Transformation Grant appropriation or reappropriation, SED then makes payments to the district from funds made available by DOB from the Transformation Grant appropriation or reappropriation to reimburse the actual program costs incurred by the school district (see Conroy Aff., at ¶ 7).

Commissioner Elia announced that they had amended New York's "Priority Schools" list, which caused the nine schools to lose their "Persistently Failing" designation for the 2016-2017 school year (see Conroy Aff., Ex. F).[4] The nine schools that were eliminated as "Persistently Failing" schools are the same nine schools that are referenced in the Petition (hereinafter referred to as the "removed schools" or the "subject schools").[5]

Commissioner Elia's press release regarding the removal of certain schools from the list of "Persistently Failing" schools acknowledged, the "special authority of the superintendent" at the nine removed schools "will sunset on June 30, 2016" or, the close of the 2015-2016 school year (see id). Commissioner Elia further stated, "[s]chools that will be removed from the Persistently [Failing] Schools list . . . will continue to be eligible to receive funding in 2016-2017 from a state grant to support and strengthen their school improvement efforts" (see id). This pronouncement was made without consulting DOB as to the consequences of altering the categorization of certain schools (see Conroy Aff., at ¶ 15; Affidavit of Robert J. Mujica ("Mujica Aff."), dated September 29, 2016, at ¶ 4).

Thereafter, on March 30, 2016, DOB revoked its prior approval for SED to make additional payments against the Transformation Grant appropriation. This revocation was expressed through placing the entire unexpended balance of the Transformation Grant appropriation in reserve in the Statewide Financial System, thereby preventing SED from incurring any additional liabilities against the Transformation Grant appropriation (see Conroy Aff., at ¶ 17). Next, on April 1, 2016, the Transformation Grant appropriation was amended and

[4] The nine (9) schools that SED removed from the Persistently Failing schools list are: William S Hackett Middle School, Roosevelt High School (Early College), JHS 80 Mosholu Parkway High School, Buffalo Elementary School of Technology, Burgard Vocational High School, South Park High School, Automotive High School, PS 328 Phyllis Wheatley, and Grant Middle School (see Lecker Aff., at ¶ 44; Verified Answer, at ¶ 56).

[5] Only 3 of the 9 schools that were removed from the "Persistently Failing Schools" list are represented by parent-petitioners in this proceeding. The Petition does not name any party representative for the remaining 6 schools (see Verified Petition).

reappropriated as part of the State's FY 2016-2017 budget (see Chapter 53 of the Laws of 2016). The reappropriation continued to limit the authority to expend Transformation Grant funds to school districts containing one or more schools identified as "Persistently Failing" for eligible activities at such schools (see Conroy Aff., Ex G). Notably, between February 26, 2016 and April 1, 2016, SED did not add the removed schools back onto the "Persistently Failing" schools list.

Ironically, counsel for the Petitioners vehemently opposed returning the removed schools back into the receivership program and the "Persistently Failing" list in late March 2016 during the State's FY 2016-2017 budget negotiations, stating that the removed schools "do not fall within the purview of the receivership law, NY Education Law 211-f" and that the receivership program "had absolutely no effect on the progress the [Removed] [S]chools made" (see Bethany Bump, *Law Memo: Cuomo Stance on Struggling Schools a 'Mockery' of Receivership Program*, Times Union [March 31, 2016]). There is clear evidence in opposing counsel's memorandum to Governor Cuomo, dated March 31, 2016, that a determination had been made prior to that date to remove the schools at issue from the "Persistently Failing" schools list, which resulted in excluding those schools from the receivership program, and from the purview of the Transformation Grant appropriation (see id).

After the DOB became aware of SED's announcement that nine schools had been removed from the "Persistently Failing" schools list, a determination was made that the nine schools removed from the "Persistently Failing" schools list were ineligible to receive Transformation Grant funds for the 2016-2017 school year (see Mujica Aff., at ¶ 5). This determination was made because the removed schools were no longer categorized as "Persistently Failing," therefore, making the Transformation Grant funds available to those

schools for the 2016-2017 school year would be contrary to law (see id). This determination was contrary to the public statement of SED Commissioner Elia on February 26, 2016, which was not made in consultation with DOB or Director Mujica individually. In addition, DOB released a statement to a reporter that was quoted in a news article on April 21, 2016 which read, in part:

> **To suggest that these [removed] schools should remain eligible for the funding even though they were removed from the program is contrary to the law**" (see Conroy Aff., Ex. H [emphasis added]).

As this Court is aware, nearly six months after Commissioner Elia and SED updated the State's "Priority Schools" list and took the removed schools off the list of "Persistently Failing" schools for the 2016-17 school year, and more than four months after the Transformation Grant reappropriation was enacted and DOB stated publicly that the removed schools would not receive continuation of funding under the Transformation Grant for the 2016-2017 school year due to the limitations imposed by the Transformation Grant reappropriation and Spending Plan, the Education Law Center (the same Center that publicly acknowledged that the removed schools do not "fall within the purview of . . . NY Education Law 211-f" in March of 2016) commenced this Article 78 proceeding on behalf of four parents, and their children, who collectively attend three of the nine removed schools.

Without attaching any proof that all of the removed schools even submitted a PSSG Application to SED to receive Transformation Grant funding in the first instance,[6] Petitioners now ask this Court to "[o]rder[] and direct[] Respondents Mujica and DOB to immediately release to SED the Transformation Grants for 2016-17" and for "SED to immediately distribute said Transformation Grants to" the *all* of the removed schools (see Petition, at "Wherefore Clause" [a]).

[6] Petitioners only attached the PSSG Applications and subsequent SED approval for of Roosevelt High School, JHS 80 The Mosholu Parkway Middle School, and William S. Hackett Middle School.

There are several threshold procedural deficiencies in connection with this proceeding that require this Court to dismiss this proceeding before consideration of the merits. In the event this Court declines to grant a dismissal a procedural ground(s), DOB will demonstrate that the relief sought by Petitioner exceeds the scope of DOB's legal authority to distribute state monies, and that DOB's determination was rationally based, therefore, this Court should not award the relief Petitioners' seek and this proceeding must be dismissed.

4. Summarized Timeline Chart

DATE	EVENT
April 13, 2015	EL § 211-f was enacted as a part of the State's FY 2015-2016 budget (see Chapter 56, Section1, Part EE, Subpart H of the Laws of 2015).
April 13, 2015	The "Persistently Failing Schools Transformation Grants" appropriation, valued at $75 million, was enacted as part of the State's FY 2015-2016 budget (see Chapter 61 of the Laws of 2015, amending Chapter 53 of the Laws of 2015).
June 23, 2015	SED adopted an emergency rules and regulation entitled "[t]akeover and restructuring of failing and persistently failing schools" to carry out its responsibility to identify New York schools that qualify as "Persistently Failing" schools (see 8 NYCRR § 100.19).
July 16, 2015	Commission Elia announced that 20 New York schools had been designated as "Persistently Failing" in accordance with the mandates of EL § 211-f and 8 NYCRR § 100.19.
October 15, 2015	After extensive review and deliberations between SED and DOB, DOB approved the final Spending Plan required by the Transformation Grant appropriation.
December 10, 2015	President Barack Obama signed into law ESSA, which reauthorized ESEA.
December 18, 2015	United States Department of Education distributes letter to SED, among other entities, outlining that because of the reauthorization of ESEA, SED could either update its "Priority List" or freeze its "Priority List" through the 2016-2017 school year.

February 26, 2016	Prior to the completion of the State's FY 2016-2017 budget cycle, Commissioner Elia announced that SED amended its "Priority Schools" list, which resulted in the removal of nine schools from the State's "Persistently Failing" schools list for the 2016-2017 school year. Commissioner Elia publicly stated that the removed schools would remain eligible to receive Transformation Grant funds for the 2016-2017 school year, without first consulting with DOB.
March 30, 2016	DOB revoked its prior approval for SED to make additional payments against the Transformation Grant appropriation. This revocation was expressed through placing the entire unexpended balance of the Transformation Grant appropriation on "reserve" in the Statewide Financial System.
March 21, 2016	Petitioners' counsel vehemently opposed an effort by the Executive Branch to return the removed schools back into the receivership program and the "Persistently Failing" list during the State's FY 2016-2017 budget negotiations (see Bethany Bump, *Law Memo: Cuomo Stance on Struggling Schools a 'Mockery' of Receivership Program*, Times Union [March 31, 2016]).
April 1, 2016	The Transformation Grant funds were reappropriated as part of the State's FY 2016-2017 budget (see Chapter 53 of the Laws of 2016).
On or before April 20, 2016	A determination was made that the nine schools removed from the "Persistently Failing" schools list were ineligible to receive Transformation Grant funds for the 2016-2017 school year and that any distribution of funds for such schools would be contrary to law.
April 21, 2016	DOB's statement regarding the above determination was published and became available to the public.
August 21, 2016	Limitations period to challenge determination at issue in this proceeding expired (see CPLR 217 [1]).
September 2, 2016	Petitioners' commence the pending proceeding challenging the determination rendered on or before April 20, 2016 and made available to the public on April 21, 2016.

ARUGMENT

POINT I

DOB'S RESPONSIBILITIES IN THIS MATTER ARE NOT MERELY MINSTERIAL AND HAD A RATIONAL BASIS

A. Whether DOB can Allocate State Funds is Not a Ministerial Decision

The remedy of mandamus should not be available in the context of this proceeding. "Mandamus, of course, is an extraordinary remedy that, by definition is only available in limited circumstances" (Klostermann v Cuomo, 61 NY2d 525, 537 [1984]). More specifically, "mandamus lies [only] to compel the performance of purely ministerial act[s] where there is a clear legal right to the relief sought" (Klostermann, 61 NY2d at 539; see also Siegel, New York Practice, § 558 [5th Ed.]). By extension, mandamus cannot be used to compel an officer of the state to perform an act that involves any judgment or discretion (see Klostermann, 61 NY2d at 539; Ozdoba v Chelsea Landmark LIC, LLC, 74 AD3d 555, 555 [1st Dept 2010]).

The Supreme Court of the United States ("SCOTUS") has long recognized that the "head of an executive department ot (sic) the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion" and, in general, such duties "are not mere ministerial" (see US ex rel. Dunlap v Black, 128 US 40, 46 [1888]). The SCOTUS continued, "[t]he court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, [because] the court ha[s] no appellate power for that purpose" (id).

DOB asserts that the determination at issue was surely not a mere ministerial act because the determination that certain spending is, or is not, legally allowed under duly-enacted appropriations is the exercise of an official duty that involves judgment and discretion. New

York courts have agreed with this position in the past and found that the Budget Director not only has a duty to see that "appropriated funds are distributed properly," but that the Budget Director's approval of expenditures against appropriations is "not a mere ministerial act" (see City of New York v New York State Div. of Budget, 160 Misc2d 1028, 1033 [New York County, Sup. Ct., 1994] [outlining the threshold duties and responsibilities of the Budget Director regarding the appropriation of funds] [citing, Matter of Alliance for Progress v New York State Div. of Housing and Comm. Renewal, 141 Misc2d 265 (New York County, Civ. Ct. of the City of New York (1988)]).

Similarly, in EZ Properties, LLC v City of Plattsburgh, 128 AD3d 1212 (3d Dept 2015), the Third Department was asked whether the lower court properly dismissed petitioners' Article 78 claims seeking to compel the City of Plattsburgh to issue a certificate of occupancy ("CO") (see 128 AD3d at 1214-15). After reviewing the City Code, which granted the building inspector the authority to approve applications for COs "upon compliance by an applicant with all provisions in this chapter," the Third Department held that the claims were "beyond the reach of a proceeding for relief in the nature of mandamus" (see id, at 1215). The Court reached this conclusion because the City Inspector's decision regarding petitioner's entitlement to a CO involved "discretionary considerations" and, therefore, petitioners did not have a "clear legal right to the relief sought" (id [internal quotations and citations omitted]).

Additionally, in Ozdoba v Chelsea Landmark LIC, LLC, 74 AD3d 555 (2010), the petitioner sought to reverse respondents' determination that petitioner did not meet the income eligibility requirement for an affordable apartment (74 AD3d at 555). The Third Department recognized that petitioner's "request for an award of an affordable apartment is plainly in the nature of mandamus to compel the performance of a duty" but cautioned that mandamus will

"not be awarded to compel an act in respect to which the officer may exercise discretion or judgment" because, in those instances, petitioners cannot demonstrate a legal right to that which they seek (see id, at 555-56). Ultimately, the Third Department dismissed petitioner's proceeding because "petitioner [ ] show[ed] no legal right to an affordable apartment" and the officer's determination to that effect involved the exercise of judgment (id, at 555-56).

As DOB's counsel explained in his Affirmation accompanying this motion, DOB (including the Budget Director) is permitted by law to make appropriated funds available for payment that are used for the specific purpose set forth in a duly-enacted appropriation (see Affirmation of Alan P. Lebowitz, dated September 29, 2016 ("Lebowitz Aff."), at ¶ 2; see also Mujica Aff., at ¶ 2). Conversely, DOB is not permitted by law to make appropriated funds available for payment that are not to be used for the specific purpose set forth in a duly-enacted appropriation (see id, at ¶ 3). Stated differently, it would be illegal for DOB to make available for payment any appropriated funds that are not to be used for the specific purpose set forth in a duly-enacted appropriation statute. More specially, as it relates to this proceeding, DOB is duty bound to ensure that Transformation Grant funds are legally dispersed (see City of New York , 160 Misc2d at 1033). Accordingly, a determination was made, in accordance with the plain language of the Transformation Grant appropriations and related spending plan, that school districts that contained schools removed from the "Persistently Failing" schools list for the 2016-2017 school year were not eligible to receive Transformation Grant funding for the 2016-2017 school year for those removed schools and that making the Transformation Grant funds available to those removed schools for the 2016-2017 school year would be contrary to law (see Mujica Aff., at ¶ 5). This decision was not "purely ministerial" but, instead, involved discretion and analysis to complete an official duty.

Accordingly, this determination is not subject to review by this, or any other, Court and this proceeding should be dismissed.

B. The Determination that the Removed Schools are Ineligible for Transformation Grant Funds for the 2016-2017 School Year is Not Arbitrary or Capricious

Courts will not interfere with the decision of an administrative agency unless the action complained of is arbitrary and capricious or an abuse of discretion (see 7803 [3]). "This standard is, of course, an extremely deferential one: The courts cannot interfere with an administrative tribunal's exercise of discretion unless there is *no rational basis* for its exercise or the action complained of is arbitrary and capricious, a test which chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is *without foundation in fact*" (Beck-Nichols v Bianco, 20 NY3d 540, 559 [2013] [internal quotation marks and citation omitted, emphasis in original]; accord 4M Holding Co. v Town Bd. of Islip, 81 NY2d 1053, 1055 [1993] [defining an arbitrary action as one that "is without basis in reason and is taken without regard to the facts"]; Cnty. of Monroe v Kaladjian, 83 NY2d 185, 189 [1994] ["determination need only be supported by a rational basis," which "requires the Court to assess whether the action in question was taken without sound basis in reason and without regard to the facts"] [internal quotation marks omitted]; Matter of Pell v Bd. of Educ. of Union Free Sch. Dist., 34 NY2d 222, 231 [1974] ["Arbitrary action is without sound basis in reason and is generally taken without regard to the facts."].

A clear rational basis exists and supports the determination that the nine removed schools at issue in this Petition are ineligible to receive Transformation Grant funding for the 2016-2017 school year. DOB can only make appropriated New York State funds available for payment that are used for the specific purpose set forth in a duly-enacted appropriation (see Lebowitz Aff., at ¶ 2; NYS Finance Law Section 43; NY Const. Art. VII, § 7). Accordingly, it is unlawful to make

available for payment and appropriated funds that are not to be used for the specific purpose set forth in a duly-enacted appropriation (see Lebowitz Aff., at ¶ 3; NYS Finance Law Section 43). More specially, as it relates to this proceeding, DOB is duty bound to ensure that Transformation Grant funds are legally dispersed (see City of New York , 160 Misc2d at 1033). The plain language of the Transformation Grant appropriation and reappropriation, along with the Spending Plan, render only one determination in this instance lawful: the nine schools no longer characterized as "Persistently Failing" no longer satisfy the condition precedent to be eligible to receive Transformation Grant funds, and, therefore, Transformation Grant funds for the 2016-17 schools year cannot be made available to school districts for the nine removed schools within the confines of the appropriation or reappropriation.

As a result, a determination was made, in accordance the plain language of the Transformation Grant appropriations and related spending plan, that the school districts containing schools removed from the "Persistently Failing" schools list for the 2016-2017 school year were not eligible to receive Transformation Grant funding for the 2016-2017 school year for those removed schools and that making the Transformation Grant funds available to those removed schools for the 2016-2017 school year would be contrary to law (see Mujica Aff., at ¶ 5). This decision was rationally based and simply the only lawful determination that could be reached. Accordingly, the determination at issue was not arbitrary and capricious and the Petition should be dismissed.

POINT II

PETITIONERS' FAILED TO TIMELY COMMENCE THIS PROCEEDING

The Petitioners' here did not comply with the statute of limitations requirement pertaining to CPLR Article 78 proceedings (see CPLR 217 [1]). It is well-established that a

petitioner who seeks Article 78 review of an agency determination must "commence the proceeding 'within four months after the determination to be reviewed becomes final and binding upon the petitioner'" (see Walton v New York State Dept. of Correctional Services, 8 NY3d 186, 194 [2007] [quoting CPLR 217 (1)]). A determination is "final and binding," once the determination inflicts an "actual concrete injury" that may not be prevented "or significantly ameliorated by further administrative action" (see Mtr. of the City of NY v Grand Lafayette Props., 6 NY3d 540 [2006]).

In the present case, Petitioners argue that DOB's "refusal to release second year" Transformation Grant funding to the removed schools is "arbitrary and capricious" (see Petition ¶ 60). Accordingly, Petitioners' four-month limitations period began to run on the day that a determination was made that making the Transformation Grant funds available to the removed schools for the 2016-2017 school year would be contrary to law. This determination became final and binding, at the absolute latest, on April 21, 2016, when DOB's statement that "To suggest that these schools should remain eligible for the funding even though they were removed from the program is contrary to the law" was published. Therefore, Petitioners' proceeding is time barred and must be dismissed.

There is no dispute that DOB made public, on April 21, 2016, a determination that the removed schools were ineligible for Transformation Grant funds for the 2016-2017 school year, and that making any such grants available to those removed schools would be contrary to law. Therefore, Petitioners' statute of limitations began to run, at the latest, on April 21, 2016 when the public was unquestionably informed of the ramifications of the amendment to the list of "Persistently Failing" schools. Petitioners failed to commence their proceeding within the four-month limitations period, which expired on August 21, 2016. Instead, Petitioners waited until

September 2, 2016 to commence this proceeding, rendering the Petition untimely and subject to dismissal.

POINT III

PETITIONERS LACK STANDING TO CHALLENGE DOB'S DETERMINATION THAT THE REMOVED SCHOOLS ARE INELIGIBLE FOR TRANSFORMATION GRANT FUNDS FOR THE 2016-2017 SCHOOL YEAR

Petitioners have not met the requirements to achieve standing to contest DOB's determination. "Standing is . . . a threshold requirement for a [petitioner] seeking to challenge governmental action" (NY State Ass'n of Nurse Anesthetists v Novello, 2 NY3d 27, 211 [2004]; see also Assoc. for a Better Long Island, Inc. v NY State Dept. of Envtl. Cons., 23 NY3d 1, 6 [2014]). A petitioner cannot claim standing in an action by "virtue of his status as a citizen or taxpayer since the common law of this State does not afford a taxpayer standing to challenge the acts of a governmental official or body, unless the taxpayer has a special right or interest in the matter that is different from those common to all taxpayers and citizens" (see Kadish v Roosevelt Raceway Assoc., 183 AD3d 874, 874-75 [2d Dept 1992]). Accordingly, in order to establish standing, an aggrieved party must demonstrate "special damage, different in kind and degree from the community generally" (see Mtr of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406, 413 [1987]). Relying on these foundational principles, the Court of Appeals articulated a two-part test to establish standing: the individual petitioners must show: (1) an "injury in fact" that is in some way different from that of the public at large; and (2) that the asserted injury "fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (see Colella v Board of Assessors of County of Nassau, 95 NY2d 401, 409-10 [2000]; Finger Lakes Racing

Association, Inc. v N.Y. State Gaming Facility Location Board, 51 Misc3d 193, 196-200 [Albany Co. Sup. Ct. 2015]).

Petitioners here have not demonstrated any particularized harm or special right that is different from every other citizen or parent in their school district. Instead, Petitioners' generally allege that the removed schools "will not be able to continue to provide the programs and services specified in their approved Transformation Grant Applications" and that those "programs and services are essential to continue school improvement in 2016-17, thus jeopardizing the improvements made in the first year" (see Petition, at ¶ 58). Petitioners did not plead any particularized harm they, or their children, will suffer if the removed schools are not provided with Transformation Grant funds during the 2016-2017 school year. As an initial observation, Transformation Grants are provided to eligible school districts, which then funnel the monies to certain eligible schools. The schools themselves do not directly apply to or receive the monies from either SED or DOB.

If a petitioner fails to articulate a specific harm that he or she will suffer if an administrative determination is not invalidated or submit proof establishing that the agency's determination will have adverse impacts on the petitioner that are different from the public at large, the petitioner has failed to establish standing to challenge the agency determination and their proceeding must be dismissed (see Clean Water Advocates of New York, Inc. v NYS Dept. of Envtl. Conservation, 103 AD3d 1006, 1006-07 [3d Dept 2013]). In Clean Water Advocates, the Third Department found that petitioner, an organization, lacked standing to challenge the Department of Environmental Conversion's acceptance of an stormwater pollution prevention plan ("SPPP") because petitioner did not demonstrate that the SPPP would directly harm any of its members in some way different in kind or degree from that of the public at large and because

petitioner's general accusation of environmentally-related injury was "[d]evoid of evidentiary support and far too speculative and conjectural to demonstrate a specific injury-in-fact" to the organization's members (see id, at 1007-08).

In this proceeding, Petitioners' are plagued by the same deficiencies and amorphous claims as the petitioner in Clean Water Advocates. Petitioners' generally allege that DOB's failure to disperse Transformation Grant funds to the removed schools for the 2016-2017 school year will prevent the removed schools from continuing programs implemented during the 2015-2016 school year and will jeopardize the removed school's progress from the prior academic year (see Petition, at ¶ 58). These conclusory allegations are unsupported. Petitioners did not articulate any specific harm that they, or their children, will suffer as a result of the elimination of this funding that could be used only for specifically approved items, nor have Petitioners submitted any proof establishing that the lack of Transformation Funds to the removed schools will have any adverse impact on the removed schools' progress from the prior academic year. Furthermore, Petitioners fail to demonstrate that the DOB's decision will directly harm them in some unique way different from the public. As such, Petitioners do not have standing to bring this proceeding and dismissal is required.

DOB does not deny that courts have previously conferred standing to parents, on behalf of their children, when parents seek to challenge the *constitutionality* of the educational funding the State provides public schools (see New York State Ass'n of Small City School Districts, Inc. v State, 42 AD3d 648, 651 [2007] [affirming lower courts determination that parents and students of individual school districts can challenge the constitutionality of their school's funding, relying on the Boryszewski case which provides a "common law" basis for standing to plaintiffs in instances where a "failure to accord such standing would be in effect to erect an

impenetrable barrier to any judicial scrutiny of legislative action"]; see also, Aristy-Farer v State, -- NYS3d --, 2016 WL 4699191, at *4 [1st Dept Sept. 8, 2016] ["as to standing, the State concedes that individual parent and student plaintiffs have standing to sue, at least as to alleged [constitutional] educational deficiencies in the school districts where the children are enrolled"]; Hussein v State of New York, 19 NY3d 899 [2012] [holding there is "no reason to close the courthouse doors to parents and children with viable constitutional claims"]; Campaign for Fiscal Equity v State, 187 Misc2d 1, 18 [New York County, Sup. Ct 2001] [holding that parents of children who attended public schools in New York City had standing to challenge the constitutionality of the State's funding of New York City schools]). But, Petitioners in this proceeding do not allege *any* constitutional violation (see generally, Petition) and their claims are not grounded on a constitutional basis, distinguishing their claims from the precedent outlined above. In contrast to constitutional challenges, this proceeding simply presents an issue of statutory interpretation and the plain language of the budget provisions direct the result sought by DOB in this proceeding.

Finally, should this Court determine that Petitioners have alleged particularized harms sufficient to confer standing in this action, the Petition still must be dismissed to the extent it seeks recovery for the six schools that are not represented in this action by parents and school children (see NYS Ass'n of Small City School Districts, Inc. v State, 2006 NY Slip Op 52649(U) [Alb. County Sup. Ct. June 6, 2006], aff'd 42 AD3d 648, 650 [3d Dep't 2007]) [dismissing all claims in the action except those claims that were "brought by the parents and students enrolled in such districts[,]" which narrowed the schools that could obtain relief to the four schools in the State that were represented in the action by parents and enrolled students]). Petitioners here are parents and students enrolled just three of the affected schools: Roosevelt High School; JHS 80

The Mosulu Parkway Middle School; and William S. Hackett Middle School (see Petition, at ¶¶ 2-5). There are no parent-petitioners from the remaining six removed schools (see Petition). Accordingly, the claims involving those six schools have not been properly commenced and must be dismissed.[7]

POINT IV

DOB CAN NOT BE COMPELLED TO ILLEGALLY ALLOCATE TRANSFORMATION GRANT FUNDS

1. Petitioners Seek to Compel DOB to Allocate Funds in Violation of an Appropriation

Article VII, § 7 of the New York State Constitution provides that no money shall ever be paid out of the [S]tate [T]reasury or any of its funds, or any of the funds under its management except in pursuance of an appropriation by law, and that every law making a new appropriation or continuing or reviving an appropriation shall distinctly specify the sum appropriated, and the object or purpose for which it is to be applied (see NY Const., Art. VII, § 7). It is, therefore, well-established that funds belonging to the State or under its control can be paid out only by legislative appropriation (see Anderson v Regan, 53 NY2d 356, 360 [1981]). Stated differently, Article VII, § 7 prohibits the removal or disbursement of State funds without authorization from a duly-enacted appropriation adopted into law (see id; NY Const., Art. VII, § 7).

Similarly, Article 4 of New York's Finance Law states "[m]oney appropriated for a specific purpose shall **not** be used for any other purpose" (see N.Y. State Finance Law § 43 [emphasis added]). Consequently, money appropriated by the legislature for "books, binding and supplies" for the Supreme Court law libraries, for example, cannot be used for insurance upon these libraries (see Op. Attny. Gen. 127 [1915]), and funds appropriated for the construction of

[7] Moreover, even if this Court confers standing on Petitioners, and the other grounds for dismissal are overcome, their relief is capped at the amount that each of their children's schools were allocated to receive due to their children's enrollment therein (see Lecker Aff., Ex. A).

roads along specific routes cannot be used for other roads (see Op. Atty. Gen. 152 [1913]). These longstanding principles remain true to this day and, as a result, DOB may only allocate state funds in accordance with an appropriation's specific purpose.

It is well-established the Director of the DOB is bound by these bedrock principles and that he or she must ensure that "appropriated funds are distributed properly" (see City of New York, 160 Misc2d at 1033; see also Mujica Aff., at ¶ 2; Lebowitz Aff., ¶ 2). DOB's Director is duty-bound not to distribute funds in contravention of conditions, requirements and purposes contained in appropriations and other laws (see id).

It is beyond dispute that DOB, when determining whether Transformation Grant funds can be allocated to a particular school district for a particular school, is bound by the plain language of the Transformation Grant appropriation statutes and that any allocation of Transformation Grant funds outside of the confines of the appropriation statues, no matter how well-intentioned, would be illegal. As was explained above, the Transformation Grant appropriation statute, enacted in 2015, and the Transformation Grant re-appropriation statute of 2016, both give the DOB power to allocate Transformation Grant funds, in accordance with a spending plan, to schools categorized as "Persistently Failing" (see Conroy Aff., Exs. B, G). More specifically, the Transformation Grant appropriation reads as follows:

> 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 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

(see id, Ex. A [emphasis added]; see also id, Ex. G). Further, the Spending Plan mirrors this language and confirms that only schools designated as "Persistently [Failing]" are eligible to

receive Transformation Grant funds (see Lecker Aff., Ex. A). The plain language of the governing appropriation statutes and DOB Spending Plan limit DOB's legal authority to distribute Transformation Grant funds to a very narrow subset of schools located in New York – only those schools that are categorized as "Persistently Failing."

Until such time that the Legislature amends the Transformation Grant appropriation statute, or re-appropriation statute, to empower DOB to allocate funds to the nine schools that are no longer categorized as "Persistently Failing," DOB does not have the legal authority to allocate Transformation Grant funds to the removed schools for the 2016-17 school year. This Court would be ordering both Director Mujica and DOB to violate the State Constitution if it compels DOB to release Transformation Grant funds in a manner inconsistent with the condition precedent and not contemplated by the Transformation Grant appropriation or re-appropriation statutes. Regardless of whether the provision of this aid is a good idea, the language of the statutory appropriation controls.

2. *The Availability of Transformation Grant Funds is a Legislative Determination*

If this Court were to grant Petitioners' the relief they seek, in addition to ordering DOB to violate the law, this Court would be reviewing a legislative act (*i.e.*, the determination not to expand the scope of schools eligible to receive Transformation Grant funds in the State's FY 2016-2017 budget), which this Court does not have the power to do (see Harby Assoc., Inc. v Gloversville, 82 AD2d 1003, 1004 [3d Dept 1981] ["It is well settled that a CPLR Article 78 proceeding is not available to review a legislative act"] [citing Merced v Fisher, 38 NY2d 557, 559 [1976]).

New York state courts, including this Court, have long recognized the necessity to leave legislative decisions, including education financing, to the Legislature and the Executive (see

Larry J. Maisto v State of New York, Sup Ct, Albany County Sup. Ct., September 19, 2016, O'Connor J., Index No. 8997/08 [recognizing that state courts "'have neither the authority, nor the ability, nor the will, to micromanage education financing'"] [quoting Campaign for Fiscal Equity, Inc. v State, 8 NY3d 14, 28 [2006]). This is because "the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government" (id [internal quotations and citations omitted]). Accordingly, courts must give "deference to the Legislature . . . where . . . the State's budget plan [ ] is being questioned because devising a State budget is a prerogative of the Legislature and Executive and the Judiciary should not usurp this power" (see id [internal quotations and citations omitted]).

Should this Court oblige Petitioners' request and order DOB to make available Transformation Grant funds to school districts for the removed schools, the Court would be acting in a legislative capacity and essentially overriding a clear determination by the Legislative and Executive branches to limit the availability of Transformation Grant funds to school districts for schools categorized as "Persistently Failing." Such an expansion of authorization is contrary to foundational principles of separation of powers which prevents the Judiciary from intruding upon "policy-making and discretionary decisions that are reserved to the legislative and executive branches" (see id [internal quotations and citations omitted]). Petitioners' prayer for relief in this proceeding is a request that only the Executive and Legislative branches can answer through legislative action that addressed the eligibility of the removed schools to receive 2016-2017 school year funds from the Transformation Grant. DOB respectfully requests that this proceeding be dismissed.

CONCLUSION

Based on the foregoing, Respondents Robert Mujica, Director of the New York State Division of Budget and the New York State Division of Budget respectfully submit that the Petition should be dismissed in its entirety, together with such other and further relief as the Court may deem just and proper.

Dated: September 29, 2016

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