

**Dormitory Authority**  
State of New York

*Alfonso L. Carney, Jr., Chair*  
*Paul T. Williams, Jr., Executive Director*

January 20, 2010

Edward V. Grant, Jr.  
Chief Examiner, Division of Local Government and School Accountability  
Office of the State Comptroller  
The Powers Building  
16 West Main Street, Ste. 522  
Rochester, NY 14614-1608

Dear Mr. Grant:

The Dormitory Authority of the State of New York (the "Authority") received the Draft Report of Examination for the Rochester Rhinos Soccer Stadium Civic Project, Report Number 2008M-159, from the Office of the State Comptroller ("OSC") on January 13, 2009 (the "Report"), and appreciates the opportunity to respond to the findings set forth therein.<sup>1</sup>

According to the Report, OSC's audit addressed the following questions:

- 1) Did State and City agencies provide adequate due diligence when approving and monitoring the PAETEC Park project?
- 2) Were public funds intended for the construction of PAETEC Park actually used for this purpose?

The report concludes that "the Empire State Development Corporation, the Dormitory Authority, and the Rochester Urban Renewal Agency failed to perform due diligence activities to determine PAETEC Park's business-worthiness and overall feasibility." The Report further asserts that these entities "did not conduct due diligence activities designed to ensure that a proposed investment of public funds would provide taxpayers with measurable economic benefit," in part because no agency assumed "lead agency responsibility" or conducted a cost-benefit analysis to assess project viability.

The Authority strongly disagrees with the fundamental conclusion reached by OSC in connection with the audit of the Rochester Rhinos Soccer Stadium for the reasons set forth below:

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<sup>1</sup> According to the OSC publication, "Responding to an OSC Audit Report: Audit Responses and Corrective Action Plans," the Authority has 30 days from the date of receipt of the Draft Report to provide such response. Nonetheless, in response to a directive from OSC that a response be submitted within four (4) business days and as a professional courtesy to OSC, the Authority has agreed to provide a response to the Report by January 20, 2010.

- The Authority does not identify, select, or award grants under the New York Economic Development Program (“NYEDP”) or other legislative discretionary grant programs.
- Matters pertaining to economic viability, cost benefit analysis and project feasibility are the responsibility of the parties making the award pursuant to the statute authorizing the NYEDP and the MOU executed by them to implement this statute.
- The Authority exercised due diligence in administering the NYEDP grant award process and performed the tasks required to be undertaken in connection with its role as grant administrator.

As further discussed in Point III below, the Authority could support the concept of a lead administering agency for projects that have been awarded concurrent grants from different State entities and would be interested in participating in any discussions regarding the implementation of such a process.

**I. The Authority Does Not Select Grantees; Rather, it Administers Grants To Those Grantees Selected and Approved by the Legislature and the Executive.**

As an initial matter, the Scope and Objectives set forth in the Report do not accurately describe the Authority’s role as Grant Administrator. According to OSC, the audit addressed the question as to whether “State and City agencies provide[d] adequate due diligence when *approving and monitoring* the PAETEC Park project.” This objective is based on a flawed premise, as it presupposes that the Authority has the ability to exercise control over the grant award process. As indicated in the Report, the Authority administered a \$4,000,000 NYEDP grant to the Rochester Rhinos LLC at the direction of the Senate Finance Committee<sup>2</sup> (the “Grant”). The NYEDP is a discretionary, *non-competitive* capital program, and the grantees, the amount of the grant awards, and the projects upon which grant dollars are to be expended are determined by the Legislature and then receive three-way approval by the Senate, Assembly, and Division of the Budget.<sup>3</sup> Thereafter, OSC advances funds to the Authority to make payment on the NYEDP grants.

The Memorandum of Understanding among the Senate, Assembly, and Executive, dated May 3, 2005, (the “MOU”) states that “the Governor and Legislature have determined that investments in projects that encourage and foster viable commercial uses of technology, facilitate the creation and retention of jobs, increase business activity within a municipality or region of

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<sup>2</sup> See letter from the Secretary of the Senate Finance Committee dated April 12, 2006, directing the Authority to process the grant to the Rochester Rhinos Stadium, LLC, attached hereto.

<sup>3</sup> See letter from the Secretary of the Senate Finance Committee dated July 6, 2006, notifying the Authority that three way approval had been obtained and directing the the Authority to forward a Grant Disbursement Agreement to the Grantee, attached hereto.

the State, *or* enhance educational opportunity and *quality of community life will provide public benefits to the State of New York and its citizens.*"<sup>4</sup> Clearly, it was contemplated that NYEDP grants might be awarded to projects other than those that could demonstrate economic viability or commercial success.

Assessing the risks and benefits of a particular project are factors to be taken into account when the decision is made to award a grant and should have been considered prior to the decision to appropriate \$15,000,000 in the 2000-2001 New York State budget for the purpose of constructing the stadium. Indeed, on no occasion has the Assembly, the Senate, the Division of the Budget, or OSC (which must approve vouchers for payment under NYEDP) ever requested a cost benefit analysis for any NYEDP grant award. The reason no such analysis was ever requested is straightforward: No State entity has ever believed that the type of analysis described in the Report is authorized, required or was being undertaken by the Authority.

By way of comparison, the State has enacted other grant programs, such as the New York Health Care Efficiency and Affordability Law for New Yorkers (HEAL), that contemplate a competitive process among applicants in order to receive a grant, and where the Authority, together with the Department of Health, is actively involved in the selection and award process. Neither the NYEDP nor the other legislative discretionary grant programs require or authorize the Authority to undertake these types of activities relative to the award of grants.

According to the Report, it should have been evident from the outset that the Project was not economically viable, in part because 91% of the project was to be funded by the grant (see, e.g., pages 8,9, and 22) and there were "clear indications, early on, that the project was in trouble" (pages 13-14). Notably, the \$15,000,000 appropriation occurred six (6) years *prior* to the Authority's involvement in this Project, which was for the limited purpose of administering the Grant to pay for the purchase and installation of a scoreboard for the Rhinos Stadium and other targeted stadium improvements. By the time the Authority was directed to administer the Grant, the stadium had already been completed, and was actually in use by the Rochester Rhinos.<sup>5</sup>

The Report, however, largely ignores the fact that by the time the Authority was directed to administer the Grant, critical decisions had been made by other entities to fund the project. Undertaking the analyses described in the Report, such as requiring a business plan, financial oversight, and the undertaking of a cost benefit analysis, after the stadium was operational, would not serve any valid public purpose even if it had been required by the statute and the

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<sup>4</sup> See Memorandum of Understanding among Senate, Assembly, and Executive, dated May 3, 2005, (the "MOU") attached hereto, which describes how the NYEDP grants are to be awarded and approved.

<sup>5</sup> Although the Report states on page 9 that the second \$4,000,000 grant was delayed because the Authority wanted to work directly with the Owners rather than through RURA, this is not the case. Rather, RURA was not eligible to be the grantee for this grant because it did not have a direct role in the Project at that time, and would not have been able to certify, among other things, requisitions for payment. The City of Rochester is the grantee for the second \$4,000,000 grant.

MOU. In order for the analysis to be meaningful, it would need to be done prior to making the decision to award the Grant.

## **II. The Authority Exercised Due Diligence in Administering This Grant.**

The Authority's responsibilities in connection with administering legislative discretionary grant programs are determined by other State entities. As each new grant program is enacted, the Authority meets with representatives from the Division of the Budget and the Legislature. At that time, the parties discuss the type and scope of the reviews to be undertaken by the Authority and the different administrative functions involved in completing such reviews. The State of New York pays debt service on the bonds issued to finance the grants as well as for the Authority's costs to administer the grant programs. As a result, the State has to agree to reimburse the Authority for the various reviews it undertakes in connection with the grant administration process.

The reviews undertaken by the Authority include a legal review of each grant funded project to confirm, among other things, that the project may be funded with bond proceeds; that an appropriate review pursuant to the State Environmental Quality Review Act ("SEQRA") has been undertaken; that the Grantee has sufficient site control over the location where the grant-funded improvements will be undertaken and, for most programs, that sufficient committed financial resources exist to fund the capital project as described in the application. In addition, the Authority's bond counsel must conclude that the project may be funded with bond proceeds and that it complies with statutory requirements.<sup>6</sup> Each grantee must also complete a Uniform Grantee Questionnaire ("UGQ"), modeled after documents developed by OSC to determine vendor responsibility. Prior to each disbursement of Grant funds, the Grantee must certify that the provisions of the UGQ, as well as the other covenants set forth in the Grant Disbursement Agreement between the Authority and the Grantee, remain in effect.

When the first legislative discretionary grant program to be administered by the Authority (the Community Enhancement Facilities Assistance Program) was enacted, the Authority assigned a Project Manager to every grant that it administered. The Project Manager was responsible for verifying that the work undertaken with grant proceeds was completed, that the project was consistent with the SEQRA review, confirming that the cost was reasonable for the tasks undertaken, and approving each requisition prior to payment. This practice was discontinued, as it was determined to be too expensive. It is true, as the Report states, that the Authority relies on certifications from the grantee as a prerequisite to making payment on a requisition. To the extent that any irregularities are identified at any point during the grant review or desk audit, however, the Authority has the discretion to assign appropriate personnel,

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<sup>6</sup> See the Authority's letter to the Secretary of the Senate Finance Committee dated June 21, 2006 regarding this Grant (attached hereto).

such as a construction project manager, internal affairs investigator, or auditor to investigate the matter further. Accordingly, the Authority exercised due diligence in connection with administering the Grant and performed the tasks required to be undertaken in connection with its role as grant administrator.

OSC has found, however, that adequate due diligence would consist of establishing a lead agency to assess whether a project has met its goals; analysis of a business plan; verification of project funding; undertaking a cost benefit analysis; ongoing monitoring of a project's budget, and approving a project based upon consistent criteria including economic viability. As discussed in Point I, above, the Authority believes these are factors to be taken into account prior to grant award and not by the grant administrator. Again, the Report minimizes the fact that the Authority was directed to administer the Grant to provide a scoreboard and other stadium improvements *after* the stadium was constructed and *after* the Rhinos were already playing soccer there. A business plan or cost benefit analysis for the Project would have been of little use at that point.

Moreover, although the Report criticizes the Authority for its position that the scoreboard was a post-construction standalone project that was fully funded by the Grant (see, e.g. pages 6, 17, 20, and 22), it does not state from where the Authority would derive the authority to become involved, at State expense, in any other aspect of the stadium. Neither the Senate, the Division of the Budget, nor any other entity ever requested that the Authority play a role in any aspect of the Stadium's construction other than what was set forth in the application provided by the grantee to the Senate and then forwarded to the Authority for processing.

It is important to note that while OSC has raised concerns regarding methods utilized by the entities administering grants in connection with the Project, it cannot point to any standards or guidelines that have been promulgated by a control agency such as OSC or the Division of the Budget for use by grant administrators in New York in connection with legislative discretionary grant programs. Instead, OSC has audited the Authority against a disparate set of practices promulgated by non-State entities such as the United States Department of Defense and the National State Auditors Association ("NSAA").<sup>7</sup> These sources address grant programs that utilize a competitive process to award state funds to certain projects to promote economic development activity, as opposed to the administration of discretionary legislative grants.

Under the current framework, the considerations outlined by OSC in the Report are to be taken into account during the awards process by the awarding entities and not during the grant administration process. Not a single State source is referenced in the Report that would provide the Authority with any information whatsoever as to what due diligence measures would be applicable when administering legislative discretionary grant programs. To find that the Authority failed to exercise due diligence for not undertaking the analysis described in the

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<sup>7</sup> The only State entities eligible for membership in the NSAA are the Office of the State Comptroller and the New York State Department of Tax and Finance.

Report presupposes that applicable administrative guidance actually exists and that an affirmative decision was made by the Authority to ignore such process. It is one thing to suggest that such a system be implemented, and quite another to find that due diligence was not exercised by the Authority because it failed to comply with parameters that do not exist, and that no entity, including OSC, believed it to be undertaking.

**III. The Authority Could Support a Grant Administration Process That Would Utilize a Lead Administrative Agency Where Projects Have Been Awarded Concurrent Grants.**

Neither the legislation establishing the NYEDP, nor the MOU promulgated thereunder, authorizes a “lead agency” process of the type described in the Report, nor contemplates that the administering entity would undertake the analyses set forth in the Report. If it is determined that there will be a change in the framework pursuant to which grants are awarded and administered, the Authority would be supportive of any changes designed to improve the efficiency of the administrative process to the extent applicable to the Authority’s involvement. The Authority would be interested in participating in any discussions regarding such changes. In addition, the Legislature has the ability to enact grant programs that require a competitive process to be undertaken prior to grant award, as it has done for several programs, including HEAL. Such programs would set forth the factors to be considered prior to making a grant award and would more clearly describe the Authority’s role in the process.<sup>8</sup>

In this case, however, it is difficult to understand how establishing a lead agency as recommended in the Report would have led to a different result. As previously discussed, the Authority received notification from the Senate to begin processing the grant in 2006, six years *after* funds were first appropriated in the New York State budget for the construction of the stadium and *after* the Rhinos had played their first game. Given the timing involved in this case, the Empire State Development Corporation could not have coordinated with the Authority prior to 2006, since the Authority was not involved until after the stadium was constructed. Similarly, by the time the Authority was asked to administer a grant for a specific piece of capital equipment, the stadium was already operational. It is difficult to see how any sort of lead agency coordination could have taken place or would have been particularly helpful in this case.

OSC has also found that the Authority should “thoroughly review documentation submitted for reimbursement both to ensure bills are properly supported and to avoid making duplicate payments to vendors” (page 25) and that there was a potential that the Authority’s grant was funding items already paid for in a prior grant. A lead agency coordination process

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<sup>8</sup> Of course, a threshold matter to be determined would be the extent to which the considerations outlined in the Report would apply to certain grants, particularly those advanced for the purpose of “improving the quality of community life.” It would be possible, however, to more clearly set forth the factors to be considered when making such determinations, either in the legislation, or in other State guidance documents promulgated by a State control entity such as OSC.

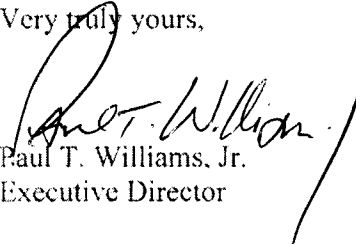
could help ensure that there are no such duplicate payments made. This aspect can be further explored in connection with the other program improvements that may be discussed at some point in the future. In any event, as indicated in the Report, no duplicative payments were processed in connection with this Grant.

With respect to the recommendations set forth on page 24 of the Report, the Authority believes that some recommendations may have value to the extent that changes are made regarding the manner in which the legislative discretionary grant programs are administered. The Authority will provide a more detailed response to the recommendations section in the Corrective Action Plan to be submitted to OSC within 90 days.

For the reasons set forth above, the Authority strongly disagrees with OSC's conclusions. It is simply inaccurate to allege that the Authority failed to exercise due diligence by failing to take steps that it is not authorized to take and that no state entity believed it to be undertaking. The Authority looks forward to working with OSC to improve the grant administration process to maximize the State's investments in its communities.

Thank you for the opportunity to respond.

Very truly yours,



Paul T. Williams, Jr.  
Executive Director

cc: Alfonso L. Carney, Jr., Chair  
Michael T. Corrigan, Deputy Executive Director  
Jeffrey M. Pohl, Esq., General Counsel  
Debra Pulenskey Drescher, Esq., Managing General Counsel  
Joel A. Brophy, Director of Internal Audit  
Karen B. Rieth, Director, Budget  
Sara Richards, Esq., Associate Counsel

NEW YORK  
STATE  
SENATE  
ALBANY, NEW YORK 12247



MARY LOUISE MALLICK  
SECRETARY TO THE  
SENATE FINANCE COMMITTEE

RECEIVED

APR 12 2006

Dormitory Authority  
State of New York

April 12, 2006

Ms. Maryanne Gridley  
Executive Director  
Dormitory Authority of NYS  
515 Broadway  
Albany, NY 12207-2964

Dear Ms. Gridley: *Maryanne*

Attached please find **one new** NYS Economic Development Program (NYSEDP) Preliminary Application for the following project:

**Rochester Rhinos Stadium, LLC - \$4,000,000**

Please begin processing this application at your earliest convenience. Thank you for your cooperation in this regard. If you have any questions, I can be reached at 455-2417.

Sincerely,

A handwritten signature in cursive script that reads "Dave".

David J. Natoli  
Assistant Secretary

Enclosures  
cc: Mary Louise Mallick w/o enclosures (SFC)

CC: Sara, U. Di. Senate, ...  
Sarah, File

NEW YORK  
STATE  
SENATE  
ALBANY, NEW YORK 12247



RECEIVED

JUL 06 2006

Dormitory Authority  
State of New York

July 6, 2006

MARY LOUISE MALLICK  
SECRETARY TO THE  
SENATE FINANCE COMMITTEE

Ms. Maryanne Gridley  
Executive Director  
Dormitory Authority of the State of New York  
515 Broadway  
Albany, New York 12207-2964

Dear Ms. Gridley:

This letter is to officially inform the Dormitory Authority that the following projects to be funded through the New York Economic Development Program (NYEDP) have been deemed approved by the Governor, the Temporary President and Majority Leader of the Senate and the Speaker of the Assembly pursuant to the Memorandum of Understanding among them and the terms of the enabling legislation (Chapter 3 of the Laws of 2004):

Rochester Rhinos Stadium, LLC	\$4,000,000
Steuben Foods, Inc. / Expansion Project	\$750,000

Please arrange to have Grant Disbursement Agreements forwarded to the grantees listed above as soon as possible. If you have any questions or require further information, please contact me or Dave Natoli of my staff at (518) 455-2417. Thank you.

Sincerely,

Mary Louise Mallick  
Secretary, Senate Finance Committee



GEORGE E. PATAKI  
GOVERNOR


STATE OF NEW YORK  
**EXECUTIVE DEPARTMENT**  
DIVISION OF THE BUDGET  
STATE CAPITOL  
ALBANY, NEW YORK 12224  
WWW.BUDGET.STATE.NY.US

JOHN F. CAPE  
DIRECTOR

**MEMORANDUM**

**TO:** The Honorable George E. Pataki, Governor  
The Honorable Joseph L. Bruno, Temporary  
President and Majority Leader of the Senate  
The Honorable Sheldon Silver, Speaker of the  
Assembly

June 23, 2006

**FROM:**  John F. Cape

**SUBJECT:** New York State Economic Development Program

Pursuant to the requirements of paragraph 3 of the Memorandum of Understanding executed between the Governor, Temporary President and Majority Leader of the Senate and the Speaker of the Assembly governing administration of the New York State Economic Development Program, please be advised that the attached project proposals have been received:

Project	Amount	Authority
Rochester Rhinos Stadium, LLC	\$4,000,000	DASNY
Steuben Foods, Inc. / Expansion Project	\$750,000	DASNY
Total	\$4,750,000	

This request will be deemed preliminarily approved on July 3, 2006, unless prior to this date either the Governor or the Speaker of the Assembly notifies the Director of the Budget that the project is disapproved including the basis for such disapproval consistent with established project criteria.

Attachments

cc: Caroline Ahl  
Mary Louise Mallick  
Dean Fuleihan  
~~Maryanne Gridley~~

**RECEIVED**

JUN 28 2006

**Dormitory Authority  
State of New York**

## MEMORANDUM OF UNDERSTANDING

THIS AGREEMENT, is entered into on \_\_\_\_\_, by and among Governor George E. Pataki, or his designee; Joseph L. Bruno, Temporary President and Majority Leader of the Senate, or his designee; and Sheldon Silver, Speaker of the Assembly, or his designee.

WHEREAS, the Governor and Legislature have determined that investments in projects that encourage and foster viable commercial uses of technology, facilitate the creation and retention of jobs, increase business activity within a municipality or region of the State, or enhance educational opportunity and quality of community life will provide public benefits to the State of New York and its citizens.

WHEREAS, the Legislature has authorized the New York State Urban Development Corporation (d/b/a Empire State Development Corporation) and/or the Dormitory Authority of the State of New York to issue bonds or notes in an aggregate principal amount not to exceed \$350 million for the New York State Economic Development Program, as established pursuant to Section 29 of Chapter 3 of the Laws of 2004.

NOW THEREFORE, in consideration of the mutual covenants contained herein, the parties hereto agree as follows:

1. No more than \$166.66 million of the \$350 million Economic Development Purpose appropriation authorized pursuant to Section 29 of Chapter 3 of the Laws of 2004 shall be allocated to and available for economic development projects outside cities with a population of one million or more designated by the Governor, including up to \$150 million for a cooperative nanotechnology initiative between the State of New

York, IBM, and Albany Nanotech; no more than \$91.67 million of the \$350 million Economic Development Purpose appropriation authorized pursuant to Section 29 of Chapter 3 of the Laws of 2004 shall be allocated to and available for economic development projects outside cities with a population of one million or more designated by the Temporary President and Majority Leader of the Senate; and no more than \$91.67 million of the \$350 million Economic Development Purpose appropriation authorized pursuant to Section 29 of Chapter 3 of the Laws of 2004 shall be allocated to and available for economic development projects outside cities with a population of one million or more designated by the Speaker of the Assembly.

2. In addition to any limitations contained within the appropriation or other provision of law, individual projects funded from such programs shall be for \$250,000 or more, unless the party that submits a project proposal pursuant to section 3 of this agreement determines that the circumstances and merit of such project warrant a waiver of such minimum threshold.
3. From time to time, projects may be proposed by the Governor, Temporary President and Majority Leader of the Senate, or the Speaker of the Assembly, or their respective designees, to be funded pursuant to the appropriation contained within Section 29 of Chapter 3 of the Laws of 2004. Such proposal shall specify: 1) a description of such project; 2) the amount of such project allocation; and, 3) the public authority which shall issue bonds to finance such project and which shall administer such funds.

Within two business days of receipt of any such project proposal(s), the Director of the Budget shall submit to each of the parties to this Memorandum of Understanding, and their designees, project proposal(s) so advanced. Such project proposal(s) shall

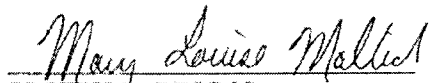
be deemed approved unless, within ten business days of receipt of any such project proposal(s), either the Governor, Temporary President and Majority Leader of the Senate, or the Speaker of the Assembly notifies the Director of the Budget that such project proposal(s) shall be disapproved.

4. In no event shall the total amount of allocations approved pursuant to this Memorandum of Understanding exceed \$350,000,000.
5. This agreement may be amended only by written agreement of all parties.

This agreement is entered into on this 3<sup>rd</sup> day of May, 2005 by:



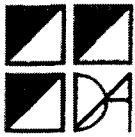
GEORGE E. PATAKI  
Governor  
By JOHN F. CAPE  
Director of the Budget



JOSEPH L. BRUNO  
President Pro Tem and  
Majority Leader of the Senate  
By MARY LOUISE MALLICK  
Secretary of Senate Finance



SHELDON SILVER  
Speaker of the Assembly  
By DEAN FULEIHAN  
Secretary of Ways and Means



**Dormitory Authority  
State of New York**

*Maryanne Gridley, Executive Director*

June 21, 2006

***VIA HAND DELIVERY***

Ms. Mary Louise Mallick  
Secretary  
Senate Finance Committee  
State Capitol - Room 423  
Albany, New York 12247

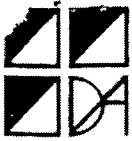
Dear Ms. Mallick:

As requested by the Senate Finance Committee, the Dormitory Authority of the State of New York has completed its initial review of the following preliminary grant application for the New York Economic Development Program (NYEDP):

✓ Rochester Rhinos Stadium, LLC	\$4,000,000
Steuben Foods, Inc.	\$ 750,000

The review of this preliminary grant application by the Authority included an examination as to whether the project could be undertaken within the statutory framework of NYEDP; a categorization in accordance with the State Environmental Quality Review Act as to the nature and type of action involved with the proposed project; and an initial review of the project for compliance with applicable federal tax laws. No adverse issues were identified in our review that would prevent the award of a grant to this applicant. The review may therefore advance to the next level.

Please note that our review of the aforementioned grant was limited to the project as described in the grant application. Any subsequent changes in the project may necessitate an additional review. Please note that sufficient cash must be available to the Authority in order to make payment to the grantee with an executed grant disbursement agreement as envisioned under NYEDP.



**Dormitory Authority**  
**State of New York**

Ms. Mary Louise Mallick  
June 21, 2006  
Page 2

We are enjoying working with the Senate to successfully implement the NYEDP.  
Thank you.

Sincerely,

A handwritten signature in black ink that reads "Maryanne Gridley".

Maryanne Gridley  
Executive Director

cc: David Natoli  
Michael T. Corrigan  
Debra Pulenskey Drescher, Esq.