

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

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.

61. DOB denies the allegations contained in Paragraph 61 of the Petition and denies that Petitioners are entitled to any relief.

62. DOB denies the allegations contained in Paragraph 62 of the Petition and denies that Petitioners are entitled to any relief.

63. DOB denies the allegations contained in Paragraph 63 of the Petition and denies that Petitioners are entitled to any relief.

64. DOB further denies each and every request for relief in Petitioners' "Wherefore Clause" and further denies that Petitioner is entitled to any relief based upon the allegations in the Verified Petition.

**AFFIRMATIVE DEFENSES AND OBJECTIONS IN POINT
OF LAW IN RESPONSE TO THE VERIFIED PETITION**

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

65. The Petition should be dismissed in its entirety because it fails to state a claim or cause of action upon which relief may be granted under CPLR Article 78 or as a matter of law.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

66. The Petition should be dismissed in its entirety because Petitioners are attempting to compel DOB to perform an act that is not purely ministerial and are asking for relief that they do not have a clear legal right to. Accordingly, Petitioners claim is beyond the reach of a proceeding for relief in the nature of mandamus and must be dismissed.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

67. The Petition should be dismissed in its entirety as barred by the statute of limitations because Petitioners failed to timely commence this action after a determination was

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.

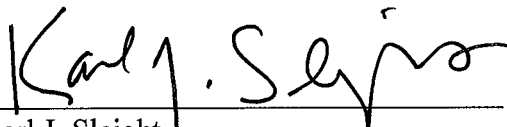
WHEREFORE, Respondents, Robert Mujica, Director, New York State Division of Budget and New York State Division of Budget, respectfully demand a judgment dismissing the Petition in its entirety together with such other and further relief as this Court deems just and proper.

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
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


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

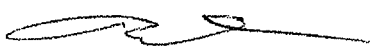
STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

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
#02PR8319350
Commission Expires 2/17/2019