

SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of

TAMARA TUCKER and MELANIE KOTLER,
individually, and on behalf of all parents and guardians
of New York City public school students, and
PAUL TRUST and SARAH BROOKS, individually, and
on behalf of all similarly situated New York City public
school teachers,

Index No. 155933/2022
IAS Part 11
(Frank, J.)

Petitioners,

-against-

THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF EDUCATION, and the
CHANCELLOR OF THE NEW YORK CITY
DEPARTMENT OF EDUCATION, David C. Banks,
In his official capacity,

Respondents,

For an Order, Pursuant to Section 6301 and Article 78
of the CPLR and Sections 2590-g and 2590-q
of the New York Education Law, Annulling the
Adoption of the New York City FY 2023 Budget and
the New York City Department of Education
FY 2023 Education Budget.

**AFFIDAVIT IN
OPPOSITION TO
MOTION FOR
INTERIM RELIEF**

-----X
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BENJAMIN SCHANBACK, under penalty of perjury, declares that the following is
true and correct:

1. I am the Interim Acting Chief Financial Officer of the New York City Department
of Education (“DOE”). I have served in this role since June 27, 2022. Previously, I was
Managing Director in the Office of the Chief Financial Officer.

2. In both my prior and current roles, I am deeply involved in the development and implementation of budgets at all levels of DOE, from individual schools up through citywide operations of DOE Central and the Chancellor's office.

3. I also have worked closely on every fiscal year budget for DOE since FY 2015.

4. As such, I am familiar with both NYC and DOE's budget processes, and the facts and circumstances set forth below.

5. I submit this affidavit in support of Respondents' application to vacate the preliminary injunction issued by the Court on July 22, 2022 (the "Order"), which enjoins Respondents from implementing the budget approved by the City Council for DOE for the 2022-23 school year, and requires Respondents to spend at levels approved for the 2021-22 school year.

CURRENT STATUS QUO/IMPLICATIONS OF TRO FOR DOE OPERATIONS

6. On July 23, 2022, the Court issued an Order enjoining Respondents (a) "from any further implementation of the funding cuts contained in the adopted City FY23 Budget, which approved the DOE FY 23 education budget for the 2022-2023 school year," and (b) "from spending at levels other than as required by the prior year DOE FY 22 education budget."

7. The sweeping nature of this injunction fails to account for the manner in which DOE's approved budget funds are allocated and spent. This is largely because, while the budget approved by City Council describes certain spending levels, it does not set forth any methodology by which the approved funds may be spent, except as explicitly laid out in the budget structures.

8. As a result, the Order has the potential to create havoc and confusion for the day-to-day operations and spending decisions of the DOE necessary for it to properly prepare for the

2022-23 school year. Moreover, the Order has the potential to hinder DOE's efforts to create or fund certain programs, because the funds necessary for such programs are not authorized by Fiscal Year 2022 (i.e. last year's) budget.

9. The immediate harm caused by the Order is exacerbated by its uncertain duration: it is set to expire by its terms on August 4, 2022 and, even if it is continued until a determination of the underlying Petition, there is no certainty it will continue thereafter as Respondents may prevail. And even if the Petition were granted, there is no assurance that DOE's funding will be increased to last year's levels, as the Petition does not seek this relief, but rather seeks a revote on the DOE's FY 2023 budget by the City Council, which may determine to continue the amounts it already has approved.

10. Significantly, approved budgets do not *require* agencies to expend the monies Council has approved for appropriation to them; rather, these budgets set maximum dollar amounts beyond which agencies must seek adjustments as needed. Changes to an agency's budget have significant consequences.

11. The potential need to re-distribute funds and revise spending decisions already made (but not yet implemented) in order to comply with the Order, only to have such decisions later negated by the outcome of this proceeding, creates further confusion and uncertainty.

12. Schools have already received their budget allocations and many budget processes/transaction are taking place daily; the TRO offers no guidance as to which of those would need to stop.

13. Under the school-based budgeting process, many of these transactions are entered into directly by schools and field offices, including:

- a. Principals and central offices are setting their budgets;

- b. Superintendents are reviewing and approving school budgets;
 - c. New teachers are being hired based on available funding for FY 2023;
 - d. Contracts are being registered, and goods/services are being ordered based on available funding for FY 2023;
 - e. Summer programming is underway; payrolls and spending for this programming will continue through August 12.
14. New funding is being allocated to schools based on available funding for FY 2023. New funding includes “budget appeals” funding – wherein schools apply for additional funding for mandated instructional needs which they are unable to meet within their current budgets – funding for demonstrated register growth, and funding for new programming.
15. Schools are already well down the road of budgeting for next year with staffing, student assignments and scheduling decisions. In fact, the initial deadline for schools to schedule their budgets was June 30, 2022. Freezing or altering budgets now could create a domino effect with schools attempting to reverse mutually agreed-to transfers and hires of teachers and other school staff. For example, if P.S. 1, which has a higher budget hired a teacher through a mutually agreed-to transfer from P.S. 2 (not necessarily an excess teacher) and now cannot hire that person, or is uncertain whether it can do so, then the teacher would go back to P.S. 2, and that school may need to renege on a hiring commitment to another teacher who was transferred or newly hired. The ripple effect of reversing one hiring decision could impact multiple staff and schools. With over 75,000 teachers and 23,000 paraprofessionals, DOE has a dynamic staffing situation that is

impacted not just by budgets, but also by staff attrition, staff transfers, and staff going on and returning from leave.

16. Interrupting these budget processes/transactions would threaten schools' ability to successfully open schools this September:

- a. Schools which cannot continue to set and modify their budgets – including making programming decisions based on those budgets – cannot effectively plan for the upcoming year, including making decisions on staffing, per session (e.g., after school activities), per diem (e.g., substitute planning), and supply and equipment purchasing to support instructional programming.
- b. Superintendents and the district-based school support structures in NYC's 45 school districts cannot provide meaningful oversight of principal planning for the upcoming year.
- c. Critical staffing decisions cannot be made and teachers cannot be hired through transfers or new vacancies.
- d. Contracts cannot be registered and purchases cannot be entered for delivery by or during SY 2022-23 in a timely fashion.
- e. New funding cannot be allocated to schools to support these and other needs, as is standard practice throughout the summer.

17. The DOE was planning to make allocations for certain programs, such as a new program for Identifying and Supporting Students at Risk of Dyslexia and new Career and Technical Education pilot programs, within the next two weeks in advance of school opening, but if these allocations are not made for two or more weeks, this will leave schools with little or no time for plan and schedule these allocations for the upcoming school year. The DOE was also

planning within the next two weeks to consider and grant appeal requests made by schools that need additional funding to meet the instructional needs of students. It is unclear whether, under the language of the Order, these appeals requests can be granted, since they differ from spending levels required by the SY 2021-22 DOE budget.

18. Moreover, if school budgets must be changed, even temporarily to their SY 2021-22 levels by this Order:

- a. Hundreds of schools will lose funding compared to last year. As school budgets are primarily driven by enrollment, many schools actually saw projected increases of enrollment in SY 2022-23 compared to SY 2021-22, and millions of dollars were allocated to those schools to support register growth.
- b. Schools which lost register, and therefore funding, compared to last year may attempt to retain teachers or hire new staff – only to find that, if the Court rules in favor of respondents, that those transactions must be reversed, resulting in last-minute changes to staffing and programming only weeks before school starts, a tremendous burden on Principals.
- c. Schools will be inequitably funded, as a school's budget will not be directly tied to the projected enrollment and needs of the school, but rather the enrollment and needs of prior years regardless of changed circumstances for the upcoming school year. Even if the number of students in a school remains the same, there are always shifts in mandates and student programming (i.e., course) needs. This has significant implications, as the population of students with disabilities, multilingual learners, and students in temporary housing also shifts year over

year. For schools that have increased enrollment in any of these populations, the DOE would want to provide increased funding to meet students' needs.

19. At a basic, conceptual level, freezing school budgets and consequent staffing could have a detrimental effect to schools. For example, such a freeze could prevent a school from hiring enough staff for its incoming population of students with disabilities. If this scenario were multiplied by all of the DOE's public schools, the scale of the chaos and confusion the Order will cause, if it remains in effect, becomes clear.

ABOUT NYC BUDGET PROCESS

20. I have reviewed the description of the budget process set forth in the accompanying memorandum of law. That description accurately summarizes the process and DOE's role.

21. It bears emphasizing that development of each annual fiscal year budget is an almost continuous, year-round process. City budgets are based on a five-year financial plan. The Mayor must propose a balanced budget for the upcoming fiscal year as part of the Preliminary Budget in January. That budget is then updated in the Executive Budget and finalized in the Adopted Budget. After the Adopted Budget, the Mayor's Office proposes amendments in November, January, April, and again a final one as part of the subsequent year's Adopted Budget.

22. Pursuant to N.Y. Education Law- 2590-r, DOE (and, in particular, the Chancellor, or his designees) is required to engage in a months-long process of engagement with stakeholders at every level of DOE, including school principals, superintendents, Community Education Councils (which are composed of parents and community members selected from among the families and community members engaged with local schools).

23. DOE, like other agencies, advises City Hall of its anticipated budget needs for the upcoming fiscal year, but it is City Hall that decides what funding levels to propose in the Mayor's executive budget. The Chancellor does not have a veto over this decision, and neither state education law nor the NYC Charter requires the Mayor to defer to or even consider DOE's budget requests.

24. Significant percentages of DOE's budget are:

- i. Funded by the state and federal government, based on decisions over which New York City has no or limited direct authority;
- ii. Dedicated to mandatory expenditures such as debt service and pension costs, which are centrally paid by the Office of Management and Budget, and nondiscretionary expenses such as charter school tuition and special education settlements.

25. Mayor Adams' Preliminary FY 2023 Budget, announced in February 2022, proposed to reduce DOE's city tax levy budget by approximately \$557 million, including \$375 million in systemwide savings from enrollment changes.

26. Following that announcement, DOE sent an e-mail on February 18, 2022 to all principals noting the Mayor's preliminary budget and how schools would be funded for the upcoming school year, and explaining that initial budget and Fair Student Funding allocations in FY 2023 will reflect projected enrollment and all schools will be maintained at 100% Fair Student Funding. The proposed reduction was also reported in the media.

27. On or about June 5, 2022, following the release of the Executive Budget on April 26, 2022, principals and school communities received their FY 2023 initial budgets, which showed the preliminary impact of enrollment loss on their individual school budgets.

28. DOE timely posted its Estimated Budget on May 6, 2022, ensuring the statutorily required 45 days of public notice of the budget estimate would take place before PEP voted on it at the regular, calendar meeting scheduled for June 23, 2022.

29. On May 31, 2022, DOE Chancellor David Banks issued an Emergency Declaration pursuant to N.Y. Educ. Law § 2590-g(9), adopting the Estimated Budget on an interim basis. In so doing, the Chancellor explained that “Due to the timing of the release of projected funding for the city school district used to develop the Estimated Budget, there is not sufficient time to complete the public comment period and obtain Panel approval of the estimated budget before budget allocations are sent to schools and the FY23 City Budget is adopted.” Because “[d]elaying the school-based budgeting process would have a harmful effect on the operation of schools,” the Emergency Declaration was “necessary to preserve the health, safety and general welfare of the students and the school system as a whole.”

30. Pursuant to the Emergency Declaration, the Chancellor adopted the Estimated Budget for a period of 60 days or until the City Board voted on it following the forty-five-day comment period, whichever came first.

31. On June 13, 2022, City Council voted to adopt the budget for Fiscal Year 2023 (which began July 1, 2022).

32. The Fiscal Year 2023 budget for NYC is \$101.1 billion and includes Fiscal Year 2023 DOE budget of \$37.6 billion.

33. The final Fiscal Year 2023 DOE budget includes increased City and State dollars; the decrease in DOE’s bottom-line budget was primarily attributable to a reduction of federal dollars, which has been provided to DOE as a one-time infusion of pandemic-related relief over several years.

PEP Meeting

34. The Estimated Budget was a voting item on the agenda of the June 23rd meeting of the PEP.

35. Members of the public can comment on any item that will come before the PEP for a vote at a regular public meeting, as part of the statutorily required public review process (Education Law Section 2590-g(8)), in one of two ways: By submitting comments up until 24 hours before commencement of the relevant meeting or by speaking at the meeting itself.

36. DOE received a total of two comments in anticipation of the June 23, 2022 PEP meeting: one comment stated that the Chancellor circumvented the budget process by adopting on a temporary basis the Estimated Budget by issuing an Emergency Declaration on May 31, 2022; the other comment asked about the formation of a working group to discuss the Fair Student Funding formula weights and about whether there were meetings among PEP members and DOE staff concerning the budget following the May 18, 2022 PEP meeting.

37. The resolution to adopt the Chancellor’s budget estimate passed with 10 votes in favor and 4 opposed.

By reason of the foregoing, it respectfully requested that the Court vacate the preliminary injunction entered on July 22, 2022.


Benjamin Schanback

Sworn to before me this
25th day of July, 2022


Notary Public of the State of New York

ROBIN FEINGOLD SINGER
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02SI6104235
Qualified in New York County
My Commission Expires January 20, 2024