

SUPREME COURT OF THE STATE OF NEW YORK  
ALBANY COUNTY

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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 A. 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, NEW YORK STATE  
EDUCATION DEPARTMENT

Respondents.

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**AFFIRMATION IN OPPOSITION TO RESPONDENTS MUJICA'S AND DIVISION OF  
BUDGET'S MOTION TO DISMISS**

State of Connecticut )

s.s.:

County of Fairfield )

The undersigned, an attorney-at-law in the state of New York, affirms that:

1. I am the attorney of record for the Petitioners in the above-captioned action and I submit this affirmation in opposition to Respondents Mujica and Division of Budget Motion to Dismiss and accompanying papers. I also rely on the papers already submitted by Petitioners, the papers submitted by Respondents Elia and State Education Department, and the oral arguments of Petitioners' Counsel and Respondents Elia's and State Education Department's Counsel in opposing the Motion to Dismiss.

2. On September 2, 2016, Petitioners' filed a Verified Petitioner for an Article 78 proceeding seeking a Writ of Mandamus ordering Respondents ROBERT MUJICA, Director of the New York State Division of Budget ("Director"), the NEW YORK STATE DIVISION OF BUDGET ("DOB"), to comply with Chapter 53 of the Laws of 2015 and immediately release the 2016-17 installment of the "Transformation Grants" to the NEW YORK STATE EDUCATION DEPARTMENT ("SED"); and for MARYELLEN ELIA, the Commissioner of Education of the State of New York ("Commissioner") and SED to then distribute those funds to nine schools removed by the Commissioner from the persistently failing schools list, including Roosevelt High School, JHS 80 Mosholu Parkway Middle School, and William S. Hackett Middle School;; and for such other and further relief as the Court may deem appropriate.

3. The specific action contested by the Petitioners was Respondents Mujica's and Division of Budget's ("DOB Respondents") freezing of the second year's installment of a two-year grant appropriated by the New York State Legislature pursuant to Chapter 53 of the Laws of 2015. The central issue in the Petition was whether the plain language of the statute, Chapter 53, read together with New York Education Law 211-f, the statutorily-approved spending plan, the applications for the grant and the purpose of the law, provided for a two-year grant to these schools; and whether the language of the law provided anywhere that the schools would forfeit the second year of grant funding if they improved performance.

4. The matter was scheduled for oral argument before the Hon. Kimberly A. O'Connor in State Supreme Court, Albany County, for September 23, 2016, after an adjournment on consent of all parties from the original return date, September 9, 2016. Respondents' papers were due on September 21, and any reply by Petitioners was due September 23.

5. On September 20, 2016, the parties and the Court agreed to an additional adjournment of the oral argument to September 30, 2016, in response to DOB Respondents' request and the Court's unavailability for oral argument on September 23. Respondents' papers were due September 29. There was no provision for reply papers by Petitioners.

6. On September 29, Respondents Elia and State Education Department ("SED Respondents") submitted a Memorandum of Law in Limited Opposition to the Verified Petition, along with Exhibits. DOB Respondents submitted a Notice of Motion to Dismiss the Verified Petition, affidavits from Conroy and Mujica of the Division of Budget, a Memorandum of Law and Exhibits.

7. Respondents' Memorandum of Law addressed alleged procedural defects in the Petitioners' claim, specifically a statute of limitations defense and a defense that Petitioners lacked standing. Their Memorandum of Law also addressed the substance of the Petitioners' Article 78 claim.

8. At oral argument, Counsel for DOB Respondents contended that the DOB Respondents actions in freezing the second year of funding were an exercise of DOB Respondents' discretion. SED Respondents and Petitioners argued that DOB Respondents had no authority under Chapter 53 to take any other action than releasing the second installment of funds pursuant to the statutorily-required expenditure plan DOB Respondents approved. SED Respondents' and Petitioners' position was that the DOB Respondents' have no statutory authority to make this decision in the first place. Counsel for DOB Respondents further contended that the law forbids compelling the DOB Respondents to release the funds. Counsel for SED Respondents and Petitioners argued that the plain language of Chapter 53, and the rules


of statutory construction mandate just the opposite, i.e. that the Court compel the DOB Respondents to release the already-appropriated funds.

9. Petitioners rely on the oral arguments of Petitioners' and SED Respondents' counsel, as well as all the papers submitted by both Petitioners and SED Respondents to oppose the substantive points in DOB Respondents' Motion to Dismiss. Petitioners maintain that the plain language of Chapter 53, read in harmony with New York Education Law 211-f, the spending plan approved by DOB pursuant to Chapter 53's mandates, the application for the two-year grant created by SED, and SED's Continuation Guidance, as well as the purpose of the two statutes, all consistently demonstrate that the Transformation Grants were intended to provide two-year grants and that nothing in the law, spending plan, or any other documents gives the DOB Respondent authority to withhold the second year of the grant funding if they improved to the point where SED removed the schools from the "persistently failing" list.

10. Petitioners rely on the oral arguments of Petitioners' and SED Respondents' counsel, and the attached Memorandum of Law in Opposition to DOB Respondents' Motion to Dismiss, to oppose the Statute of Limitations and Standing arguments set forth by DOB Respondents both in their Memorandum of Law and in oral argument.

WHEREFORE, Petitioners respectfully request that this Court deny DOB Respondents' motion to dismiss in all respects.

Dated: Stamford, CT  
October 3, 2016



Wendy Lecker