

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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In the Matter of an Article 78 Proceeding

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

Index No. 05102-16

Hon. Kimberly O'Connor

Petitioners,

**VERIFIED ANSWER**

-against-

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

Respondents.

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Respondents, **MARYELLEN ELIA, New York State Commissioner of Education, and the NEW YORK STATE EDUCATION DEPARTMENT** (collectively "the NYSED respondents"), by their attorney, Alison B. Bianchi - Acting Counsel and Deputy Commissioner for Legal Affairs, through Aaron M. Baldwin, Assistant Counsel for Litigation, of Counsel, respond as follows to the Verified Petition:

1. Deny each and every allegation contained in the Petition that alleges or tends to allege that the actions of the NYSED respondents were in any way contrary to constitutional, statutory, regulatory or case law.
2. State that paragraph 1 of the Petition is a jurisdictional statement/statement of the nature of the proceeding to which no response is required.

3. Deny sufficient knowledge or information to form a basis for responding to paragraphs 2, 3, 4, 5, 7, 47, 58, and 63 of the Petition.
4. Admit in response to paragraph 6 that respondent Robert Mujica is the Director of the respondent New York State Division of Budget, affirmatively assert that all references in the petition to "Chapter 53 of the Laws of 2016" should be to "Chapter 53 of the Laws of 2015 as amended by Chapter 61 of the Laws of 2015 and further amended by Chapter 53 of the Laws of 2016," and refer the Court to the appropriate Chapters as referenced herein as the best evidence of the contents and meaning thereof.
5. Admit in response to paragraph 8 that respondent New York State Education Department oversees public education within the State and that NYSED developed the Transformation Grant application and issued guidance regarding same to eligible schools, but refer the Court to Chapter 53 of the Laws of 2015 as amended by Chapter 61 of the Laws of 2015 and further amended by Chapter 53 of the Laws of 2016 as the best evidence of the contents and meaning thereof.
6. Admit in response to paragraph 9 that respondent MaryEllen Elia is the Commissioner of the New York State Education Department, but refer the Court to Education Law §305 as the best evidence of the contents and meaning thereof.
7. In response to paragraphs 10, 11, 12, 13, and 14, refer the Court to Chapter 53 of the Laws of 2015 as amended by Chapter 61 of the Laws of 2015 and further amended by Chapter 53 of the Laws of 2016 and Education Law §211-f as the best evidence of the contents and meaning thereof.

8. Admit in response to paragraph 15 that the NYSED respondents developed an expenditure plan, but refer the Court to Chapter 53 of the Laws of 2015 as amended by Chapter 61 of the Laws of 2015 and further amended by Chapter 53 of the Laws of 2016 and the cited Exhibit as the best evidence of the contents and meaning thereof.
9. In response to paragraphs 16, 17, 18, 20, 21, 22, 24, 25, 26, 27, 28, 29, 31, 32, 33, 35, 36, 37, 40, 41, 50, 51, and 52, refer the Court to the cited Exhibit as the best evidence of the contents and meaning thereof.
10. Admit in response to paragraphs 19, 49 and 59 that the expenditure plan developed by the NYSED respondents was approved by respondents Robert Mujica and/or Division of Budget on or about October 15, 2015, but refer the Court to the cited Exhibit and the referenced laws as the best evidence of the contents and meaning thereof.
11. In response to paragraph 23, refer the Court to Chapter 53 of the Laws of 2015 as amended by Chapter 61 of the Laws of 2015 and further amended by Chapter 53 of the Laws of 2016 and the cited Exhibits as the best evidence of the contents and meaning thereof.
12. Admit in response to paragraph 28 that Roosevelt High School's transformation grant application was approved by the NYSED respondents.
13. Admit in response to paragraphs 30, 34, 38, 42, 44 and 56 that in or about February 2016, Ira Schwartz, NYSED's Assistant Commissioner for the Office of Accountability issued a letter removing Roosevelt High School, JHS 80, Hackett Middle School and other schools from the list of schools designated as Priority,

but affirmatively assert that, in accordance with §100.19(d)(6)(i) of the Commissioner's regulations (8 NYCRR), such schools were not removed from the persistently struggling list until June 30, 2016.

14. Admit in response to paragraph 39, that the NYSED respondents sent additional guidance to schools in or around early 2016, but refer the Court to the cited Exhibit as the best evidence of the contents and meaning thereof.
15. In response to paragraph 43, refer the Court to the referenced newspaper article as the best evidence of the contents and meaning thereof, but admit that, upon information and belief, on or about March 29, 2016, the transformation grant fund account of NYSED in the State Financial System was "reserved" or frozen by respondent Division of Budget.
16. Admit in response to paragraph 45, that the NYSED respondents issued a memo on or about June 9, 2016, but otherwise refer the Court to the cited Exhibit as the best evidence of the contents and meaning thereof.
17. Deny sufficient knowledge or information to form a basis for responding to paragraph 46 of the Petition and refer the Court to the cited Exhibit as the best evidence of the contents and meaning thereof.
18. In response to paragraph 48, the NYSED respondents repeat and reiterate their responses to paragraphs 1-46 of the Petition as set forth herein.
19. Admit in response to paragraphs 53, 54 and 55 that Roosevelt High School, Hackett Middle School and JHS 80 were eligible to apply for and did apply for transformation grants, which grant applications were approved by the NYSED respondents, and further admit that these schools received some

reimbursements and distributions of year-one funds before the grant account was frozen by the DOB respondents.

20. Admit the allegations in paragraph 57.

21. In response to paragraphs 60, 61 and subparagraph (a) of the "Wherefore" clause, the NYSED respondents do not oppose the allegations in and relief sought in these paragraphs to the extent petitioners seek an order directing the Division of Budget and its Director to release to NYSED the remaining transformation grant funds.

22. In response to paragraph 62 and subparagraph (b) of the Wherefore clause, deny the allegations and oppose the relief sought to the extent that petitioners seek an order directing NYSED respondents to "immediately release" remaining funds to the schools at issue; affirmatively assert that if and when the funds are released to the NYSED respondents by the DOB respondents, NYSED will review and approve expenditures and reimbursements in accordance with each district's plan/budget for the school and the applicable laws.

23. Deny each and every allegation in the Petition not specifically responded to above.

#### **Objections in Point of Law**

24. The Petition fails to state a cause of action in the nature of mandamus to compel against the NYSED respondents and to the extent that it seeks an order directing NYSED respondents to "immediately release" remaining funds to the schools at issue if and when such funds are released by the Division of Budget respondents to the NYSED respondents.

### **NYSED Respondents' Return and Exhibits**

25. The NYSED respondents respectfully submit the Affidavit of Ira Schwartz, sworn to the 27<sup>th</sup> day of September, and the following Exhibits in support of this Answer:

Exhibit A – May 15, 2015 Board of Regents – P-12 Education Committee item

Exhibit B – June 15, 2015 Board of Regents – P-12 Education Committee item

Exhibit C – Sept. 8, 2015 Board of Regents – P-12 Education Committee item

Exhibit D – Oct. 22, 2015 Board of Regents – P-12 Education Committee item

Exhibit E – Dec. 7, 2015 Board of Regents – P-12 Education Committee item

Exhibit F – Excerpt of Ch. 53 of the Laws of 2015, as amended by  
Ch. 61 of the Laws of 2015

Exhibit G – Press Release dated July 16, 2015

Exhibit H – Persistently Struggling Schools/Transformation Grant Expenditure  
Plan for the period July 1, 2015 – March 31, 2017

Exhibit I - U.S. Department of Education “Dear Colleague” letter  
dated December 18, 2015

Exhibit J – email correspondence to USDOE

Exhibit K – February 26, 2016 press release

Exhibit L – Priority Schools list effective February 2016

Exhibit M – letters dated July 1, 2016 to three school districts

Exhibit N – Excerpt of Ch. 53 of the Laws of 2016

Exhibit O – Excerpt of U.S. Department of Education: Guidance on School  
Improvement Grants Under Section 1003(g) of the Elementary and  
Secondary Education Act of 1965 (March 2015)

Exhibit P – September 12, 2016 press release

**WHEREFORE**, respondents MARYELLEN ELIA, New York State Commissioner of Education, and the NEW YORK STATE EDUCATION DEPARTMENT do not oppose the relief requested in the Petition, except to respectfully request that the Court: deny the Petition to the extent that it seeks an order directing NYSED respondents to “immediately release” the funds if and when such funds are released by the Division of Budge respondents to the NYSED respondents, and; grant such other and further relief as may be right and just.

Dated: September 29, 2106  
Albany, New York

Alison B. Bianchi  
Acting Counsel and Deputy  
Commissioner for Legal Affairs  
New York State Education Department  
Attorney for Respondents  
NYSED and Commissioner  
MaryEllen Elia



By: Aaron M. Baldwin,  
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**TO: (Via Email and Overnight Delivery)**

Wendy Lecker, Esq.  
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Albany, NY 12207

## VERIFICATION

Aaron M. Baldwin, being a duly licensed attorney in the State of New York and an Assistant Counsel to respondent NYS Education Department, affirms the following under penalties of perjury pursuant to CPLR §2106:

I have been assigned to defend the within proceeding and I am acquainted therewith, and I have personally examined the exhibits annexed to the foregoing Answer and the records of my employers, respondents Commissioner Elia and the NYS Education Department, provided herein.

I have read the foregoing Answer. The same is true to my knowledge, except as to those matters alleged on information and belief and, as to those matters, I believe them to be true.

This verification is made by me pursuant to CPLR §3020(d)(2) because the NYSED respondents are an agency and officer of the State and I am acquainted with the facts of this proceeding.



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Aaron M Baldwin  
Albany, NY  
September 29, 2016.



AFFIRMATION OF SERVICE

Aaron M. Baldwin, an attorney admitted to practice in the Courts of the State of New York and an Assistant Counsel for the New York State Education Department, of counsel in this matter to Alison B. Bianchi, Acting Counsel and Deputy Commissioner for Legal Affairs, attorney for the NYSED respondents, affirms the following under penalty of perjury pursuant to CPLR 2106:

On September 29, 2016, I served the annexed Answer, Affidavit of Ira Schwartz with Exhibits, and Memorandum of Law upon the following individuals, by email and by overnight delivery via the United Parcel Service to the following addresses designated for such purposes:

Wendy Lecker, Esq. (Counsel for Petitioners)  
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Karl J. Sleight, Esq. (Counsel for DOB Respondents)  
ksleight@HarrisBeach.com  
HARRIS BEACH PLLC  
677 Broadway, Suite 1101  
Albany, NY 12207

Dated: Albany, New York  
September 29, 2016

  
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Aaron M. Baldwin