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, MARRYELLEN 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

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APP. DIV.
3RD DEPT.

KARL J. SLEIGHT, ESQ., is an attorney duly admitted to practice law before the Courts of the State of New York, affirms under penalty of perjury as follows:

1. I am counsel to the Respondents-Appellants Robert Mujica, Director of the New York State Division of Budget and the New York State Division of Budget (collectively, "Appellants") in this proceeding. As such, I am fully familiar with this proceeding to date.

2. I submit this Affirmation in opposition to Petitioners-Respondents' Nidia Cortes, Virgil Dantes, AnnMarie Heslop, and Curtis Witters, and on behalf of their children (collectively, "Respondents") motion seeking to vacate the automatic stay governing this appeal or, in the alternative, expedite the appeal.

3. As counsel to the Respondents-Petitioners, I have personally reviewed the Memorandum in opposition to the Petitioners-Respondents' motion to vacate the automatic stay

or expedite the appeal and attached the following documents hereto to assist the Court in its review of the pending motion:

a. A true and accurate copy of the Respondents' Verified Petition, dated August 30, 2016, as **Exhibit 1**;

b. A true and accurate copy of Appellants' Verified Answer, dated September 29, 2016, as **Exhibit 2**;

c. A true and accurate copy of Appellants' Memorandum of Law in support of its Motion to dismiss the Verified Petition, along with a true and accurate copy of Robert Mujica's Affirmation, both dated September 29, 2016, as **Exhibit 3**;

d. True and accurate copies of the Transformation Grant appropriation and reappropriation as **Exhibit 4**;

e. A true and accurate copy of Justice O'Connor's Decision and Order/Judgment, dated December 28, 2016, as **Exhibit 5**;

f. A true and accurate copy of the Appellants' Notice of Appeal, attachment not included (see Exhibit 5 above), dated February 3, 2017, as **Exhibit 6**;

g. A true and accurate copy of Appellants' request to Respondents' counsel to adjourn the return date of this motion beyond the State's 2017-2018 budget season, dated March 10, 2017, as **Exhibit 7**;

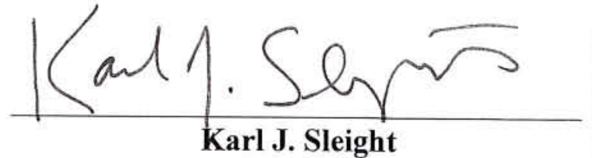
h. A true and accurate copy of Respondents' denial of the Appellants' request to adjourn the return date of this motion, dated March 13, 2017, as **Exhibit 8**;

i. A true and accurate copy of Appellants' request to the Court for an adjournment of the return date of this motion, dated March 13, 2017, without enclosures, as **Exhibit 9**; and

j. A true and accurate copy of the Court's denial of the Appellants' request to adjourn the date of the motion, dated March 15, 2017, as **Exhibit 10**.

4. Finally, as is outlined in the accompanying Memorandum of Law, dated March 17, 2017, Respondents' motion to vacate the stay should be denied because well-established public policy of this State mandates the enforcement of the automatic stay governing this proceeding, and Appellants are likely to prevail on appeal. Accordingly, Appellants respectfully request that the pending motion be denied in its entirety.

Dated: March 17, 2017



Karl J. Sleight

1

ORAL ARGUMENT REQUESTED

SUPREME COURT OF THE STATE OF NEW YORK
ALBANY COUNTY

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

Petitioners,

VERIFIED PETITION

-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.

PRELIMINARY STATEMENT

1. This is a special proceeding under Article 78 brought by the above-named Petitioners 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

NYS DEPARTMENT OF LAW
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SIGNED: [signature]
OFFICE OF LEGAL RECORDS

distribute those funds to nine schools removed by the Commissioner from the persistently failing schools list, including Roosevelt High School, JHS 80 The Mosholu Parkway Middle School, and William S. Hackett Middle School; and for such other and further relief as the Court may deem appropriate.

PARTIES

2. Petitioner Virgil Dantes is a parent of a child who attends Roosevelt High School in Yonkers, Westchester County. She brings this petition on her own behalf and on behalf of her minor child.

3. Petitioner AnnMarie Heslop is a parent of a child who attends Roosevelt High School in Yonkers, Westchester County. She brings this petition on her own behalf and on behalf of her minor child.

4. Petitioner Nidia Cortes is a parent of a child who attends JHS 80 The Mosulu Parkway Middle School, in the Bronx. She brings this petition on her own behalf and on behalf of her minor child.

5. Petitioner Curtis Witters is a parent of a child who attends William S. Hackett Middle School, Albany. He brings this petition on his own behalf and on behalf of his minor child.

6. Respondent Robert Mujica is Director of the New York State Division of Budget. Pursuant to Chapter 53 of the Laws of 2016, the Director of DOB is charged with approving the spending plan for Transformation Grants to persistenly failing schools developed by New York State Education Department and releasing those Grants to eligible schools.

7. Respondent New York State Division of Budget ("DOB") oversees implementation of the duly enacted New York State budget for each fiscal year.

8. Respondent New York State Education Department ("SED") oversees public education in New York State. Under Chapter 53 of the Laws of 2015, L. 2015, ch. 53, SED was directed to develop a spending plan for the Persistently Struggling Schools Transformation Grant ("Transformation Grant") funded by the law. SED also developed the Transformation Grant application and issued Grant guidance to eligible schools.

9. Respondent MaryEllen Elia is Commissioner of Education of New York State ("Commissioner"). The Commissioner is Chief Executive Officer of SED, charged by New York Education Law Section 305 with enforcing "all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents."

FACTS

TRANSFORMATION GRANT PROGRAM: YEAR 1

10. In 2015, the Legislature enacted New York Education Law §211-f, regarding takeover and restructuring of public schools, which took effect on April 13, 2015. The law targets the lowest performing schools in the state and mandates various intervention strategies to improve performance in these schools.

11. Education Law §211-f mandates that the Commissioner designate schools as "persistently failing" based on the test results and other outcome data.

12. New York State's appropriations law for FY2017, specifically Chapter 53 of the Laws of 2015, directed that schools designated by the Commissioner as "persistently failing" pursuant to Education Law §211-f were eligible to receive a two-year

Transformation Grant to support school improvement "pursuant to a spending plan developed by the commissioner of education and approved by the director of the budget." L 2015, ch. 53.

13. The Transformation Grants are designed to enable persistently failing schools to provide additional staff, services and programs to support school improvement. L 2015, ch. 53. Among permitted uses of the Grant under Chapter 53 are health, mental health, counseling, legal and/or nutritional services; expanded learning time for students; professional development for staff; and mentoring for at-risk youth.

14. Chapter 53 further provides that a portion of the grant "shall be available by July 1 of each such school year." L 2015, ch. 53.

15. As required by Chapter 53, the Commissioner developed a spending plan, called The Persistently Struggling Schools/Transformation Grant Expenditure Plan ("Expenditure Plan") for the two-year Transformation Grant for persistently failing schools. Affirmation of Wendy Lecker, Exhibit A ("Lecker Affirmation").

16. The Expenditure Plan identified twenty schools as persistently failing and eligible to apply for a Tranformation Grant under Chapter 53 to support school improvement. Lecker Affirmation, Exhibit A, p. 3.

17. The Expenditure Plan specified the Transformation Grant as a two-year grant over the 2015-16 and 2016-17 school years to each eligible school. The Expenditure Plan also set forth the total two-year amount set aside for each school. Exhibit A, p. 3.

18. The Expenditure Plan allowed schools to use the entire Transformation Grant in the first year, or expend the funds over the two-year grant period. The Expenditure Plan states that the eligible school:

may plan to use the school's Transformation Allocation over one year or two years, but schools should anticipate receiving no more than 50 percent of the Transformation Allocation for the 2015-16 school year. If a SCEP requires more than 50 percent of the allocation in the first year, the school district must submit a request for accelerated funding, as detailed in the next paragraph.

Lecker Affirmation, Exhibit A, p. 5.

19. On October 15, 2105, DOB approved the Expenditure Plan prepared by SED, thereby allowing the twenty eligible schools to apply for the Transformation Grants over the specified two-year period. Lecker Affirmation, Exhibits A and C.

20. SED provided eligible schools with a Persistently Struggling Schools Grant (PSSG) Application ("Transformation Grant Application "). The Transformation Grant Application stated that the twenty schools were eligible to apply for and receive Transformation Grants "[b]eginning July 1, 2105." Lecker Affirmation, Exhibit B, p. 2.

21. The Transformation Grant Application specified that the Transformation Grants would cover a two-year period, or from July 1, 2015 to March 31, 2017. Lecker Affirmation, Exhibit B, p. 1.

22. The Transformation Grant Application made clear that the purpose of the Transformation Grants is to support school improvement over a 21-month period, stating that:

> Beginning on July 1, 2015, schools identified as Persistently Struggling will be eligible for a portion of $75 million to support and implement turnaround efforts over a 21 month period.

Lecker Affirmation, Exhibit B, p. 1.

23. Nowhere in Chapter 53, nor in the Expenditure Plan or Transformation Grant Application, does it provide that schools applying for and receiving Transformation Grants may forfeit or otherwise not receive the second year of the Grants should the

Commissioner remove the schools from the persistently failing schools designation at any time during the two-year grant period.

24. Among the twenty schools eligible for Transformation Grants are Roosevelt High School, Yonkers; JHS 80 The Mosholu Parkway Middle School, Bronx; and William S. Hackett Middle School, Albany. Lecker Affirmation, Exhibit A p. 3.

ROOSEVELT HIGH SCHOOL

25. In 2015, Roosevelt High School, in the Yonkers school district, was designated by the Commissioner as persistently failing under Education Law §211-f and eligible for a Trasformation Grant under Chapter 53. Lecker Affirmation, Exhibit A, p. 3 and Exhibit B, p. 3.

26. On November 12, 2015, Roosevelt submitted a Transformation Grant Application to SED ("Roosevelt Application"). Lecker Affirmation, Exhibit D.

27. Roosevelt's Transformation Grant Application requested a Transformaion Grant of $3,763,581, over two years, the amount allocated by SED to the school. Lecker Affirmation, Exhibits A and D.

28. Roosevelt's Transformation Grant Application was approved by SED. Lecker Affirmation, Exhibit E.

29. Roosevelt's Transformation Grant was to provide additional social workers trained in mental health; a full-time literacy/numeracy coach; extended learning for both struggling students and higher achievers; family, community outreach and parent engagement services; professional development; and student health services. Lecker Affirmation, Exhibits D and F.

30. In February 2016, the Commissioner removed Roosevelt High School from the list of schools designated as persistently failing.

THE MOSHOLU PARKWAY MIDDLE SCHOOL

31. In 2015, JHS 80 The Mosholu Parkway Middle School ("JHS 80"), a New York City public school located in the Bronx, was designated by the Commissioner as persistently failing under Education Law §211-f and eligible for a Transformation Grant under Chapter 53. Lecker Affirmation, Exhibit A, p. 3 and Exhibit B, p. 3.

32. In November 2015, JHS 80 submitted a Transformation Grant Application to SED to support implementation of additional programs and services for the two year grant cycle, or from July 1, 2015 through March 31, 2017. Lecker Affirmation, Exhibit G. The Transformation Grant Application was approved by SED. Lecker Affirmation, Exhibit E.

33. The Transformation Grant to JHS 80 was to provide additional programs and services to support school improvement, including mentoring of academically at-risk students; social work and guidance counseling services; expanded learning time; and curriculum and staff development. Lecker Affirmation, Exhibits G and H.

34. In February 2016, the Commissioner removed JHS 80 from the list of schools designated as persistently failing.

HACKETT MIDDLE SCHOOL

35. In 2015, William S. Hackett Middle School ("Hackett"), in the Albany school district, was designated by the Commissioner as a persistently failing school under Education Law §211-f and eligible for a Transformation Grant under Chapter 53. Lecker Affirmation, Exhibit A, p. 3 and Exhibit B, p. 3.

36. In November 2015, Hackett submitted a Transformation Grant Application for a SED. Lecker Affirmation, Exhibit I. Hackett requested the Transformation Grant to support school improvement by providing expanded learning time; college tutors for struggling students; a data coach; professional development for teachers on cultural competency; stress management and reduction training for staff and students; a school improvement supervisor; a school culture and climate survey; and additional administrative support. Lecker Affirmation, Exhibits I and J.

37. The Transformation Grant Application for Hackett was approved by SED. Lecker Affirmation, Exhibit E.

38. In February 2016, the Commissioner removed Hackett from the list of schools designated as persistently failing.

TRANSFORMATION GRANT PROGRAM – YEAR 2

39. In early 2016, SED sent guidance to schools awarded a Transformation Grant for the 2015-16 school year regarding the second year – 2016-17 -- of the Grant. Lecker Affirmation, Exhibit K (The Receivership and Non-Receivership Schools 2016-17 Continuation Plan Guidance) ("Continuation Guidance").

40. In the Continuation Guidance, SED sets forth two conditions that may result in withholding of Transformation Grant for the second year: if the approved activities are not performed and/or the funds are expended inappropriately. Lecker Affirmation, Exhibit K, p.1. The Continuation Guidance does not provide that the second year of Transformation Grant would be withheld if an eligible school were removed by the Commissioner from the persistently failing school designation.

41. The Continuation Guidance makes clear that Transformation Grants are for a full two school years. The Guidance instructs schools that they "must set aside a portion of the grant (no less than 5%) to pay for an external evaluator to assess program implementation in Year 2." Lecker Affirmation, Exhibit K, p. 2. The Guidance further provides that schools must submit a budget narrative, a 2016-17 FS10, a budget summary chart, and a Sustained Activities Certification for the second year of the Tranformation Grant by April 29, 2016. Lecker Affirmation, Exhibit K, p. 2.

42. In February 2016, the Commissioner removed nine of the twenty schools that received Transformation Grants under Chapter 53 from the persistently failing schools designation.

43. Following the Commissioner's removal of the nine schools from the persistently failing designation, Governor Andrew Cuomo announced that his Office would withhold the second year of the Transformation Grants from those schools. See, e.g., http://www.timesunion.com/local/article/Extra-aid-for-New-York-state-schools-in-dispute-7941171.php

44. Three of the nine schools removed by the Commissioner from the persistently failing designation are Roosevelt High School, JHS 80 Middle School and Hackett Middle School. The remaining six schools are: Grant Middle School, Syracuse; Buffalo Elementary School of Technology, Burgard Vocational High School, and South Park High School, Buffalo; and Automotive High School and PS 328 Phyllis Wheatley School, Brooklyn.

45. On June 9, 2016, SED sent a memo to the nine schools removed from the persistently failing schools designation that a decision on whether the second year of

Transformation Grants would be withheld "is still pending approval" by DOB. Lecker Affirmation, Exhibit L.

46. On July 28, 2016, Petitioner's counsel sent a letter to DOB Director Mujica asking whether DOB will release the second year of the Transformation Grants to the nine schools removed from the persistently failing schools designation. Lecker Affirmation, Exhibit M.

47. To date, neither Director Mujica or anyone from the DOB has responded to Petitioner's counsel request.

AS TO THE CAUSE OF ACTION FOR A WRIT OF MANDAMUS PURSUANT TO NY CPLR ARTICLE 78

48. Petitioners repeat the allegations set forth in paragraphs 1-46 of this Petition.

49. DOB Director Mujica and/or the DOB approved the SED Expenditure Plan for Transformation Grants under Chapter 53 to schools designated as persistently failing by the Commissioner under Education Law §211-f.

50. The Transformation Grants under the Expenditure Plan approved by the DOB are to provide programs and services to support improvement in eligible schools in the 2015-16 and 2016-17 school years, or between July 1, 2015 and March 31, 2017. The Grant amounts under Chapter 53, as set forth in the Expenditure Plan, were for this two-year period.

51. The SED Transformation Grant Application specified that the eligible schools could apply for the two-year Transformation Grant under Chapter 53.

52. The SED Transformation Grant Application explicitly provided for a Grant funding period of 21 months, ending on March 31, 2017.

53. Roosevelt High School, JHS 80, and Hackett Middle School were among the twenty schools statewide eligible to apply for Transformation Grants on July 1, 2015.

54. SED approved the Applications for Transformation Grant funds to Roosevelt High School, JHS 80 and Hackett Middle School and the other remaining seventeen schools for the two-year Transformation Grant period.

55. Pursuant to the approved Applications, Roosevelt, JHS 80, Hackett Middle School received the first year allocation of Transformation Grants and utilized those funds to provide the programs and services to support school improvement as specified in the schools' Applications.

56. In February 2016, the Commissioner removed Roosevelt High School, JHS 80, Hacket Middle School, and the six other schools listed in paragraph 44, supra, from the persistently failing schools designation.

57. The DOB has, to date, refused to release the second year of the Transformaiton Grants approved under Chapter 53 to Roosevelt High School, JHS 80, Hackett Middle School and the six other schools removed from the persistently failing schools designation.

58. The DOB's refusal to release the second year of Transformation Grants means that Roosevelt High School, JHS 80, Hackett Middle School and the other six schools will not be able to continue to provide the programs and services specified in their approved Transformation Grant Applications. These programs and services are

essential to continue school improvement in 2016-17, thus jeopardizing the improvements made in the first year.

59. DOB is required by Chapter 53 of the Laws of 2015, and by the express terms of the Expenditure Plans approved by DOB to provide Transformation Grants to Roosevelt High School, JHS 80, Hackett Middle School and all other eligible schools for the full two-year grant period established by law.

60. The DOB's refusal to release the second year of Chapter 53 Grant funds from Roosevelt High School, JHS 80, Hackett Middle School and the other six schools listed in paragraph 44, supra, is arbitrary, capricious and violates the agency's ministerial and mandatory duty to release the Transformation Grants under Chapter 53.

61. The Court should enter a Judgment directing DOB Director Mujica and the DOB to immediately release to SED the Transformation Grants for the 2016-17 school year to Roosevelt High School, JHS 80, Hackett Middle School and the the other six schools removed from the persistently failing schools designation.

62. The Court should also enter a Judgment directing the Commissioner and SED to immediately release those funds to Roosevelt High School, JHS 80, Hackett Middle School and the the other six schools removed from the list persistently failing schools designation.

63. Petitioners have made no prior request for the relief herein.

WHEREFORE, Petitioners request the Court to issue an Order of Mandamus:

(a) Ordering and directing Respondents Mujica and DOB to immediately release to SED the Transformaton Grants for 2016-17 to Roosevelt High School, JHS 80

and Hackett Middle School, and the other six schools removed from the persistently failing schools designation list to SED

(b) Ordering and directing SED to immediately distribute said Transformation Grants to these schools;

(c) An order admitting David G. Sciarra, Esq. pro hac vice representing petitioners; and

(d) For such other and further relief as this Court may deem appropriate.

Dated: August 30, 2016

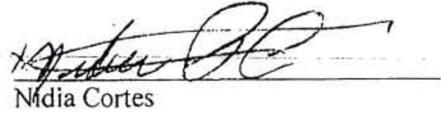
WENDY LECKER, ESQ.
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
PHONE: 203-536-7567
FAX: 973-624-7339

Attorney for Petitioners

VERIFICATION

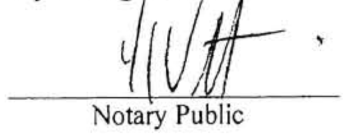
STATE OF NEW YORK)
) ss.:
COUNTY OF BRONX)

NIDIA CORTES, petitioner in this action as the parent of a child who attends JHS 80 Mosholu Parkway Middle School, in the Bronx, being duly sworn, deposes and states that the foregoing Verified Petition of Nidia Cortes, Virgil Dantes, AnnMarie Heslop and Curtis Witters is true and correct to the best of her knowledge, information, and belief.



Nidia Cortes

Sworn to before me this 30 day of August, 2016



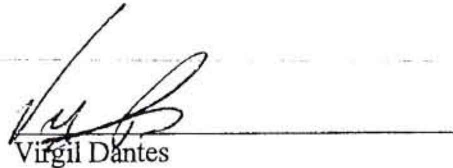
Notary Public

DALMA VALENTIN
Notary Public, State of New York
No. 034958540
Qualified in Bronx County
My Commission Expires Nov. 6, 2017

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

VIRGIL DANTES, petitioner in this action as the parent of a child who attends Roosevelt High School in the Yonkers District, being duly sworn, deposes and states that the foregoing Verified Petition of Nidia Cortes, Virgil Dantes, AnnMarie Heslop and Curtis Witters is true and correct to the best of her knowledge, information, and belief.



Virgil Dantes

Sworn to before me this 30th day of August, 2016

Notary Public

KIRSYS LANGLEY
Notary Public - State of New York
NO. 01LA6322877
Qualified in Westchester County
My Commission Expires Apr 13, 2019

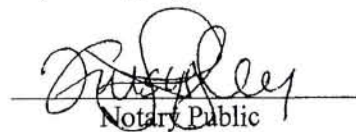
VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

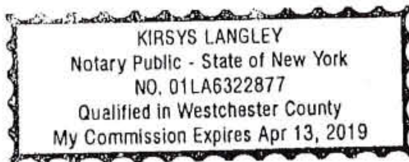
ANNMARIE HESLOP, petitioner in this action as the parent of a child who attends Roosevelt High School, in the Yonkers School District being duly sworn, deposes and states that the foregoing Verified Petition of Nidia Cortes, Virgil Dantes, AnnMarie Heslop and Curtis Witters is true and correct to the best of her knowledge, information, and belief.

AnnMarie Heslop

Sworn to before me this 30th
day of August, 2016



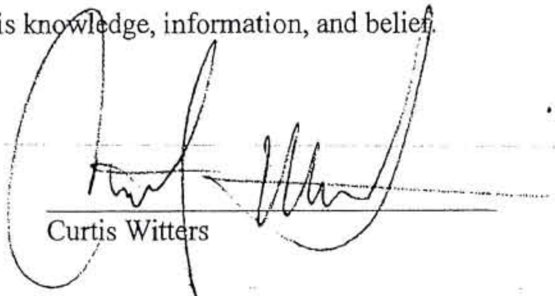
Notary Public



VERIFICATION

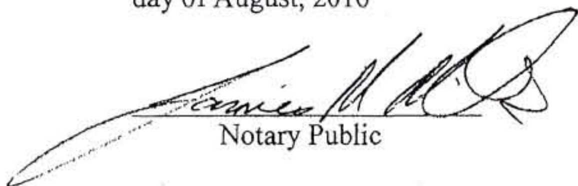
STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

CURTIS WITTERS, petitioner in this action as the parent of a child who attends William S. Hackett Middle School in the Albany School District, being duly sworn, deposes and states that the foregoing Verified Petition of Nidia Cortes, Virgil Dantes, AnnMarie Heslop and Curtis Witters is true and correct to the best of his knowledge, information, and belief.



Curtis Witters

Sworn to before me this 30 day of August, 2016



Notary Public

JAMAICA M. MILES
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01MI6233620
QUALIFIED IN SCHENECTADY COUNTY
COMMISSION EXPIRES JANUARY 03, 2019

2

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,

-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.

VERIFIED ANSWER, WITH AFFIRMATIVE DEFENSES AND OBJECTIONS IN POINT OF LAW OF RESPONDENTS, ROBERT MUJICA, DIRECTOR, NEW YORK STATE DIVISION OF BUDGET AND NEW YORK STATE DIVISION OF BUDGET

Index No. 05102-16

2017 SEP 30 AM 3

Respondents, Robert Mujica, Director, New York State Division of Budget and New York State Division of Budget (collectively, "DOB"), by and through, Harris Beach PLLC, as and for their Verified Answer, with Affirmative Defenses and Objections in Point of Law, to the Verified Petition (the "Petition") filed by Nadia Cortes, Virgil Dantes, Annmarie Heslop, Curtis Witters, on behalf of themselves and their children (collectively, "Petitioners"), state as follows:

1. As and for a response to Paragraph 1 of the Petition, DOB acknowledges that Petitioners have outlined the relief they seek in this proceeding in Paragraph 1 and admits that this is a special proceeding under Article 78. DOB denies that Petitioners have stated any viable cause of action and denies that Petitioners are entitled to any relief.

2. DOB denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 2 of the Petition.

3. DOB denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 3 of the Petition.

4. DOB denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 4 of the Petition.

5. DOB denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 5 of the Petition.

6. DOB admits that Respondent Robert Mujica is the Director of the New York State Division of Budget ("Director Mujica"). DOB refers to Chapter 53 of the Laws of 2015, as amended by Chapter 61 of the Laws of 2015, which speaks for itself, for a complete and accurate recitation of the charges contained therein.

7. DOB admits the allegations in Paragraph 7 of the Petition.

8. As and for a response to Paragraph 8 of the Petition, DOB refers to Chapter 53 of the Laws of 2015, as amended by Chapter 61 of the Laws of 2015, which speaks for itself, for a complete and accurate recitation of the laws contained therein. Except as stated, DOB denies knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 8 of the Petition and refers to Section 101 of the New York State Education Law and all other provisions of law pertaining to the duties of the New York State Education Department ("SED").

9. DOB admits that Respondent MaryEllen Elia is the Commissioner of SED ("Commissioner Elia"). As and for a response to the remainder of Paragraph 9, DOB refers to New York Education Law ("EL") § 305, which speaks for itself, for a complete and accurate recitation of the role of the Commissioner. Except as stated, DOB denies knowledge and

information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 9 of the Petition.

10. DOB admits that EL § 211-f was enacted in 2015 and refers to EL § 211-f, which speaks for itself, for a complete and accurate recitation of the law.

11. As and for a response to Paragraph 11 of the Petition, DOB refers to EL § 211-f, which speaks for itself, for a complete and accurate recitation of the law.

12. DOB denies the allegations contained in Paragraph 12 of the Petition..

13. As and for a response to Paragraph 13 of the Petition, DOB refers to Chapter 53 of the Laws of 2015 and Chapter 53 of the Laws of 2016, which speak for themselves, for a complete and accurate recitation of the purpose and permitted uses of Persistently Failing Schools Transformation Grants ("Transformation Grant" funds).

14. As and for a response to Paragraph 14 of the Petition, DOB refers to Chapter 53 of the Laws of 2015, as amended by Chapter 61 of the Laws of 2015, which speaks for itself, for a complete and accurate recitation of that law. Except as stated, DOB denies the remaining allegations in Paragraph 14 of the Petition.

15. As and for a response to Paragraph 15 of the Petition, DOB admits that DOB approved an expenditure plan related to the allocation of Transformation Grant Funds on October 15, 2015 ("Expenditure Plan" or "Spending Plan") and refers to Chapter 53 of the Laws of 2015, as amended by Chapter 61 of the Laws of 2015, which speaks for itself, for a complete and accurate recitation of the law. Except as stated, DOB denies the remaining allegations in Paragraph 15 of the Petition.

16. DOB admits that the Expenditure Plan identified 20 schools designated by SED as persistently failing and refers to Chapter 53 of the Laws of 2015, as amended by Chapter 61 of

the Laws of 2015, as amended by Chapter 61 of the Laws of 2015, which speaks for itself, for a complete and accurate recitation of the law.

17. DOB denies the allegations in Paragraph 17 of the Petition and objects to the characterization of the Transformation Grant as a "two-year grant". DOB also refers to the Expenditure Plan, which speaks for itself, for a complete and accurate recitation of the items set forth therein.

18. DOB denies the first sentence of Paragraph 18 of the Petition and objects to the characterization that the Transformation grant covers a "two-year" period. Further, DOB refers to the Expenditure Plan, which speaks for itself, for a complete and accurate recitation of the items set forth therein. DOB denies all remaining allegations in paragraph 18 of the Petition.

19. DOB admits that it approved the Expenditure Plan on October 15, 2015 and refers to the Expenditure Plan, which speaks for itself, for a complete and accurate recitation of the contents of the Expenditure Plan. Except as stated, DOB denies the remaining allegations in Paragraph 19 of the Petition.

20. As and for a response to Paragraph 20 of the Petition, DOB denies knowledge and information sufficient to form a belief as to the truth or falsity of the first sentence thereof and denies the remaining allegations in Paragraph 20 of the Petition.

21. DOB denies the allegations in Paragraph 21 of the Petition and refers to the Transformation Grant application, which speaks for itself, for a complete and accurate recitation of the contents thereof. DOB restates its objection to the characterization that the Transformation Grants cover a "two-year period."

22. DOB denies the allegations in Paragraph 22 of the Petition and refers to the Transformation Grant application for a complete and accurate recitation of the contents thereof.

23. DOB denies the allegations in Paragraph 23 of the Petition and refers Chapter 53 of the Laws of 2015, as amended by Chapter 61 of the Laws of 2015, the Expenditure Plan and the Transformation Grant Application, which speak for themselves, for a complete and accurate recitation of the contents thereof.

24. DOB denies the allegations contained in Paragraph 24 of the Petition.

25. DOB admits that Roosevelt High School was designated by the Commissioner as persistently failing in 2015 and denies the remaining allegations contained within Paragraph 25 of the Petition.

26. DOB denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 26 of the Petition.

27. As and for a response to Paragraph 27 of the Petition, DOB refers to Roosevelt's Transformation Grant Application, which speaks for itself, for a complete and accurate recitation of the contents thereof. Except as stated, DOB denies the remaining allegations in Paragraph 27 of the Petition.

28. DOB denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 28 of the Petition.

29. As and for a response to Paragraph 29 of the Petition, DOB refers to Roosevelt's Transformation Grant Application, which speaks for itself, for a complete and accurate recitation of the contents thereof. Except as stated, DOB denies the remaining allegations in Paragraph 29 of the Petition.

30. DOB denies the allegations as stated in Paragraph 30 of the Petition. DOB admits that in February 2016, Commissioner Elia announced the removal of Roosevelt High School's designation as "persistently failing" for the 2016-2017 school year.

31. DOB admits that JHS 80 The Mosholu Parkway Middle School ("JHS 80") was designated by the Commissioner as persistently failing in 2015 and denies the remaining allegations contained within Paragraph 31 of the Petition.

32. As and for a response to Paragraph 32 of the Petition, DOB refers to JHS 80's Transformation Grant Application, which speaks for itself, for a complete and accurate recitation of the contents thereof. Except as stated, DOB denies information and belief sufficient to form a belief as to the truth or falsity regarding whether, or when, JHS 80 submitted a Transformation Grant Application to SED and denies the remaining allegations in Paragraph 32 of the Petition.

33. As and for a response to Paragraph 32 of the Petition, DOB refers to JHS 80's Transformation Grant Application, which speaks for itself, for a complete and accurate recitation of the contents thereof. Except as stated, DOB denies the remaining allegations in Paragraph 33 of the Petition.

34. DOB denies the allegations as stated in Paragraph 34 of the Petition. DOB admits that in February 2016, Commissioner Elia announced the removal of JHS 80's designation as "persistently failing" for the 2016-2017 school year.

35. DOB admits that William S. Hackett Middle School ("Hackett Middle School") was designated by the Commissioner as persistently failing in 2015 and denies the remaining allegations contained within Paragraph 35 of the Petition.

36. As and for a response to Paragraph 36 of the Petition, DOB refers to Hackett Middle School's Transformation Grant Application, which speaks for itself, for a complete and accurate recitation of the contents thereof. Except as stated, DOB denies information and belief sufficient to form a belief as to the truth or falsity regarding whether, or when, Hackett Middle

School submitted a Transformation Grant Application to SED and denies the remaining allegations in Paragraph 36 of the Petition.

37. DOB denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 37 of the Petition.

38. DOB denies the allegations as stated in Paragraph 38 of the Petition. DOB admits that in February 2016, Commissioner Elia announced the removal of Hackett Middle School's designation as "persistently failing" for the 2016-2017 school year.

39. DOB denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 39 of the Petition.

40. DOB denies that the Continuation Guidance referenced in Paragraph 40 applies to the nine schools at issue in this proceeding and refers to the Continuation Guidance, which speaks for itself, for a complete and accurate recitation of the contents thereof. DOB denies the remaining allegations in Paragraph 40 of the Petition.

41. DOB denies that the Continuation Guidance referenced in Paragraph 41 of the Petition applies to the nine schools at issue in this proceeding and objects to the characterization that Transformation Grants were made for a "full two school years." DOB refers to the Continuation Guidance, which speaks for itself, for a complete and accurate recitation of the contents thereof. DOB denies the remaining allegations in Paragraph 41 of the Petition.

42. DOB denies the allegations contained in Paragraph 42 as stated. DOB admits that in February 2016, Commissioner Elia announced the removal of nine schools from the "Persistently Failing" schools designation for the 2016-2017 school year.

43. As and for a response to Paragraph 43 of the Petition, DOB refers to the news article published in the Times Union newspaper which Petitioners cites in Paragraph 43, which

speaks for itself, for a complete and accurate recitation of the contents thereof. Except as stated, DOB denies the remaining allegations in Paragraph 43 of the Petition.

44. DOB admits that Commissioner Elia amended SED's list of persistently failing schools and that this amendment no longer categorized the following 9 schools as persistently failing: Roosevelt High Schools, JHS 80, Hackett Middle School, Grant Middle School, Buffalo Elementary School of Technology, Burgard Vocational High School, South Park High School, Automotive High School and PS 328 Phyllis Wheatley School. Except as stated, DOB denies the remaining allegations in Paragraph 44 of the Petition.

45. DOB denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 45 of the Petition.

46. As and for a response to Paragraph 46 of the Petition, DOB refers to the July 28, 2016 letter attached to Wendy Lecker's Affirmation as Exhibit M, which speaks for itself, for a complete and accurate recitation of the contents thereof. Except as stated, DOB denies the remaining allegations in Paragraph 46 of the Petition.

47. DOB admits that DOB has not responded to the July 28, 2016 letter attached to Wendy Lecker's Affirmation as Exhibit M.

RESPONSE TO THE CAUSE OF ACTION FOR A WRIT OF MANDAMUS PURSUANT TO NY CPLR ARTICLE 78

48. DOB repeats and realleges their responses to the allegations of Paragraphs 1 through 47 as if fully set forth herein.

49. DOB admits that it approved the Expenditure Plan for Transformation Grants attached to the Affirmation of Wendy Lecker as Exhibit A and denies the remaining allegations in Paragraph 49 of the Petition.

50. DOB denies the allegations in Paragraph 50 of the Petition.

51. DOB denies the allegations in Paragraph 51 of the Petition.

52. DOB denies the allegations in Paragraph 52 of the Petition.

53. DOB admits that Roosevelt High School, JHS 80 and Hackett Middle School were categorized as persistently failing schools by SED on July 1, 2015 and, therefore, eligible to apply for Transformation Grant funds at that time.

54. DOB objects to the characterization of the Transformation Grant period as "two-years" is accurate and denies knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 54 of the Petition.

55. DOB denies knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 55 of the Petition.

56. DOB denies the allegations in Paragraph 56 of the Petition as stated. DOB admits that in February 2016, Commissioner Elia announced the removal of Roosevelt High School JHS 80, Hackett Middle School, Grant Middle School, Buffalo Elementary School of Technology, Burgard Vocational High School, South Park High School, Automotive High School, and PS 328 Phyllis Wheatley School from the "Persistently Failing" schools designation for the 2016-2017 school year.

57. DOB denies the allegations in Paragraph 57 of the Petition.

58. DOB denies the allegations contained in Paragraph 58 of the Petition.

59. DOB denies the allegations in Paragraph 59 of the Petition and denies that Petitioners are entitled to any relief.

60. DOB denies the allegations contained in Paragraph 60 of the Petition.

made that the nine schools addressed in this Petition that were removed from the "Persistently Failing" schools designation were not eligible to receive Transformation Grant funds for the 2016-2017 school year.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

68. The Petition should be dismissed in its entirety because the Petitioners do not have standing to challenge the determination that the 9 schools mentioned in the Petition are not eligible to receive Transformation Grants for the 2016-2017 school year.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

69. The Petition should be dismissed in its entirety because the determination was not made in violation of lawful procedure, affected by an error of law, arbitrary and capricious, or an abuse of discretion pursuant to CPLR §7803 (3). The determination has a rational basis and was based on the governing appropriation, Expenditure Plan and EL § 211-f.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

70. The Petition should be dismissed in its entirety because Petitioners seek to compel DOB to make Transformation Grant funds available for payment without the authority of an appropriation and this Court cannot order DOB to make those funds available illegally.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

71. The Petition should be dismissed in its entirety because only the Executive and Legislative branches of state government can delineate the conditions precedent that schools must satisfy to become eligible to receive Transformation Grant funds and an Article 78 proceeding cannot be used to review a legislative act.

AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

72. The Petition should be dismissed in its entirety because New York courts have long recognized that they do not have the authority, nor the ability or will, to micromanage state education financing.

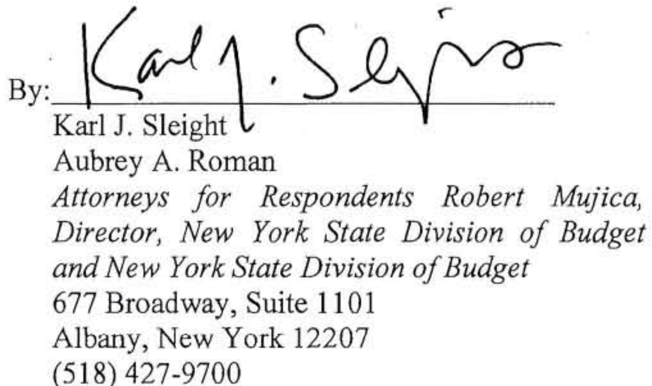
WHEREFORE, Respondents, Robert Mujica, Director, New York State Division of Budget and New York State Division of Budget, respectfully demand a judgment dismissing the Petition in its entirety together with such other and further relief as this Court deems just and proper.

RECORD BEFORE THE AGENCY BELOW

The administrative record in this matter consists of the documents annexed to the Affirmation of Wendy Lecker as Exhibits A-M, as well as Exhibit A-H annexed to the Affidavit of Joseph Conroy, dated September 29, 2016:

Dated September 29, 2016
Albany, New York

HARRIS BEACH PLLC



By: ____________________________

Karl J. Sleight
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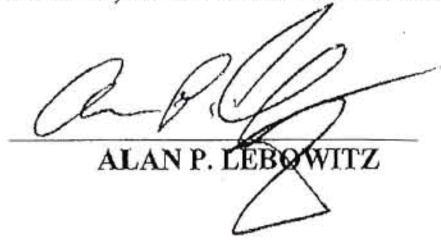
TO: Wendy Lecker, Esq.
David G. Sciarra, Esq.
Education Law Center
Attorneys for Petitioners
60 Park Place, Suite 300
Newark, New Jersey 07102

VIA ELECTRONIC MAIL
AND OVERNIGHT MAIL

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

ALAN P. LEBOWITZ, being duly sworn, deposes and says that he is Counsel to the New York State Division of Budget, that he has read the foregoing Verified Answer, with Affirmative Defenses and Objections in Point of Law; and as to the factual matters contained therein, he knows the same to be true, the knowledge of the deponent, except as to the matters therein stated on information and belief, and that as to those matters, he believes them to be true based upon reasonable inquiry.



ALAN P. LEBOWITZ

Sworn to before me this
29th day of September, 2016.

Notary Public

TERRANCE N. PRATT
Notary Public State of New York
Qualified in Schenectady County
#02PR6319350
Commission Expires 2/17/2019

3

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

HARRIS BEACH PLLC

Karl J. Sleight
Aubrey A. Roman
Attorneys for Respondents Robert Mujica, Director, New York State Division of Budget and New York State Division of Budget
677 Broadway, Suite 1101
Albany, New York 12207
(518) 427-9700

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., Ex's. 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 determinatioh 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]).

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[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

HARRIS BEACH PLLC

By:

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Aubrey A. Roman
Attorneys for Respondents Robert Mujica, Director, New York State Division of Budget and New York State Division of Budget
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Albany, New York 12207
(518) 427-9700

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,

-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.

AFFIDAVIT OF ROBERT F. MUJICA

Index No. 05102-16

2017 SEP 30 AM 11:37

STATE OF NEW YORK)
) ss.:
COUNTY OF ~~ALBANY~~ New York)

ROBERT F. MUJICA, being duly sworn, deposes and says:

1. I am currently the Director of the New York State Division of Budget ("Budget Director") and named Respondent in this proceeding. I was appointed Director of the Budget by Governor Andrew Cuomo and began serving in that capacity on January 14, 2016.

2. In my capacity as Budget Director, I am aware that 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 the duly-enacted appropriation

3. In my capacity as Budget Director, I am aware that Chapter 53 of the Laws of 2015, as amended by Chapter 61 of the Laws of 2015, included a $75 million appropriation for "Persistently Failing Schools Transformation Grants" (hereinafter referred to as the

"Transformation Grant funds") and that Chapter 53 of the Laws of 2016 re-appropriated the Transformation Grant funds (collectively referred to as the "Transformation Grant appropriations").

4. Upon information and belief, in February 2016 Commissioner Elia of the New York State Education Department ("SED") announced the amendment of New York's list of "Priority Schools," which had the impact of removing the nine schools at issue in this proceeding from the "Persistently Failing" schools designation for the 2016-2017 school year. Upon information and belief, Commissioner Elia stated publicly that those schools removed from the "Persistently Failing" schools list for the 2016-2017 school year would still be eligible to receive Transformation Grant funds for the 2016-2017 school year. Commissioner Elia did not consult with me prior to making this statement.

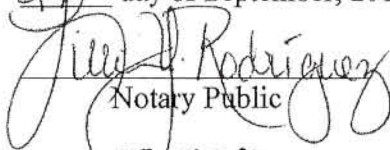
5. On or before April 20, 2016, a determination was made that the schools removed from the "Persistently Failing" schools list by Commissioner Elia for the 2016-2017 school year were not eligible to receive Transformation Grant funding for the 2016-2017 school year because they were not persistently failing according to SED and that making the Transformation Grant funds available to those removed schools for the 2016-2017 school year would be contrary to law. On April 21, 2016, DOB's spokesperson, on behalf of DOB, provided a statement to a reporter that was quoted in a news article regarding eligibility for Transformation Grant funds for schools whose "Persistently Failing" designation was removed by the Commissioner.

6. That quote from DOB's spokesperson read, in part:

> "To suggest that these schools should remain eligible for the funding event though they were removed from the program is contrary to the law."

ROBERT F. MUJICA

Sworn to before me this
29th day of September, 2016.



Notary Public

Lillian Y. Rodriguez
Notary Public, State of New York
No. 01RO4959417
Qualified in New York County
Commission Expires 2/2/20 18

4

able for 2015-16 state fiscal year

of the external receiver of the school. Provided that the commissioner shall confirm that any such eligible activity is aligned with the school's approved intervention model, comprehensive education plan or school intervention plan.
In determining the amount of such grants, the commissioner shall consider factors including but not limited to the enrollment of the school. Provided that for each of the persistently failing schools, the maximum annual grant in the 2015-16 and 2016-17 school years shall be established by the state education department in the spending plan for such grants. A portion of such grants shall be available by July 1 of each such school year. Notwithstanding section 40 of the state finance law or any provision of law to the contrary, this appropriation shall lapse on March 31, 2017 75,000,000
For reimbursement of supplemental basic tuition payments to charter schools made by school districts in the 2014-15 school year, as defined by paragraph a of subdivision 1 of section 2856 of the education law 28,260,000
For services and expenses of remaining obligations for the 2014-15 school year for support for the operation of targeted prekindergarten for those providers not eligible to receive funding pursuant to section 3602-e of the education law and for support for providers continuing to operate such programs in the 2015-16 school year. Such funds shall be expended pursuant to a plan developed by the commissioner of education and approved by the director of the budget 1,303,000
For services and expenses of remaining obligations of a $14,260,000 teacher resources and computer training centers program for the 2014-15 school year 4,278,000
Funds appropriated herein shall be available for services and expenses of a $14,260,000 teacher resources and computer training center program for the 2015-16 school year 9,982,000
For education of children of migrant workers for the 2015-16 school year 89,000
For the school lunch and breakfast program. Funds for the school lunch and breakfast program shall be expended subject to the limitation of funds available and may be used to reimburse sponsors of non-profit school lunch, breakfast, or other school

to, improved graduation rates, provided that such services shall be provided to students in one or more city school districts located in a city having a population in excess of 125,000 and less than 1,000,000 inhabitants (21804) ... 490,000 .... (re. $490,000)

For services and expenses of the Executive Leadership Institute ... 475,000 .... (re. $475,000)

For payment of small government assistance to school districts pursuant to subdivision 7 of section 3641 of the education law on or before March 31, 2016 upon audit and warrant of the comptroller in the amount that small government assistance was paid to school districts in state fiscal year 2010-11 ... 1,868,000 .. (re. $1,000)

For services and expenses of the New York City Community Learning Schools initiative ... 1,500,000 .... (re. $1,500,000)

For services and expenses of National history Day .... 100,000 .... (re. $75,000)

For educational services and expenses for DACA (Deferred Action for Childhood Arrivals) eligible out of school youth and young adults (56045) ... 1,000,000 .... (re. $1,000,000)

The appropriation made by chapter 53, section 1, of the laws of 2015, is hereby amended and reappropriated to read:

For nonpublic school aid payable in the 2015-16 state fiscal year. Provided that nonpublic schools shall continue to receive aid based on either a 5.0/5.5 hour standard instructional day, or another work day as certified by the nonpublic school officials, in accordance with the methodology for computing salary and benefits applied by the department in paying aid for the 2012-13 and prior school years. Notwithstanding any provision of law, rule or regulation to the contrary, the amount appropriated herein represents the maximum amount payable during the 2015-16 state fiscal year (21769) .... 102,273,000 .... (re. $101,689,000)

The appropriation made by chapter 53, section 1, of the laws of 2015, as added by chapter 61, section 1, of the laws of 2015, is hereby amended and appropriated to read:

For persistently failing schools transformation grants to school districts pursuant to a spending plan developed by the commissioner of education and approved by the director of the budget.

Eligibility for such grants shall be limited to school districts containing a school or schools designated as persistently failing pursuant to paragraph (b) of subdivision 1 of section 211-f of the education law, provided that separate applications shall be required for each such school for which the school district requests a grant.

Such grants shall support activities including but not limited to the following: (i) use of school buildings as community hubs to deliver co-located or school-linked academic, health, mental health, nutrition, counseling, legal and/or other services to students and their families; (ii) expansion, alteration or replacement of the school's curriculum and program offerings; (iii) extension of the school day and/or school year; (iv) professional development of teachers and administrators; (v) mentoring of at-risk students; and (vi) the actual and necessary expenses of the external receiver of the

school. Provided that the commissioner shall confirm that any such eligible activity is aligned with the school's approved intervention model, comprehensive education plan or school intervention plan.
In determining the amount of such grants, the commissioner shall consider factors including but not limited to the enrollment of the school. Provided that for each of the persistently failing schools, the maximum annual grant in the 2015-16 and 2016-17 school years shall be established by the state education department in the spending plan for such grants. A portion of such grants shall be available by July 1 of each such school year. Notwithstanding section 40 of the state finance law or any provision of law to the contrary, this appropriation shall lapse on March 31, [~~2017~~] 2018 (55906) ...
75,000,000 .... (re. $75,000,000)
Notwithstanding any inconsistent provision of law, the amount appropriated herein shall be available only to the extent that the unencumbered balance of the commercial gaming revenue account established by section 97-nnnn of the state finance law is less than the amount required to fully fund payments of general support for public schools to be made from funds appropriated from such account, provided that the state comptroller shall certify to the commissioner of education the amount of funds available in such account, (1) for the 2014-15 school year, by June 15, 2015 based on the amount of funds available as of June 1, 2015 and (2) for the 2015-16 school year, for the first such payment, by March 15, 2016 based on the amount of funds available as of March 1, 2016 and, for the second such payment by June 15, 2016 based on the amount of funds available as of June 1,2016, and provided further that the commissioner shall notify the director of the budget no later than 15 days after receipt of such certification of the amounts, if any, payable pursuant to section 3609-h of the education law from such account and from this appropriation. Provided, however, that of the amount appropriated herein, no more than 50 percent shall be available for general support for public schools payments for the 2014-15 school year, and no more than 35 percent shall be available for such payments for the 2015-16 school year to be made in the 2015-16 state fiscal year. Provided that, notwithstanding section 40 of the state finance law or any provision of law to the contrary, this appropriation shall lapse on [~~June 30, 2016~~] March 31, 2017 (56140) ...
162,000,000 .... (re. $81,000,000)

The appropriation made by chapter 20, section 1 of subpart B of part B, of the laws of 2015, is hereby amended and reappropriated to read:
[~~The sum of two hundred fifty million dollars ($250,000,000) is hereby appropriated to the state education department out of any moneys in the state treasury in the general fund to the cred it of the local assistance account, not otherwise appropriated, and made immediately available, for~~] For reimbursement to non-public schools for prior year expenses for performing state-mandated functions, including but not limited to the comprehensive attendance policy program. Provided, further, that up to twenty million dollars ($20,000,000) of the amount appropriated herein shall be available to pay additional liabilities of the comprehensive attendance policy program

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STATE OF NEW YORK
SUPREME COURT CHAMBERS
ALBANY COUNTY COURTHOUSE
16 EAGLE STREET - ROOM 411
ALBANY, NEW YORK 12207
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HON. KIMBERLY A. O'CONNOR
JUDGE

JUSTINA CINTRÓN PERINO, ESQ.
LAW CLERK

DIANE K. DEYO
SECRETARY

December 28, 2016

Via mail and e-mail
David G. Sciarra, Esq.
Wendy Lecker, Esq.
Education Law Center
60 Park Place, Suite 300
Newark, New Jersey 07102
wlecker@edlawcenter.org

Re: ***Cortes v. Mujica, et al.***
Index No.: 5102-16
RJI No.: 01-16-ST8123

Dear Counselor:

Enclosed is a signed Decision and Order/Judgement in the above-referenced matter. The original is being forwarded to you for filing with the Albany County Clerk's Office.

Very truly yours,

Kimberly A. O'Connor

Hon. Kimberly A. O'Connor
Acting Supreme Court Justice

cc: Karl J. Sleight, Esq.
Aubrey A. Roman, Esq.
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of an Article 78 Proceeding

Nidia Cortes, Virgil Dantes, AnneMarie Heslop, Curtis Witters, on Behalf of Themselves and Their Children,

Petitioners,

-against-

DECISION AND ORDER/JUDGMENT
Index No.: 5102-16
RJI No.: 01-16-ST8123

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.

(Supreme Court, Albany County, Article 78 Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES:

EDUCATION LAW CENTER
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Wendy Lecker, Esq., of Counsel)
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ALISON B. BIANCHI
Acting Counsel and Commissioner
for Legal Affairs
Attorney for Respondents MaryEllen Elia and New York State Education Department
(Aaron M. Baldwin, Esq., of Counsel)
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Albany, New York 12234

O'CONNOR, J.:

Petitioners Nidia Cortes, Virgil Dantes, AnneMarie Heslop, and Curtis Witters, on behalf of themselves and their children (collectively "petitioners"), commenced this CPLR Article 78 proceeding seeking an order of mandamus directing respondents Robert Mujica ("Mujica"), Director, New York State Division of Budget, and New York State Division of Budget ("DOB") (collectively "DOB respondents") to comply with the law and immediately release the 2016-2017 transformation grant funds to respondent New York State Education Department ("NYSED"), and directing respondents MaryEllen Elia ("Elia"), New York State Commissioner of Education, and NYSED (collectively "NYSED respondents") to distribute those funds to the nine schools removed from the "persistently failing" schools list, including Roosevelt High School, JHS 80 Mosholu Parkway, and William S. Hackett Middle School – the schools attended by petitioners' children.[1]

The DOB respondents have answered, and move for an order dismissing the petition, in its entirety and with prejudice, on the grounds that: (1) petitioners lack standing to bring their claims; (2) the proceeding is time-barred; (3) the DOB's responsibilities in this matter are not merely ministerial; and (4) the determination that the school districts containing the nine schools removed from the "persistently failing" schools list are ineligible to receive transformation grant funding for the 2016-2017 school year and that making the transformation grant funds available to those removed schools for the 2016-2017 school year would be contrary to law was not arbitrary and capricious, and was made in accordance with the plain language of the transformation grant appropriations and related spending plan. The DOB respondents further argue that the DOB cannot be compelled to allocate funds in violation of duly-enacted appropriation statutes, and that directing

[1] The following six schools were also removed from the list of "persistently failing" schools: Buffalo Elementary School of Technology, Burgard Vocational High School, South Park High School, Automotive High School, PS 328 Phyllis Wheatley, and Grant Middle School.

the DOB to make the transformation grant funds available to the nine removed schools would intrude upon policy-making and discretionary decisions that are reserved to the legislative and executive branches. Petitioners oppose the motion.

The NYSED respondents answered the petition, opposing only that portion of the requested relief seeking to compel NYSED to immediately release the transformation grant funds for the 2016-2017 school year to the removed schools, if such funds are unfrozen by the Court or released by the DOB, but did not respond to the motion. Oral argument on the petition and motion was held on September 30, 2016, and, on consent of the parties, all issues raised in the petition, motion, and answering papers were addressed. At argument, petitioners withdrew their request to have NYSED immediately release the 2016-2017 transformation grant funds to the subject schools, accepting NYSED's position that the funding, if released by the DOB, would continue to be provided on a reimbursement basis. Petitioners also requested an opportunity to submit written opposition to the procedural arguments in the motion, and the Court set a briefing schedule, making this matter returnable on October 6, 2016.[2] The papers are now fully submitted, and all issues have been addressed and briefed.

BACKGROUND

In an effort to aid in the improvement of the lowest performing public schools in New York State, the Legislature, in April 2015, enacted new section 211-f of the Education Law relating to the "takeover and restructuring [of] failing schools" ("school receivership law") (*see* L. 2015, ch. 56, part EE, subpart H, § 1). The school receivership law, which took effect April 13, 2015, mandates, among other things, that the NYSED Commissioner designate, as "persistently failing," any school

[2] During oral argument, the NYSED respondents indicated that they would not be submitting any papers in response to the DOB respondents' motion.

that has been identified under the State's accountability system to be among the lowest achieving public schools in the State for ten consecutive school years, measured by student achievement and outcomes and a methodology prescribed in the Commissioner's regulations,[3] and denominated a "priority school" for each applicable year from the 2012-2013 school year to the 2014-2015 school year or a "priority school" in each applicable year of such period, except one year in which the school was not identified because of an approved closure plan that was not implemented[4]; a "School Requiring Academic Progress Year 5"; a "School Requiring Academic Progress Year 6"; a "School Requiring Academic Progress Year 7"; and/or a "School in Restructuring" (*see* Education Law § 211-f[1][b]).

Under the school receivership law, the superintendent of a school district containing a "persistently failing" school is vested with the powers of a receiver, and a school district that has a NYSED-approved intervention model or comprehensive education plan in place is given an additional school year to make demonstrable improvement in the school's performance, based upon the performance metrics and goals in the school's model or plan (*see* Education Law § 211-f[1][c][i], [6]). At the end of that year, NYSED is required to conduct a performance review, in consultation and cooperation with the school district and school staff, to determine if a school's designation as "persistently failing" should be removed, if the school should remain under continued school district operation with the superintendent vested with the powers of a receiver, or if the school should be placed into independent receivership (*see* Education Law § 211-f[1][c]).[5]

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[3] In June 2015, the NYSED Commissioner, upon approval of the New York State Board of Regents, adopted regulations implementing the provisions of Education Law § 211-f.

[4] The "priority school" designation derives from the federal Elementary and Secondary Education Act of 1965, as amended (*see* 20 U.S.C. § 6301, *et seq.*).

[5] A school that makes demonstrable improvement in that first year and whose "persistently failing" designation is not removed will remain under school district operation for an additional school year with the

The school receivership law was supported by a $75 million appropriation in the 2015-2016 State Budget (*see* L. 2015, ch. 53, as amended by L. 2015, ch. 61), which was reappropriated in the 2016-2017 State Budget (*see* L. 2016, ch. 53). The legislation authorizing the appropriation provides that "school districts containing a school or schools designated as persistently failing pursuant to [Education Law § 211(1)(b)]" are eligible to apply for "transformation grants . . . pursuant to a spending plan developed by the [C]ommissioner of [E]ducation and approved by the [D]irector of the [B]udget" (L. 2015, ch. 53, as amended by L. 2015, ch. 61, and reappropriated by L. 2016, ch. 53). According to the appropriation legislation, transformation grants are intended to support academic, health, mental health, nutrition, counseling, legal and/or other services to students and their families; extended learning time for students; the expansion, alteration or replacement of the school's curriculum and program offerings; professional development of teaching and administrative staff; and mentoring of at-risk students, among other things (*see id.*).

The appropriation legislation vests the NYSED Commissioner with the authority to confirm that grant supported activities are aligned with a school's approved intervention model, comprehensive education plan, or school intervention plan, and the authority to determine the amount of such grants (*see id.*). The legislation further provides that "for each of the persistently failing schools, the maximum annual grant in the 2015-2016 and 2016-2017 school years [will] be established by [NYSED] . . . in the spending plan for such grants," and that "[a] portion of such grants [will] be available by July 1 of each such school year" (*id.*). The appropriation is set to lapse on March 31, 2018 (*see* L. 2016, ch. 53).

In July 2015, the NYSED respondents issued a press release announcing that Commissioner

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superintendent vested with the powers of a receiver, subject to an annual performance review by NYSED, in consultation and cooperation with the school district and school staff (*see* Education Law § 211-f[1][c]). A school that does not make demonstrable improvement in the initial one-year period will be placed into independent receivership (*id.*).

Elia had identified 124 "struggling" and 20 "persistently struggling" schools[6] in the State (referred to hereafter as "failing" or "persistently failing" schools), and indicating that the "persistently [failing]" schools would be eligible for a portion of the $75 million in State aid to support and implement improvement efforts over a two-year period. In October 2015, NYSED submitted, for the DOB Director's approval, a "Persistently [Failing] Schools/Transformation Grant Expenditure Plan" ("spending plan") for the period of July 1, 2015 through March 31, 2017. The final spending plan was approved by the DOB Director on October 15, 2015, and the DOB initially made $37.5 million of the transformation grant appropriation available to NYSED for its "Persistently [Failing] Schools Transformation Grant" program.[7]

NYSED's spending plan, approved by the DOB, identified 20 schools, including the three schools attended by petitioners' children, as "persistently failing" under Education Law § 211-f, rendering those schools eligible to apply for transformation grants. Pursuant to the spending plan, transformation grants would be made available to those 20 schools "to support and implement turnaround efforts over a two-year period." The plan set forth a "[t]wo-[y]ear [t]otal [t]ransformation [a]llocation" for each school, which schools could "use . . . over one year or two years," and provided that "schools should anticipate receiving no more than 50 percent of the [t]ransformation [a]llocation for the 2015-[20]16 school year," unless a request for accelerated funding was made, and approved, to allow funds "otherwise dedicated to the second year [to] be advanced to the first year."

NYSED subsequently made the "Persistently [Failing] Schools Grant Application"

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[6] "Persistently struggling" schools are schools the NYSED respondents have identified as "priority schools" and which have been among the lowest performing in the State, and, therefore, in the most severe accountability status since the 2006-2007 school year.

[7] The DOB allocates and makes available to NYSED the cash corresponding with the appropriation in the State Financial System.

("transformation grant application") available to the 20 "persistently failing" schools. The application indicated that transformation grant monies would be available "to support and implement turnaround efforts over a 21[-]month period." Each of the school districts containing the schools attended by petitioners' children - Yonkers City School District, New York City Department of Education, and Albany City School District – submitted a transformation grant application to NYSED on behalf of those schools for the full two-year transformation allocation to support proposed activities during both the 2015-2016 school year ("year one") and the 2016-2017 school year ("year two"), as well as a proposed budget for the school's year one activities, totaling half or less than half of the two-year transformation allocation. NYSED approved each of the applications and proposed year one budgets.

In early 2016, NYSED issued continuation guidance to schools awarded transformation grants in year one regarding year two funding. In its continuation guidance, NYSED noted that "all grants . . . are subject to further review, monitoring and audit to ensure compliance," and that NYSED "has the right to recoup funds if the approved activities are not performed and/or the funds are expended inappropriately." Schools receiving transformation grants were instructed to submit a budget narrative, a 2016-2017 FS-10, a budget summary chart, and a Sustained Activities Certification by April 29, 2016, and advised that they "must set aside a portion of the grant (no less than 5%) to pay for an external evaluator to assess program implementation in [y]ear 2."

On February 26, 2016, NYSED issued a press release indicating that nine schools from the list of "persistently failing" schools, including Roosevelt High School, JHS 80 Mosholu Parkway, and William S. Hackett Middle School – the schools attended by petitioners' children – would be removed from "priority school" status and, consequently, removed from the list of "persistently failing" schools, effective June 30, 2016. NYSED indicated, however, that the "[s]chools . . .

removed from the [p]ersistently [failing] [s]chools list in June 2016 will continue to be eligible to receive funding in 2016-[20]17 from a [S]tate grant to support and strengthen their school improvement efforts."

On or about March 30, 2016, the DOB placed the entire unexpended balance of the transformation grant appropriation in "reserve" in the State Financial System, preventing NYSED from accessing the remaining year one funds and the entire $37.5 million year two appropriation.[8] On April 1, 2016, the transformation grant appropriation, was amended and reappropriated as part of the State's 2016-2017 Budget[9] (*see* L. 2016, ch. 53). On April 21, 2016, a DOB's spokesperson issued a statement quoted in a news article regarding the eligibility for transformation grant funding of those schools removed by NYSED from the "persistently failing" schools list for the 2016-2017 school year. The DOB spokesperson was quoted as saying, "To suggest that these schools should remain eligible for the funding even though they were removed from the program is contrary to law."

On or about June 9, 2016, NYSED sent a memo to those schools removed from the "persistently failing" schools list, indicating that a decision as to whether the schools would have access to unexpended year one transformation grant funds during year two "is still pending approval by the [DOB]," and that NYSED would inform those schools of the DOB's decision as soon as it is notified. By letter dated July 28, 2016, petitioners' counsel, on behalf of the parents in the schools removed from the "persistently failing" schools list for 2016-2017, wrote to Director Mujica, inquiring as to whether the DOB "will release funding under the [transformation grant] to those schools for the 2016-2017 school year." Counsel indicated in its letter that if Director Mujica did not respond to petitioners' inquiry within ten days, it would deem the lack of a response "as a

[8] Grant funds can only be paid by NYSED to grant recipients if NYSED has access to such funds.

[9] The sole amendment to the legislation was an extension of the date by which the appropriation is set to lapse from March 31, 2017 to March 31, 2018.

statement by the Division of Budget that it is withholding [transformation grant] funding . . . from these schools for the 2016-2017 school year." When Director Mujica did not respond to counsel's letter, this proceeding followed.

ARGUMENTS

Petitioners contend that the DOB's refusal to release the second year of transformation grant funding to Roosevelt High School, JHS 80 Mosholu Parkway, and William S. Hackett Middle School, as well as to the six other schools removed from the "persistently failing" schools list, is arbitrary and capricious, and violates the DOB's ministerial and mandatory duty to release those funds under the appropriation legislation. Specifically, petitioners argue that the clear language of the appropriation statutes when read together with their companion legislation – Education Law § 211-f, the statutorily-mandated spending plan approved by the DOB, the transformation grant application created by NYSED, and NYSED's continuation guidance demonstrate that transformation grant funding was intended to cover a two-year period, and that there is nothing in the law or spending plan that gives the DOB respondents authority to withhold the second year of transformation grant funding if "persistently failing" schools improve to a point where their "persistently failing" designation is removed. By this proceeding, petitioners seek an order of mandamus directing the DOB respondents to immediately release to NYSED the transformation grant funds for the 2016-2017 school year, making those funds available to the nine schools whose "persistently failing" designation has been removed, including those schools attended by their children.

The DOB respondents argue, in opposition to the petition and in support of their motion, that the petition should be dismissed on both procedural and substantive grounds. Particularly, the DOB respondents maintain that the petitioners lack standing to bring their claims, that the proceeding is

time-barred, and that the petitioners are attempting to compel the DOB to perform an act that is not purely ministerial and to which petitioners have no clear legal right. The DOB respondents also submit that the determination that the nine schools removed from the "persistently failing" schools list are ineligible to receive transformation grant funding for the 2016-2017 school year and that making the transformation grant funds available to those removed school for the 2016-2017 school year would be contrary to law was not arbitrary and capricious, and was based on the plain language of the transformation grant appropriations and related spending plan. The DOB respondents further argue that the DOB cannot be compelled to allocate funds in violation of duly-enacted appropriation statutes, and that directing the DOB to make the transformation grant funds available to the removed schools would intrude upon policy-making and discretionary decisions that are reserved to the legislative and executive branches.

Petitioners assert, in opposition to the motion, that they have standing to bring their claims because the DOB respondents' refusal to release the second year of transformation grant funds to their children's schools is causing and will continue to cause harm to their children. According to petitioners, the transformation grant funding enabled these schools to provide services and programs to their children, and fellow students, during the 2015-2016 school year that would otherwise not be available but for those funds, and denying the second year of this funding will directly harm petitioners' children and their classmates for the duration of the 2016-2017 school year. Petitioners also maintain that the interests they are asserting clearly fall within the zone of interests sought to be promoted by the appropriation legislation since the legislation is intended to improve education programs and outcomes in the schools attended by petitioners' children. In addition, petitioners argue that the DOB respondents should not be permitted to use standing in order to shield their actions from judicial review, and further that this proceeding raises matters of vital public concern,

which should compel a finding that they have standing to bring their claims. Moreover, petitioners submit that the statute of limitations is not a bar to this proceeding because the DOB respondents are under a continuing statutory duty to release the appropriated funds, and failed to demonstrate that they notified the petitioners of their determination more than four months before this proceeding was commenced.

For their part, the NYSED respondents do not oppose the primary relief sought by petitioners and support the issuance of an order directing the DOB respondents to lift the freeze and release the transformation grant funds because they agree with petitioners' arguments that the transformation grant appropriations were intended to provide funding over a two-year period and are not contingent upon the schools' year two designation, and further that the withholding of the funds by the DOB respondents is contrary to law and in excess of the limited discretion extended to the DOB by the Legislature in this instance.[10] According to the NYSED respondents, failing to provide funding for the 2016-2017 school year to the schools removed from the "persistently failing" school list would punish those schools for their success, which, among other things, is inconsistent with the law under which the grants were awarded and is contrary to the expenditure plan developed by NYSED and expressly approved by the DOB.

DISCUSSION

The Court begins by noting that "[w]hether a [party] seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation" (*Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 769 [1991], citing *Dairylea Cooperative, Inc. v. Walkley*, 38 N.Y.2d 6, 9 [1975]). Indeed, "[s]tanding is . . . a threshold

[10] Because petitioners withdrew that part of their petition seeking to have NYSED immediately release the 2016-2017 transformation grant funds to the subject schools, NYSED's arguments in limited opposition to the petition on that point will not be addressed by the Court.

requirement for a [party] seeking to challenge governmental action" (*New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 [2004]), and requires that the party demonstrate, in the first instance, a stake in the resolution of litigation (*see Matter of Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local Union No. 6, AFL-CIO v. State of New York*, 280 A.D.2d 713, 714 [3d Dep't 2001]; *Matter of New York State Ass'n of Prof'l Land Surveyors v. State of New York Dep't of Labor*, 167 A.D.2d 735, 735 [3d Dep't 1990]). Notably, "[t]he burden of establishing standing to raise [a] claim is on the party seeking review" (*Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d at 769).

In order to have standing to challenge a governmental action, an individual petitioner must satisfy a two-part test. The petitioner must first "show an 'injury in fact,' meaning that [petitioner] will actually be harmed by the challenged administrative action" (*New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d at 211). "As the term implies, the injury must be more than conjectural"(*id.*), and "in some way different from that of the public at large" (*Soc'y of Plastics Indus. v. County of Suffolk, supra* at 774; *see Matter of Colella v. Bd. of Assessors of County of Nassau*, 95 N.Y.2d 401, 410 [2000]; *Matter of Clean Water Advocates of New York, Inc. v. New York State Dept. of Envt'l Conservation*, 103 A.D.3d 1006, 1007 [3d Dep't 2013]; *Matter of VTR FV, LLC v. Town of Guilderland*, 101 A.D.3d 1532, 1533 [3d Dep't 2012]). "Second, the injury a [petitioner] asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (*id.*; *see Soc'y of Plastics Indus. v. County of Suffolk, supra* at 773; *Matter of Collela v. Bd. of Assessors of County of Nassau*, 95 N.Y.2d at 409-410; *see also Matter of VTR FV, LLC v. Town of Guilderland*, 101 A.D.3d at 1533).

Guided by these principles, the facts of this case support a finding that the petitioners have

standing to bring their claims. Initially, the Court is not persuaded by the DOB respondents' argument that the petitioner parents do not have a legal stake in this proceeding because the transformation grant appropriation legislation speaks to eligible school districts, and there is no authority in the legislation for parents to either apply for these grants on behalf of the school districts or compel the districts to apply for the grants. Notably, the DOB respondents cite no legal authority to support this proposition, but instead submit that the logical conclusion to be drawn, given that the the legislation is directed to school districts, is that a parent lacks standing to bring this proceeding. The Court is not inclined to draw such conclusion on those facts alone. However, even if the Court were to credit the argument, the petitioner parents have also brought this proceeding on behalf of their children who attend the schools removed from the "persistently failing" schools list that, according to the DOB respondents, are no longer eligible to receive transformation grant funding. Their children unquestionably have a legal stake in whether the services and programs supported by the transformation grants received by their respective schools in the 2015-2016 school year is continued in the 2016-2017 school year.

In addition, the harm to petitioners' children is more than just conjectural, and different in kind from the general public. The schools attended by the petitioners' children were among the 20 schools designated by NYSED as "persistently failing" and awarded transformation grants to enable those schools to improve their performance and student outcomes. Petitioners have alleged that without the second year of transformation grant funding, their children's schools will no longer be able to continue to provide the programs and services outlined in the schools' grant applications, which petitioners argue is essential to support each schools' continued improvement efforts in 2016-

2017, thus jeopardizing the improvements made in the first year.[11] Although petitioners have not submitted any affidavits or exhibits showing that their children's schools do not have funding from other sources to continue the programs implemented during the 2015-2016 school year, that the schools have ceased or planned to cease such programs, or that the failure to continue such programs absent other funding will cause direct harm to petitioners' or their children, the fact remains that their children's schools are no longer receiving transformation grant funding to support the programs and services implemented during the 2015-2016 school year with the assistance of that funding, the loss of which will have a real, direct, and arguably negative, impact on petitioners' children, as well as the other students, attending those schools.

Furthermore, the interests that petitioners assert fall within the zone of interests sought to be promoted by the appropriation legislation. There is no dispute that the appropriation legislation is intended to support programs and services that will improve school performance and student outcomes in "persistently failing" schools in the State, and that the schools attended by petitioners' children were identified by NYSED as "persistently failing," making them eligible to apply for transformation grants. It is equally undisputed that the school districts containing petitioners' children's schools did in fact apply for and were awarded transformation grants to support their schools' improvement efforts. Notwithstanding the DOB respondents' assertion to the contrary, the removal of these schools from the "persistently failing" schools list does not take them out of the zone of interests for standing purposes since an issue in this proceeding is whether those schools that

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[11] It is worth noting that the transformation grant application advised applicants that grants "may not be used to fund, in whole or in part, existing programs and services," and each of the school districts containing petitioners' children's schools, in submitting their grant applications, certified that "the funds from the [transformation grant] allocation [would] not be used to supplant activities or services at the school, and [would] only be used to fund supplemental activities and services." Therefore, it would follow that any activities and/or services supported by the transformation grant funding in the 2015-2016 school year would have been supplemental to that which existed at the schools prior to the receipt of the grants.

were eligible for and awarded transformation grants are entitled to continue receiving those funds.

Moreover, "[s]tanding has been granted absent personal aggrievement where the matter is one of general public interest" (*Police Conference of New York v. Municipal Police Training Council*, 62 A.D.2d 416, 417 [3d Dep't 1978]). In such case, a "citizen may maintain a mandamus proceeding to compel a public officer to do his [or her] duty'" (*Hebel v. West*, 25 A.D.3d 172, 176 [3d Dep't 2005][internal quotation marks and citation omitted], quoting *Police Conference of New York v. Municipal Police Training Council*, 62 A.D.2d at 417-418; *see Matter of Schenectady County Sheriff's Benevolent Ass'n v. McEvoy*, 124 A.D.2d 911, 912 [3d Dep't 1986]). Here, petitioners have brought this proceeding in the nature of mandamus to compel the DOB respondents to comply with the appropriation legislation and release the transformation grant funds to NYSED, arguing that the DOB respondents have exceeded their authority and infringed upon the prerogatives of the Legislature when they determined that the schools attended by their children are no longer eligible to receive awarded transformation grants and withheld the funds from those schools. Such claims, in the Court's opinion, implicate concerns beyond the immediately affected parties as the Court must determine whether the DOB respondents' have the discretion and the authority, in this circumstance, to withhold funds appropriated by the Legislature.

For all of these reasons, the Court finds that petitioners have standing to bring their claims, and dismissal on that ground is denied.

Next, the Court must decide if this proceeding is time-barred. As relevant here, an Article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR § 217[1]). "To that end, 'an administrative determination becomes final and binding when it definitively impacts and aggrieves the party seeking judicial review'" (*Matter of Hogg-Chapman v. New York State Teachers' Retirement Sys.*, 83 A.D.3d 1261, 1262 [3d Dep't 2011], quoting *Matter of Scott v. City of Albany*, 1 A.D.3d 738, 739

[3d Dep't 2009]; *see Matter of Properties of New York, Inc. v. Planning Bd. of Town of Stuyvesant*, 35 A.D.3d 941, 942 [3d Dep't 2006]). A final and binding determination "contemplates that the administrative agency has reached a definitive position, there will be no further change of that position and the petitioner has no further opportunity to avoid injury other than by complying with the agency's demands" (*Matter of Delta Kappa Epsilon (DKE) Alumni Corp. v Colgate Univ.*, 38 A.D.3d 1041, 1042 [3d Dep't 2007]; *see Matter of Adams v. Carrion*, 85 A.D.3d 1517, 1518-1519 [3d Dep't 2011]).

The DOB respondents argue that the four-month limitations period began to run, at the latest, on April 21, 2016 when the DOB made public in a statement to the press that the removed schools were ineligible for transformation grant funds for the 2016-2017 school year and that making the transformation grant funds available to those removed would be contrary to law. According to the DOB respondents, petitioners failure to commence this proceeding within four months of that date, or on or before August 21, 2016, subjects this proceeding to dismissal. The Court disagrees.

The record establishes that at the time of the DOB's public statement, the removed schools had been advised by NYSED that transformation grant funding would remain available to them despite their removal from the "persistently failing" schools list. Following the press release containing the DOB's statement, NYSED wrote to those schools removed from the "persistently failing" schools list, indicating that a decision as to whether the schools would have access to unexpended year one transformation grant funds during year two was still pending approval by the DOB, and that NYSED would inform those schools of the DOB's decision as soon as it is notified. Hearing nothing further from NYSED, petitioners' counsel wrote directly to Director Mujica, asking whether the DOB would release funding under the transformation grant appropriation to the removed schools for the 2016-2017 school year. When no response was forthcoming, the petitioners commenced this proceeding.

Given the conflicting positions of NYSED and the DOB, the communication from NYSED to the removed schools after the DOB's public statement, and the lack of a response from Director Mujica to petitioners' counsel's July 28, 2016 letter, the Court declines to find that the statute of limitations began to run at the time of the DOB's publication. As the party seeking to assert the statute of limitations defense, the DOB respondents had the burden of establishing that the petitioners were provided notice of the agency's determination, and thus were "aggrieved" by it, more than four months before they commenced this proceeding (*see Matter of Romeo v. Long Island R.R. Co.*, 136 A.D.3d 926, 927 [2d Dep't 2016]; *Matter of Bill's Towing Serv., Inc. v. County of Nassau*, 83 A.D.3d 698, 699 [2d Dep't 2011]; *Berkshire Nursing Ctr., Inc. v. Novello*, 13 A.D.3d 327, 328 [2d Dep't 2004]). In this regard, the Court of Appeals has held that "for the purposes of the commencement of the statutory period, the petitioner cannot be said to be aggrieved by the mere issuance of a determination when the agency itself has created an ambiguity as to whether or not the determination was intended to be final," and stated that "[a] similar principal should apply when the petitioner has received no notice, ambiguous or otherwise, of the determination by which he [or she] is said to be aggrieved" (*Matter of Biondo v. New York State Bd. of Parole*, 60 N.Y.2d 832, 834 [1983]).

Assuming the DOB reached a definitive position on April 21, 2016, the DOB respondents have not demonstrated, to this Court's satisfaction, that the petitioners were notified of its position on that date, or on any date prior, such that they were "aggrieved" for statute of limitations purposes (*see Matter of Village of Westbury v. Dep't of Transp. of State of New York*, 75 N.Y.2d 62, 72 [1989]; *Matter of Biondo v. New York State Bd. of Parole*, 60 N.Y.2d at 834; *Matter of Martin v Ronan*, 44 N.Y.2d 374, 379-381 [1978]). The DOB and NYSED respondents admitted, at oral argument, that they did not directly notify the affected schools that transformation grant funding would be withheld from them for the 2016-2017 school year. Furthermore, there is nothing in the

record suggesting that these schools received any notification, written or otherwise, from the DOB or NYSED advising them that they would not be receiving transformation grant funding in 2016-2017.

That petitioners' counsel may have objected to placing the removed schools back into receivership and onto the "persistently failing" schools list during the State's 2016-2017 budget negotiations or that petitioners' counsel's March 31, 2016 memorandum to the Governor may have contained "evidence . . . that a determination had been made prior to that date to remove the schools at issue from the '[p]ersistently [f]ailing' schools list" tends to show only that the affected schools were aware of their removal or impending removal from the "persistently failing" schools list prior to the DOB's public statement, not that they were aware that the consequence of their removal was that the DOB would withhold awarded transformation grant funds from them. Indeed, the conflicting positions of NYSED and the DOB and NYSED's subsequent letter to the affected schools indicating that a decision from DOB on whether the transformation grant funds would be available to them for the 2016-2017 school year was pending prompted the removed schools to seek clarification from Director Mujica as to whether the DOB would be releasing the funds for 2016-2017. To argue that the petitioners were aware of the DOB's position and, therefore, aggrieved by it on or before April 21, 2016 does not appear to be supported by the record.

Furthermore, accepting, for purposes of the argument, that removal from the "persistently failing" schools list was the point at which the affected schools became ineligible for transformation grant funding and thereby aggrieved for statute of limitations purposes, the removal did not become effective until June 30, 2016. As such, the Court is inclined to agree with petitioners that the earliest date from which the statute of limitations could be measured, for commencement purposes, is June 30, 2016.

Moreover, where, as here, an Article 78 proceeding has been brought in the nature of

mandamus to compel, the proceeding is not barred by the statute of limitations if it is "commenced within four months 'after the respondent's refusal, upon the demand of the petitioner[s] . . . to perform its duty'" (*Matter of Bottom v. Goord*, 96 N.Y.2d 870, 872 [2001], citing CPLR § 217[1]; *see Matter of Letourneau v. Town of Berne*, 56 A.D.3d 880, 881 [3d Dep't 2008]; *Matter of Heck v. Keane*, 6 A.D.3d 95, 98 [4th Dep't 2004]). By letter dated July 28, 2016, counsel for petitioners wrote to Director Mujica, requesting that he advise as to whether the DOB would release transformation grant funding to the schools no longer deemed to be "persistently failing" by NYSED for the 2016-2017 school year. The letter indicated that if Director Mujica did not respond to their request within ten days, the petitioners would deem the failure to respond as a statement from the DOB that it is withholding funding to those schools for 2016-2017. Hearing nothing from Director Mujica or the DOB, petitioners commenced this proceeding on September 2, 2016.

Since the DOB respondents' failure to directly notify the removed schools of their position regarding the schools' eligibility for transformation grant funding in year two should be resolved against them in order to reach a determination on the merits and not deny petitioners their day in court (*see Matter of Biondo v. New York State Bd. of Parole*, *supra* at 834; *Matter of Castaways Motel v. Schuyler*, 24 N.Y.2d 120, 126-127 [1968]; *Berkshire Nursing Ctr., Inc. v. Novello*, 13 A.D.3d at 328), and because the verified petition was filed within four months of the date petitioners' children's schools were removed from the "persistently failing" schools list and/or the date by which Director Mujica was to respond to petitioners' counsel's letter, the Court finds that the proceeding is timely, and dismissal on that ground is also denied.

Turning to the merits of the petition, mandamus is available to enforce a clear legal right where a governmental body or officer has failed to perform a duty enjoined by law (*see* CPLR § 7803[1]; *New York Civil Liberties Union v. State of New York*, 4 N.Y.3d 175, 183-184 [2005]; *Matter of Brusco v. Braun*, 84 N.Y.2d 674, 679 [1994]; *Matter of County of Fulton v. State of New*

York, 76 N.Y.2d 675, 678 [1990]; *Matter of Mullen v. Axelrod*, 74 N.Y.2d 580, 583 [1989]; *Klostermann v. Cuomo*, 61 N.Y.2d 525, 539 [1984]). Notably, "[t]he availability of the remedy depends 'not on the [petitioners'] substantive entitlement to prevail, but on the nature of the duty sought to be commanded – i.e., mandatory, nondiscretionary action'" (*Matter of Brusco v. Braun*, 84 N.Y.2d at 679, quoting *Matter of Hamptons Hosp. & Med. Ctr. v. Moore,* 52 N.Y.2d 88, 97 [1981]). Thus, while mandamus may be awarded to compel the performance of a ministerial act, it "does not lie to compel an act which involves an exercise of judgment or discretion" (*id.* at 679; *see New York Civil Liberties Union v. State of New York*, 4 N.Y.3d at 184; *Matter of County of Fulton v. State of New York*, 76 N.Y.2d at 678; *Matter of Mullen v. Axelrod*, 74 N.Y.2d at 583; *Klostermann v. Cuomo*, 61 N.Y.2d at 539).

With these principles in mind, the Court must decide whether the DOB respondents may be compelled to release to NYSED the transformation grant funds awarded to the schools removed from the "persistently failing" schools list as of June 30, 2016, including those attended by petitioners' children, for the 2016-2017 school year. For the reasons that follow, the Court finds that the DOB respondents can be compelled to release the transformation grant monies to NYSED because the Legislature intended that those schools designated as "persistently failing" at the time they were awarded transformation grants remain eligible to receive those funds even after being removed from the "persistently failing" schools list. The Court further finds that the DOB respondents have no discretion to withhold transformation grant funding appropriated by the Legislature from "persistently failing" schools awarded those fund, and that the DOB respondents have exceeded their authority by doing so.

"The governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature" (*People v. Finnegan,* 85 N.Y.2d 53, 58 [1995]). Since "the clearest indicator of legislative intent is the statutory text, the starting point in any case of

interpretation must always be the language itself" (*Matter of Price Chopper Operating Co., Inc. v. New York State Liquor Auth.*, 52 A.D.3d 924, 925 [3d Dep't 2008], citing *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 [1998]; *see also Matter of Kern v. New York State Dep't of Civil Serv.*, 288 A.D.2d 674, 676 [3d Dep't 2001]). Thus, "[w]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Wise v. Jennings*, 290 A.D.2d 702, 703 [3d Dep't 2002], quoting *Patrolmen's Benevolent Ass'n of City of New York v. City of New York*, 41 N.Y.2d 205, 208 [1976][internal quotations and citations omitted]). On the other hand, "where a statute does not expressly address the issue, 'the reach of the statute ultimately becomes a matter of judgment made upon review of the legislative goal'" (*Brothers v. Florence*, 95 N.Y.2d 290, 298-99 [2000], quoting *Matter of OnBank & Trust Co.*, 90 N.Y.2d 725, 730 [1997] & *Matter of Duell v. Condon,* 84 N.Y.2d 773, 783 [1995]).

The Court has reviewed the appropriation legislation and finds nothing in the language of the statutes to suggest that the Legislature intended for schools designated as "persistently failing" and awarded transformation grants to remain in "persistently failing" status in order to continue receiving awarded transformation grant monies. There is no dispute that each of the removed schools was identified as a "persistently failing" school, and therefore eligible for funding under the appropriation, when they applied for and were awarded transformation grants by NYSED. While the statute states that "[e]ligibility 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," this language, in the Court's view, can only be interpreted to mean that a school must have been in "persistently failing" status at the time the grant was awarded, not that the school must remain in such status throughout the grant period.

Had the Legislature intended to condition transformation grant eligibility upon a school's "persistently failing" designation throughout the grant period, it would have expressly said so.

Indeed, that part of the State's 2016-2017 Budget appropriating monies for "community schools grants" limits eligibility "to school districts with schools designated by the Commissioner of [E]ducation pursuant to paragraphs a or b of subdivision 1 of section 211-f of the [E]ducation [L]aw throughout the 2016-2017 school year" (L. 2016, Ch. 53 [emphasis added]). No similar language is found in the transformation grant appropriations.

Furthermore, it is apparent from the language of the statutes that funding was contemplated over a two-year period. Notably, the statute authorizes NYSED to establish "the maximum annual grant in the 2015-[20]16 and 2016-[20]17 school years" for each of the "persistently failing" schools, and states that a "portion of such grants shall be available by July 1 of each school year" (emphasis added). Additionally, there is no requirement in the statutes that schools awarded transformation grants in year one (the 2015-2016 school year), reapply for funding for year two (the 2016-2017 school year). Moreover, transformation grants were awarded pursuant to a statutorily-mandated spending plan, approved by the DOB, which was designed to support and implement a "persistently failing" school's turnaround efforts over a two-year period and contained no requirement, express or implied, that schools remain designated as "persistently failing" throughout the grant period in order to receive funding.

It is significant to the Court that when the DOB approved NYSED's spending plan, the DOB respondents did not assert the position that a school's removal from "persistent failing" status renders the school ineligible for transformation grant funding and justifies withholding that funding. Certainly, if the DOB respondents believed that funding was contingent on a school's "persistently failing" designation throughout the grant period, they should not have approved a spending plan that provided for an award of the full two-year transformation grant allocation without any qualifying language regarding the effect on funding if a school's status as "persistently failing" changed after a transformation grant was awarded.

Nevertheless, having approved NYSED's spending plan in accordance with the Budget legislation, the Court finds that the DOB respondents have no discretion to withhold transformation grant funds appropriated by the Legislature from "persistently failing" schools awarded those funds. To find otherwise would upset the balance of power existing among the three co-ordinate and coequal branches under our constitutional form of government.

"It is a fundamental principle of the organic law that each [branch of government] should be free from interference, in the discharge of its particular duties, by either of the others" (*Matter of County of Oneida v. Berle*, 49 N.Y.2d 515, 522 [1980][internal quotation marks and citations omitted]). In budgetary matters, the role of each branch of government is distinctly treated and the process detailed by the State Constitution (*see id.*, citing N.Y. Const., art. VII, §§ 2, 4, and 7). In this regard, "[a] duly enacted [budget] statute, once passed cannot be changed or varied according to the whim or caprice of any officer, board or individual [and] remains fixed until repealed or amended by the Legislature" (*Matter of County of Oneida v. Berle*, 49 N.Y.2d at 523). Therefore, "[h]owever laudable its goals, the executive branch may not override [budget] enactments which have emerged from the lawmaking process," but instead "is required to implement policy declarations of the Legislature, unless vetoed or judicially invalidated" (*id.*; *see Matter of City of New York v. New York State Div. of Budget*, 160 Misc.2d 1028, 1033 [Sup. Ct., New York County 1994]).

Here, preamble language in the chapter laws enacting the transformation grant appropriations, stating that "[n]o moneys appropriated by this chapter shall be available for payment until a certificate of approval has been issued by the director of budget" (L. 2015, ch. 53, § 1[d], as amended by L. 2015, ch. 61; L. 2016, ch. 53, § 1[d]), does not yield the interpretation the DOB respondents would place on it. Nothing in that language permits the DOB Director to substitute his judgment for that of the legislative and executive branches in enacting and passing the 2015-2016 and 2016-2017 State Budgets and withhold transformation grant funding appropriated by the Legislature for

"persistently failing" schools, based upon an interpretation of "eligibility" that is simply not supported by the clear language of the statutes. Again, had the Legislature intended "eligibility" to be contingent upon a "persistently failing" school awarded transformation grant funds remaining in "persistently failing" status throughout the grant period (i.e., 2015-2016 and 2016-2017), it would have expressly said so as it did in appropriating the "community schools grants." The absence of such language compels a finding that the DOB respondents exceeded their authority in withholding the 2016-2017 transformation grant funds from those schools removed from the "persistently failing" schools list, including the schools attended by petitioners' children, and warrants an order directing them to release those funds.

Any remaining arguments have been considered and found to be lacking in merit, or need not be reached in light of this determination.

Accordingly, it is hereby

ORDERED AND ADJUDGED, that the DOB respondents' motion to dismiss is denied for the reasons stated herein; and it is further

ORDERED AND ADJUDGED, that the petition is granted to the extent that the DOB respondents are directed to immediately release the appropriated transformation grant funds to NYSED, making those funds available to the school districts awarded transformation grants for their "persistently failing" schools.

This memorandum constitutes the Decision and Order/Judgment of the Court. The original Decision and Order/Judgment is being forwarded to the attorneys for petitioners. A copy of the Decision and Order/Judgment together with all papers in this proceeding are being forwarded to the Office of the Albany County Clerk for filing. The signing of this Decision and Order/Judgment and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry,

"persistently failing" schools, based upon an interpretation of "eligibility" that is simply not supported by the clear language of the statutes. Again, had the Legislature intended "eligibility" to be contingent upon a "persistently failing" school awarded transformation grant funds remaining in "persistently failing" status throughout the grant period (i.e., 2015-2016 and 2016-2017), it would have expressly said so as it did in appropriating the "community schools grants." The absence of such language compels a finding that the DOB respondents exceeded their authority in withholding the 2016-2017 transformation grant funds from those schools removed from the "persistently failing" schools list, including the schools attended by petitioners' children, and warrants an order directing them to release those funds.

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and notice of entry of the original Decision and Order/Judgment.

SO ORDERED AND ADJUDGED.

ENTER.

Dated: December 28, 2016
Albany, New York

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

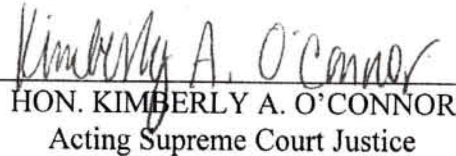
1. Order to Show Cause (McDonough, J.), dated September 2, 2016; Verified Petition, dated August 30, 2016; Affirmation of Wendy Lecker, Esq., dated August 31, 2016, with Exhibits A-M;
2. Verified Answer, with Affirmative Defenses and Objections in Point of Law of Respondents, Robert Mujica, Director, New York Division of Budget and New York State Division of Budget, dated September 29, 2016;
3. Notice of Motion of Respondents Robert Mujica, Director, New York Division of Budget and New York State Division of Budget, dated September 29, 2016; Affidavit of Robert F. Mujica, sworn to September 29, 2016; Affidavit of Joseph G. Conroy, sworn to September 29, 2016, with Exhibits A-H annexed; Affirmation of Alan P. Lebowitz, dated September 29, 2016; Memorandum of Law in Support of Respondents Robert Mujica's and New York State Division of Budget's Motion to Dismiss Based on Objections in Point of Law, dated September 29, 2016;
4. Verified Answer (MaryEllen Elia, New York State Commissioner of Education and New York State Education Department), dated September 29, 2016; Affidavit of Ira Schwartz, sworn to September 27, 2016, with Exhibits A-P annexed; NYSED Respondents' Memorandum of Law in Limited Opposition to the Petition, dated September 29, 2016;
5. Affirmation in Opposition to Respondents Mujica's and Division of Budget's Motion to Dismiss (Wendy Lecker, Esq.), dated October 3, 2016; Memorandum of Law in Opposition to Respondents Mujica's and Division of Budget's Motion to Dismiss, dated October 3, 2016; *and*
6. Reply Memorandum of Law in Further Support of Respondent Robert Mujica's and Respondent New York State Budget's Motion to Dismiss, dated October 6, 2016.

and notice of entry of the original Decision and Order/Judgment.

SO ORDERED AND ADJUDGED.

ENTER.

Dated: December 28, 2016
Albany, New York



HON. KIMBERLY A. O'CONNOR
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of an Article 78 Proceeding

NADIA CORTES, VIRGIL DANTES, ANNEMARIE HESLOP, CURTIS WITTERS, on Behalf of Themselves and Their Children,

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.

NOTICE OF APPEAL

Index No. 05102-16
RJI No. 01-16-ST8123
Hon. Kimberly A. O'Connor

PLEASE TAKE NOTICE that the Respondents, Robert Mujica, Director, New York State Division of Budget, and New York State Division of Budget (collectively, "Respondents-Appellants"), hereby appeal to the Appellate Division of the New York Supreme Court in and for the Third Department, from a Decision and Order/Judgment of the Supreme Court of the State of New York, County of Albany, dated December 28, 2016, entered in the Albany County Clerk's Office on January 5, 2017 and served by Petitioners, Nadia Cortes, Virgil Dantes, AnneMarie Heslop, and Curtis Witters, on behalf of themselves and their children (collectively, "Petitioners-Respondents"), with Notice of Entry, on January 5, 2017, attached hereto, which Decision and Order/Judgment denied Respondents-Appellants' motion to dismiss and granted Petitioners-Respondents' Article 78 Petition to the extent that the Court directed Respondents-Appellants to immediately release certain appropriated transformation grant funds to Respondent New York State Education Department.

RECEIVED
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HARRIS BEACH PLLC
ATTORNEYS AT LAW

This appeal is taken from each and every part of the December 28, 2016 Decision and Order/Judgment, as well as the whole thereof, insofar as it aggrieves Respondents-Appellants.

DATED: February 3, 2017
Albany, New York

HARRIS BEACH, PLLC

By:

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Aubrey A. Roman

From:	Aubrey A. Roman
Sent:	Friday, March 10, 2017 4:58 PM
To:	'Wendy Lecker'
Cc:	Karl J. Sleight
Subject:	Cortes v. Mujica - Index No. 5102-16

Wendy,

We are in receipt of Petitioners' motion to vacate the statutory stay or, in the alternative, expedite the appeal in the above-referenced matter. Respondents-Appellants are prepared to stipulate to an expedited briefing schedule in exchange for Petitioners' consent to adjourn the return date of the pending motion. Our proposed stipulated briefing schedule would be as follows:

1. Respondents-Appellants file their brief by Monday, April 24, 2017;
2. Petitioners-Respondents file their opposing brief by Monday May 15, 2017; and
3. Respondents-Appellants file their reply brief by Monday, May 22, 2017.

We propose that the return date of the pending motion be adjourned to April 24, 2017, which would require Respondents-Appellants to submit their opposition thereto by Friday, April 21st at 11:00 AM.

Given the complexities of the State budget process and the potential for the adopted budget to affect the parties' arguments in this case after April 1, 2017, we believe that the most efficient and prudent course of action is for the parties to postpone arguments on the merits of this matter until the State's budget is released. We believe that the proposed briefing schedule will allow the parties time to digest the enacted budget and, if need be, tailor their arguments accordingly before making any additional substantive/meritorious filings with the court.

If you are in agreement to the proposed briefing schedule, and are willing to consent to an adjournment of the pending motion's return date to April 24, 2017, we will send a letter to the court outlining the parties agreement on these issues Monday. Alternatively, if you do not consent, Respondents-Appellants intend to seek and adjournment and scheduling order from the court on Monday, March 13, 2017.

We look forward to hearing from you at your earliest convenience.

Regards,
Aubrey

Aubrey A. Roman
Attorney

HARRIS BEACH PLLC

ATTORNEYS AT LAW
677 Broadway, Suite 1101
Albany, NY 12207
518.701.2720 Direct
518.427.0235 Fax
518.427.9700 Main
Website | Bio | Add to Contacts

practiceGREEN
Save a tree. Read, don't print, emails.

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8

Aubrey A. Roman

From:	Wendy Lecker <WLecker@EdlawCenter.org>
Sent:	Monday, March 13, 2017 11:46 AM
To:	Aubrey A. Roman
Cc:	David Sciarra; Karl J. Sleight
Subject:	RE: Cortes v. Mujica - Index No. 5102-16

Dear Ms. Roman:

Thank you for your response. Funding for school districts in the FY18 budget will not affect these specific grants, for which the money has already been appropriated by the legislature and frozen by your clients.

We cannot consent to an adjournment of the motion, since an adjournment would seriously compromise our ability to obtain a decision on the motion to vacate in time for the schools our clients' children attend. As it is, we gave you almost double the time normally allotted for a motion like this one.

If your clients will consent to immediately releasing the funds pending the appeal, I am sure we can reach a mutually satisfactory briefing schedule for arguing the merits of the appeal.

Sincerely,

Wendy Lecker

Wendy Lecker
Senior Attorney
Education Law Center
60 Park Place, Suite 300
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WLecker@edlawcenter.org
www.edlawcenter.org
(203) 536-7567

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>>> "Aubrey A. Roman" <aroman@HarrisBeach.com> 3/13/2017 11:30 AM >>>

Wendy,

To answer your question, the State Budget contains complex provisions that will affect funding and programming for all school districts, including the districts at issue in this case. It is therefore possible that once passed the enacted budget could alter the arguments being made on the pending motion. As you are aware, it is unknown at this time what will be included in the enacted budget. However, given the fluid and negotiated processes involved in the development of the ultimately-enacted budget, it is

possible that the parties' arguments on the merits of the matter could also be impacted after April 1, 2017. Arguments as to the imminence of funding are premature for both parties until the State Budget is enacted, as it makes little sense to finalize arguments that could need to be changed in a matter of weeks.

With that said, and given Respondents-Appellants willingness to agree to an expedited briefing schedule, we believe both parties will benefit from adjourning the return date of the pending motion and simultaneously stipulating to a briefing schedule

Please advise at your earliest convenience whether Petitioners-Respondents are willing to consent to an adjournment of the return date to April 24, 2017 and the briefing schedule proposed below.

Regards,
Aubrey

Aubrey A. Roman
Attorney
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From: Wendy Lecker [mailto:WLecker@EdlawCenter.org]
Sent: Monday, March 13, 2017 9:41 AM
To: Aubrey A. Roman
Cc: David Sciarra; Karl J. Sleight
Subject: Re: Cortes v. Mujica - Index No. 5102-16

Dear Ms. Roman:

I don't see how the FY18 budget process would affect this motion, since the funds in question are already appropriated by the legislature and frozen by your clients. Perhaps you could enlighten me?

Thank you.

Sincerely,

Wendy Lecker

Wendy Lecker
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>>> "Aubrey A. Roman" <aroman@HarrisBeach.com> 3/10/2017 4:58 PM >>>

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3. Respondents-Appellants file their reply brief by Monday, May 22, 2017.

We propose that the return date of the pending motion be adjourned to April 24, 2017, which would require Respondents-Appellants to submit their opposition thereto by Friday, April 21st at 11:00 AM.

Given the complexities of the State budget process and the potential for the adopted budget to affect the parties' arguments in this case after April 1, 2017, we believe that the most efficient and prudent course of action is for the parties to postpone arguments on the merits of this matter until the State's budget is released. We believe that the proposed briefing schedule will allow the parties time to digest the enacted budget and, if need be, tailor their arguments accordingly before making any additional substantive/meritorious filings with the court.

If you are in agreement to the proposed briefing schedule, and are willing to consent to an adjournment of the pending motion's return date to April 24, 2017, we will send a letter to the court outlining the parties agreement on these issues Monday. Alternatively, if you do not consent, Respondents-Appellants intend to seek and adjournment and scheduling order from the court on Monday, March 13, 2017.

We look forward to hearing from you at your earliest convenience.

Regards,
Aubrey

Aubrey A. Roman
Attorney

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KARL J. SLEIGHT

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KSLEIGHT@HARRISBEACH.COM

March 13, 2017

HAND DELIVERED

Robert D. Mayberger
Clerk of the Court
State of New York Appellate Division, Third Judicial Department
P.O. Box 7288
Capitol Station
Albany, New York 12224-0288

RE: Cortes v. Mujica
Supreme Court, Albany County Index No.: 01-16-ST8123
Appellate Division Docket No.: unknown

Dear Mr. Mayberger:

We represent Respondents-Appellants Robert Mujica, Director, New York State Division of Budget, and the New York State Division of Budget (collectively, "Appellants") in the above-referenced matter. Appellants filed their Notice of Appeal, appealing the December 28, 2016 Decision and Order/Judgment of Justice Kimberly O'Connor, with this Court on February 3, 2017. Last week, Appellant's were served with Petitioners-Respondents (the "Respondents") motion seeking to vacate the statutory stay and/or expedite this appeal, which is currently returnable March 20, 2017 (the "Motion").

First and foremost, Appellants have already proposed an expedited briefing schedule to Respondents' counsel that Appellants would stipulate to. However, for the reasons outlined below, it is clear that judicial economies and the efforts of the parties involved in this action would be best served if the Motion be adjourned until at least April 24, 2017.

As this Court is aware, the State is currently undergoing its 2017-2018 fiscal year budget process, which needs to be completed by March 31, 2017 in order to enact a timely budget. The State Budget contains complex provisions that will affect funding and programming for all school districts, including the districts at issue in this case. Given the fluid and negotiated processes involved in the development of the ultimately-enacted budget, it is possible that the parties' arguments on both the Motion and the merits of the matter could be impacted after March 31, 2017.

In light of the potential for the 2017-2018 fiscal year enacted budget to affect the parties' arguments on both the Motion and the merits of this case, Appellants sent Respondents' counsel an email on Friday, March 10, 2017, requesting her consent to an adjournment of the return date of the Motion until April 24, 2017 and her stipulation to an expedited briefing schedule. A copy of this email correspondence is enclosed as Exhibit 1. As Appellants informed Respondents'

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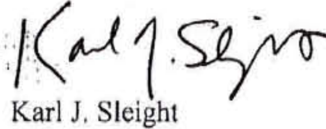
counsel, Appellants believe that the adjournment of the return date until April 24, 2017, and a briefing schedule requiring Appellants to file their brief on April 24, 2017, would allow the parties time to digest the enacted budget, and, if need be, tailor their arguments on both the Motion and merits accordingly.

Unfortunately, Respondents have refused to consent to an adjournment of the return date of the Motion or stipulate to Appellants' proposed briefing schedule. A copy of the parties' remaining correspondences regarding the above-outlined issues is enclosed as Exhibit 2. As a result, Appellants now ask the Court for the following relief: (1) an adjournment of the return date of the Motion beyond the enactment of the 2017-2018 budget, and (2) a briefing schedule that requires Appellants' brief to be filed no earlier than April 24, 2017.

Given the approaching deadline for Appellants to file their opposition to the Motion – currently Friday, March 17, 2017 – Appellants respectively request a response to this request at the Court's earliest convenience.

Please do not hesitate to contact me with any questions or concerns.

Respectfully submitted,



Karl J. Sleight

KJS:aar
Enclosures

cc: **Via electronic & overnight mail, with enclosure**
Wendy Lecker
Education Law Center
Attorneys for Petitioners-Respondents
60 Park Place
Suite 300
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WLecker@edlawcenter.org

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State of New York
Supreme Court, Appellate Division
Third Judicial Department
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Robert D. Mayberger
Clerk of the Court

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Edward J. Carey
Chief Motion Attorney

March 15, 2017

Karl J. Sleight, Esq.
Harris Beach PLLC
677 Broadway, Suite 1101
Albany, New York 12207

Via email and regular mail

Re: #524614 - **Matter of Cortes v. Mujica**

Dear Mr. Sleight:

This office is in receipt of your letter dated March 13, 2017, requesting adjournment of the pending motion in the above-referenced matter. Such motion is presently returnable before the Court on March 20, 2017. This office is also in receipt of a letter dated March 14, 2017 by Wendy Lecker in response to your request for an adjournment.

I have been directed to advise you that your request for an adjournment has been denied. Your papers in response to the pending motion should be filed and served on or before March 17, 2017.

Very truly yours,

Edward J. Carey
Chief Motion Attorney

/jlc
cc: Wendy Lecker, Esq. **(via email and regular mail)**
Attorney General Eric T. Schneiderman