STATE OF NEW YORK
SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of an Article 78 Proceeding

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

Petitioners-Respondents,

-against-

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

Respondents-Appellants.

Appellate Division No.:_____

Albany County Supreme Court
Index No.: 05102-16
RJI No.: 01-16-ST8123

MEMORANDUM OF LAW IN OPPOSITION OF PETITIONERS-RESPONDENTS' MOTION TO VACATE THE AUTOMATIC STAY OR EXPEDITE THE APPEAL

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Dated: March 17, 2017

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PRELIMINARY STATEMENT

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 the "Appellants[1]") by and through their attorneys, Harris Beach PLLC, submit this Memorandum of Law in opposition to Petitioners-Respondents' Nidia Cortes, Virgil Dantes, AnnMarie Heslop, and Curtis Witters, and on behalf of their children (collectively, "Respondents") seeking to vacate the automatic stay governing this appeal or, in the alternative, expedite the appeal.

The CPLR 5519 (a) (1) automatic stay that currently precludes Respondents from enforcing Justice Kimberly O'Connor's December 28, 2016 Decision and Order/Judgment pending the resolution of this appeal should not be vacated. To the contrary, and consistent with the well-established public policy of the State of New York, the status quo should be upheld pending the resolution of the merits of this proceeding on appeal. Upholding the stay in this proceeding is the only outcome that ensures the stability of the performance of governmental functions and disfavors the disbursement of public funds while the merits of this action are decided. Moreover, Appellants are likely to prevail on appeal, resulting in a reversal of the challenged Decision and Order/Judgment. Accordingly, Appellants respectfully request that this Court deny Respondents' motion to vacate the automatic stay.[2]

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[1] Please note that Respondents below, MaryEllen Elia, New York State Commissioner of Education and the New York State Education Department remain listed in the caption of this matter, however, they have not filed an appeal or cross-appeal in this proceeding. Accordingly, all references to "Appellants" within this Memorandum of Law are meant to reflect the DOB and Director Mujica.

[2] After being served with a copy of the pending motion, and in exchange for an agreement to adjourn the return date of this motion, Appellants' counsel proposed an expedited briefing schedule to Respondents' counsel on March 10, 2017 (see Affirmation of Karl J. Sleight, dated March 16, 2017 ("Sleight Aff."), at Ex. 7). Respondents' counsel refused to stipulate to the proposed briefing schedule or an adjournment of the return date of this motion on March 13, 2017 (id, at Ex. 8). Appellants trust in the sound discretion of this Court to impose a reasonable briefing schedule.

STATEMENT OF FACTS

The Respondent parents in this action are wrongfully attempting to compel an intergovernmental transfer to taxpayer dollars for which they have no standing or basis to effectuate. Specifically, Respondents seek to force Appellants to initiate 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).[3]

Specifically, the Transformation Grant appropriation and re-appropriation 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 (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).

[3] For the Court's convenience, the Transformation Grant appropriation and re-appropriation are attached to the Sleight Aff. as Exhibit 4.

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 Appellants 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 designated as "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. Since the Transformation Grant appropriation and re-appropriation contains a condition precedent before DOB is legally able to release and SED is able to spend Transformation Grant funds (*i.e.*, that the school be designated as "Persistently Failing"), the removal of the "Persistently Failing" designation from those nine schools had the legal effect of rendering them ineligible for further Transformation Grant funds for the 2016-2017 school year. Given that the schools at issue in this action are no longer categorized as "Persistently Failing" schools, they are no longer eligible to receive further Transformation Grant funds and DOB was – and remains – duty-bound not to provide public funds to ineligible programs.

As a result, the Respondent parents commenced this proceeding in an attempt to force Appellants to do what it does not have the authority to do – make Transformation Grant funds available from the Transformation Grant appropriation and re-appropriation 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 re-appropriation statute and related spending plan (see Sleight Aff., Exs. 1, 2). Thereafter, Appellants moved to dismiss the proceeding, in part, on the basis that Respondents, as parents, have not suffered any unique injury sufficient to challenge Appellants' decision that it could not release Transformation Grant funds to school districts that were removed from the "Persistently Failing" schools list for the 2016-2017 school year, and, as a result, Petitioners do not have standing to bring this Article 78 proceeding (see id, Ex. 3, Memorandum of Law ["MOL"]).

On December 28, 2017, Justice Kimberly A. O'Connor issued a Decision and Order/Judgment (the "Decision") denying Appellant's motion to dismiss and ordering Appellant's to "immediately release the appropriated transformation grant funds to NYSED" (id, Ex. 5 at 24). Appellants were served with notice of entry of the Decision and timely filed their notice of appeal on February 3, 2017 (id, Ex. 6). In response, Respondents filed the pending motion, dated March 6, 2017, seeking to vacate the automatic stay imposed on the Decision.[4]

ARGUMENT

POINT I

PUBLIC POLICY MANDATES THE ENFORCEMENT OF AUTOMATIC STAY IN THIS PROCEEDING

CPLR 5519 codifies the well-known stay of enforcement of a judgment pending appeal and supplies the provisions governing such stays. Pursuant to CPLR 5519, proper service of a notice of appeal in certain instances automatically "stays all proceedings to enforce the judgment or order appealed from pending the appeal" (see CPLR 5519 [a]). Generally, stays on the enforcement of money judgments exist to prevent an appellant from being "divested of valuable

[4] Appellants' request to adjourn the return date of this motion beyond the State's 2017-2018 budget season to determine whether the enacted budget impacted the arguments on this motion or the merits of this proceeding (see Sleight Aff., Exs. 7, 9) was denied by Respondents' counsel (id, Ex. 8) and this Court (id, Ex. 10).

property" during an appeal of the underlying judgment without any guarantee that such later-ordered restitution against the respondent will be collectible and to prohibit situations where the "respondent may have squandered the money and become insolvent" during the pendency of the appeal (see Siegel, New York Practice, § 535, p. 952 [5th ed]). Accordingly, the practical objective of the automatic stays provided by CPLR 5519 "is to maintain the status quo pending the appeal" (State of New York v Town of Haverstraw, 219 AD2d 64, 65 [2d Dept 1996]). The only way the status quo can be maintained during an appeal of a money judgment is to stay the enforcement of the underlying judgment until the appellate process has concluded (Haverstraw, 219 AD2d at 65-66).

Relevant to this appeal, a stay is automatically imposed on a proceeding, precluding the enforcement of an underlying judgment, when the appellant is "the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state (see CPLR 5519 [a] [1]). Accordingly, as explained by the Appellate Division in Matter of Pokoik v Department of Health Services, County of Suffolk (220 AD2d 13 [2d Dept 1996]), the service of a notice of appeal by the State, a political subdivision thereof, or its officers or agencies has the effect of automatically staying all proceedings to enforce executory directives – *i.e.*, orders which direct the performance of a future act – in the order or judgment appealed from (see also Union Free School Dist. No. 7, Town of Greenburgh v Allen, 30 AD2d 629, 629 [3d Dept 1968] [holding that the State Commissioner of Education is an officer of the State entitled to the automatic stay established by CPLR 5519 [a] [1]). The Appellants in this case – the Division of Budget and the Director of the Division of Budget – triggered the automatic stay imposed by CPLR 5519 (a) (1) when they served and filed their notice of appeal challenging the Decision on February 3, 2017 (see Sleight Aff., Ex. 6).

As the Court of Appeals has explained, the purpose of the automatic stay benefiting governmental entities is to "stabilize the effect of adverse determinations on governmental entities and prevent the disbursement of public funds pending an appeal that might result in a ruling in the government's favor" (see Summerville v City of New York, 97 NY2d 427, 434 [2002], citing 12 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 5519.03; Siegel, N.Y. Prac. § 535, at 884 [3d ed.]; 1 Newman, New York Appellate Practice § 6.02 [1], at 6; see also McLaughlin v Hernandez, 4 Misc 3d 964, 968 [Sup Ct, New York County 2004] [same]). Thus, CPLR 5519 (a) (1) reflects the dual public policies that favor the protection and stabilization "of the performance of governmental functions" and that prevent the "disbursement of public funds pending appeal" (see New York Appellate Practice § 6.02 [1] [a], citing People ex rel Office of Rent Admin v Berry Estates, Inc., 87 AD2d 161 [2d Dept 1982], af'd 58 NY2d 701 [1982] [stating that CPLR 5519 (a) (1) protects political subdivisions of the state in its conduct], Serth v New York State Dept. of Transp., 77 AD2d 957 [3d Dept 1980], DeLury v City of New York, 48 AD2d 405 [1st Dept 1975], Grant v MTA, 96 Misc 2d 683 [Sup Ct, New York County 1978]).

The automatic stay governing this proceeding serves exactly this intended purpose – it prevents the Appellants from having to release public funds to SED to be granted to recipients that the Appellants maintain are ineligible to receive those funds in the first instance and stabilizes the impact of the Decision on the functions of government pending a final resolution of this proceeding on appeal. Further, as is outlined in the Affidavit of Robert Mujica, dated March 16, 2017 ("Mujica Aff."), if Appellants were forced to release the Transformation Grant funds to SED and those funds were released to the school districts at issue during the pendency of this appeal, and Appellants obtain a reversal of the Decision, Appellants would be unable to retrieve

or recover the Transformation Grant funds from directly the schools at issue in this proceeding (see Mujica Aff., at ¶ 5).

Simply put, Appellants do **not** have the ability to recall or recover Transformation Grant funds directly from the school districts (Mujica Aff., at ¶ 5). SED is the agency that administers the program, reviews and approves applications for funds, and processes payments of Transformation Grant funds to school districts (see Affirmation of Wendy Lecker, dated March 6, 2017, at Ex. B). Further, although SED was a Respondent at the trial court, just as the DOB and Director Mujica, SED has openly opposed Appellant's refusal to provide Transformation Grant funds to schools districts that became ineligible to receive those funds. In light of SED's position taken before the trial court, Appellants do not believe that SED would attempt to retrieve or recover these funds from the school districts in the event that Appellants were to prevail on this appeal (id, at ¶ 6).[5]

The public policies underlying a CPLR 5519 (a) (1) stay are clear, logical, and practical and a vacatur of the stay governing this proceeding would stand in stark contrast to those policies. For these reasons, coupled with the fact that Appellants are willing to agree to a reasonable briefing schedule that would govern this appeal, Appellants respectfully request that Respondents' motion to vacate the stay be denied in its entirety.

[5] Given this belief, Respondents' reliance on Matter of Schmitt v Review Comm. (19 AD2d 959 [3d Dept 1992]) to support the proposition that Appellants' could retrieve the funds if they were disbursed pending appeal is misplaced. In that case, petitioner – an individual – was granted funds from a political subdivision of the State. When the State subsequently prevailed on appeal, after disbursing the funds in accordance with the underlying order, the petitioner – again, an individual who was directly provided funding from the State – was ordered to repay the State. Here, the monies would be going directly to SED for disbursement to the school districts at issue in this proceeding – not directly to the school districts. Therefore, Appellants' do not believe that the monies could be retrieved once disbursed since Appellants' have no power to retrieve monies directly from the schools and it does not believe SED would do so (see Mujica Aff., at ¶ 5).

POINT II

AUTOMATIC STAY SHOULD NOT BE LIFTED BECAUSE APPELLANTS ARE LIKELY TO SUCCEED ON APPEAL

Though automatic stays benefiting the State are not removed entirely from the purview of the appellate court's discretion to otherwise vacate, limit or modify a stay (see Wechsler v Wechsler, 8 Misc 3d 328, 329 [Sup Ct, New York County 2005]), this Court has held that CPLR 5519 (a) (1) expresses a public policy to "protect the State during pendency of appeal" and that such a stay should "***not lightly to be vacated***" (Serth, 77 AD2d at 957 [denying motion to vacate stay benefiting the Department of Transportation] [emphasis added]). Therefore, respondents seeking to vacate an automatic stay pursuant to CPLR 5519 (c) have a "high burden" and must establish both a "reasonable likelihood of success on appeal and that failure to vacate the stay will result in irreparable harm" (see DeLury, 48 AD2d at 405). Because Appellants are likely to succeed on this appeal on the basis that Respondents: (1) lack standing to bring this challenge, (2) the responsibilities of Appellants at issue in this proceeding are not merely ministerial, and (3) Appellants' actions had a rational basis, Respondents will be unable to meet the high burden imposed upon them to vacate the applicable stay and their motion should be denied accordingly.[6]

A. Respondents lack standing to bring this proceeding

As is outlined below, Appellants will be able to establish that the lower court erred when it denied Appellants' motion to dismiss on the basis that Respondents' (Petitioners below) have standing to challenge Appellants' determination that it could not release Transformation Grant funds to the schools at issue in this case – effectively, for the first time, finding that parents of

[6] Appellants reserve their right to argue other grounds for reversal of the Decision during the briefing of this appeal, such as Appellants cannot be compelled to perform an illegal act, which were argued before the trial court (see generally Sleight Aff., Ex. 3, MOL).

school children can compel the intergovernmental transfer of public funds. Accordingly, the challenged stay should not be vacated.

"Standing is . . . a threshold requirement for a [petitioner] seeking to challenge governmental action" (NY State Assn. of Nurse Anesthetists v Novello, 2 NY3d 207, 211 [2004]; see also Assn. 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 than those common to all taxpayers and citizens" (see Kadish v Roosevelt Raceway Assoc., 183 AD2d 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 Matter 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 "falls 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 Assn., Inc. v N.Y. State Gaming Facility Location Board, 51 Misc3d 193, 196-200 [Sup Ct, Albany County 2015]).

Respondents here (Petitioners below) have not demonstrated any particularized harm or special right that is different from every other citizen or parent in their school district. Instead, Respondents' generally alleged 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 Sleight Aff., Ex. 1 at ¶ 58). During the underlying proceeding, Respondents 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.[7]

Notwithstanding these facts, and the lower court's recognition that Respondents did not submit any affidavits or exhibits to establish that the Respondents' children will be harmed if the programs funded by the Transformation Grant funds were to cease or not to commence in the first instance, the court incorrectly found that the Respondents harm was "more than just conjectural" (see Sleight Aff., Ex. 5 at 13). Appellants will be able to establish on appeal that this result was an error, because, it is well-established that 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 Conservation's acceptance of a storm water 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

[7] Appellants note that Respondents have solicited affidavits in support of this motion that are not part of the record on appeal and are from entities other than Respondents. At this juncture, the late arrival of these affidavits in support of lifting the automatic stay should be given little if any weight since they are not part of the trial level record of these proceedings.

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 1008).

In this proceeding, Respondents are plagued by the same deficiencies and amorphous claims as the petitioner in Clean Water Advocates. Respondents generally allege that Appellant'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 Sleight Aff., Ex. 1 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 lack of dispersal 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. Further, a trial court has indicated that actions to improve academic results cannot be solely attributed to a funding amount since such results are based on a confluence of factors (see Larry J. Maisto v State of New York, Sup Ct, Albany County Sup. Ct., Sept. 19, 2016, O'Connor J., Index No. 8997/08). Furthermore, Respondents failed to demonstrate that the Appellants' decision will directly harm them in some unique way different from the public. Accordingly, the Appellants will be able to establish on appeal that the lower court erred when it found that Respondents have standing to bring this proceeding since they did not plead any particularized injury.

Notably, Appellants do 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 Assn. of Small City School Districts, Inc. v State of New York, 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 of New York, 143 AD3d 101, 111 [1st Dept 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, 904 [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 [Sup Ct, New York County 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]).

However, and critically important to the resolution of the pending appeal is the fact that Respondents in this proceeding do not allege *any* constitutional violation whatsoever in this proceeding and their claims are not grounded in a constitutional challenge (see generally, Sleight Aff., Ex. 1). Accordingly, Respondents claims are procedurally and substantively distinguishable from the precedent outlined above wherein parents were awarded standing to challenge school funding issues. 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 Appellants in this proceeding. The trial court did not address the fact that this proceeding does not contain any constitutional underpinnings when it determined that Respondents have standing to bring this proceeding, nor did it cite one other case wherein a parent was granted standing to challenge the allocation of State funds in the education space, or the transfer of State funds from one agency to another, absent a constitutional claim. As a result, Appellants will be able to establish that the lower court erred when it granted standing to parents to challenge state funding of educational institutions without any constitutional claim – effectively allowing a few parents to compel the intergovernmental transfer of taxpayer dollars – which requires enforcing the automatic stay currently governing this proceeding.

B. Appellants' responsibilities challenged in this proceeding are not merely ministerial and had a rational basis

Similarly, Appellants' will likely succeed on appeal because it will be established that the trial court erred when it concluded Appellants' decision to withhold Transformation Grant funds was merely ministerial and lacked a rational basis. As is highlighted below, and as was established by Appellants' papers filed before the trial court (see generally Sleight Aff., at Ex. 3, MOL), Appellants' decision to withhold the funds at issue was an act of discretion and was based upon a rational interpretation of the law, and, therefore, was not arbitrary and capricious.

As Appellants will establish on appeal, the remedy of mandamus should not be available in the context of this proceeding because Appellants' decision to release or withhold Transformation Grant funds is not ministerial. "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).

The determination by Appellants at issue in this case was 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 (see Sleight Aff., Ex. 3, MOL at 5). Notwithstanding the fact that 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] [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)]), the trial court still found that the Appellants' determination that the requested expenditure of funds was merely

ministerial and, as such, susceptible to a mandamus challenge (see Sleight Aff., Ex. 5, MOL). This decision was an error.

As the record evidence establishes, 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 Sleight Aff., Ex. Ex. 3, Mujica Aff. [dated Sept. 201]), at ¶ 5). This decision was not "purely ministerial" but, instead, involved discretion and analysis to complete an official duty and it was an error of the lower court to find to the contrary.

Additionally, Appellants' determination challenged in this proceeding was rationally based. Since it is well-established that 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 CPLR 7803 [3]), the trial court erred when it overturned Appellants' decision to withhold Transformation Grant funds.

CPLR 7803 (3) establishes an "extremely deferential" standard – "[t]he 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."].

The plain language of the Transformation Grant appropriation and re-appropriation lead to the determination that the nine schools no longer characterized as "Persistently Failing" no longer satisfied the condition precedent to be eligible to receive Transformation Grant funds (see Sleight Aff., Ex 4), and, therefore, a determination was made that Transformation Grant funds for the 2016-17 school year could not be made available to school districts for the at issue schools within the confines of the appropriation or re-appropriation. This decision was rationally based and not arbitrary and capricious. Therefore, Appellants are likely to establish on appeal that the trial court erred when it found that the challenged determination was ministerial and lacked a rational basis and, ultimately, succeed on appeal.

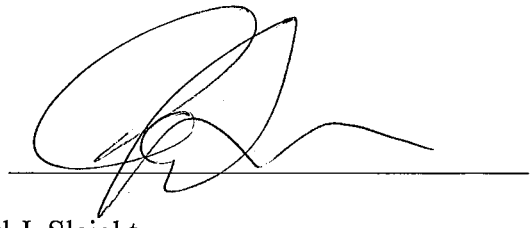
For all of these reasons, Respondents will not be able to satisfy the high burden required to vacate an automatic stay in situations such as these and their motion to vacate the stay should be denied.

CONCLUSION

Based on the foregoing, Respondents-Appellants Robert Mujica, Director of the New York State Division of Budget and the New York State Division of Budget respectfully submit that Petitioners-Respondents' motion to vacate the automatic stay in this proceeding should be denied its entirety. Additionally, Respondents-Appellants defer to the court to set a reasonable briefing schedule in this proceeding, together with such other and further relief as the Court may deem just and proper.

Dated: March 17, 2017

HARRIS BEACH PLLC

By: 

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