

ELC EDUCATION LAW CENTER

June 4, 2015

David C. Hespe, Commissioner of Education
c/o Bureau of Controversies and Disputes
100 Riverview Plaza
P.O. Box 500
Trenton, New Jersey 08625-0500

Re: IMO Application of Board of Educ. of Borough of Freehold,
Monmouth Cty., for an Order Directing Issuance of Bonds Pursuant
to N.J.S.A. 18A:7G-12, Agency Dkt. No. 42-3/15

Dear Commissioner Hespe:

Education Law Center ("ELC") submits these comments on behalf of the Latino Action Network ("LAN") and the Latino Coalition of New Jersey ("Latino Coalition") in support of the application of the Freehold Borough Board of Education ("Freehold") for an Order directing the issuance of bonds for urgently needed, and long overdue, school facilities. LAN is a statewide grassroots organization committed to advancing the equitable inclusion and participation of diverse Latino communities in all aspects of New Jersey society. The Latino Coalition is an affiliate of LAN, based in Monmouth and Ocean Counties, dedicated to protecting the constitutional rights and promoting the fair treatment of Latinos. Both organizations have a powerful history of advocacy for Freehold's Latino residents, who comprise a significant percentage of the community and a large majority of school-age children. LAN and the Latino Coalition work closely with Freehold's residents and officials and are grateful for the opportunity to express the views of their constituents, and to promote the best interests of all Freehold's students, in these comments.

Through their work in the community, LAN and the Latino Coalition are intimately familiar with the problems confronting Freehold. This K-8 school district, surrounded by more affluent districts, with whom it shares a regional high school, enrolls high numbers of at-risk students and faces significant enrollment growth. As of May 2015, the district reports an enrollment of 1661 students, up from 1563 in 2013-14, with a population that is 70.9% Hispanic, 16.9% English Language

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Learners, 16.7% students with disabilities (excluding speech-language only), and 77.3% free and reduced lunch eligible. With growing enrollment, low community income and property wealth, Freehold, as a DFG B district, has been particularly hard hit by the State's failure to properly fund the School Funding Reform Act ("SFRA") for the past six years.

As set forth by Freehold in its petition, the municipality's voters have twice failed to authorize approximately \$33 million in bonds to fund critically needed school facilities projects: 23 new classrooms, additional gym, library, and cafeteria space, and health and safety upgrades. The additional facilities are required to meet the needs of the district's growing enrollment and its nearly 500 students who exceed the district's current facilities capacity. Based on its current enrollment, the district exceeds class size limits for 72% of its K-3 students, 85% of its 4-5 students, and 4% of its 6-8 students. Moreover, it has insufficient space to provide pull out instruction, when needed for special education students and English Language Learners, and to continue to maintain full day kindergarten classes.

Freehold's current administration has worked tirelessly to make the most of the district's limited resources and, with support of the Board of Education, is relentlessly pursuing the resources needed to provide a constitutional thorough and efficient education to all district students. For the following reasons, LAN and the Latino Coalition respectfully submit that the State must also fulfill its affirmative constitutional responsibility to ensure the district's students have access to facilities adequate to afford them the opportunity to achieve the State's rigorous academic standards.

First, ultimate responsibility for "the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State," clearly belongs to the State itself. N.J. Const., Art. 8, §4, ¶1, Although assigned by the Constitution to the Legislature, the power and responsibility to ensure that the constitutional mandate for a thorough and efficient education is met for all students has been delegated by the Legislature to the Commissioner and State Board. See, e.g., Robinson v. Cahill, 69 N.J. 449, 461 (1976). Indeed, providing a constitutionally adequate public education to its children is considered "one of the fundamental responsibilities of the State," Abbott v. Burke, 199 N.J. 140, 143 (2009).

Second, there is no doubt that adequate and safe facilities are a necessary component of a thorough and efficient education. Abbott v. Burke, 153 N.J. 480, 519 (1998). Both conditions implicating "health and safety" and "gross overcrowding" have been held to have "a direct and deleterious impact on the education available to ... at-risk children." Id. The educational infrastructure necessary to meet the requirements of a thorough and efficient education has been spelled out by the State in the Educational Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 to 48, and its implementing regulations. At its core, EFCFA establishes that students must be "educated in physical facilities that are safe, healthy, and conducive to learning." N.J.S.A. 18A:7G-2. Freehold's facilities request falls well within the bounds of EFCFA, seeking merely to alleviate overcrowding that impedes learning and health, to secure educationally necessary space, and to remediate unsafe conditions.

Third, the provision of adequate facilities to Freehold's students will help address the severe disparities in educational opportunity between the Freehold students and their peers in neighboring towns, all of whom attend Freehold Regional High School District at the secondary level. Currently, Freehold's students are at a distinct disadvantage in educational resources, with funding at only \$11,462 per-pupil in 2014-15, compared with per-pupil amounts ranging from \$13,577 to \$20,786 for the other sending districts. With adequate facilities and an opportunity to reduce class sizes to the limits prescribed by law, Freehold's students will be afforded the opportunity to improve achievement at the elementary and middle grade levels, and arrive at the regional high school better prepared to achieve at levels comparable to their peers in more affluent towns. By the time they graduate from high school, Freehold's students must be able "to compete effectively in the economy" with the graduates of Manalapan, Marlboro, Howell, Freehold Township, Farmingdale, and Colts Neck. See Abbott v. Burke, 149 N.J. 145, 166 (1997) (defining a constitutionally adequate education as one that enables public school children "to compete effectively in the economy and to contribute and to participate as citizens and members of their communities"). However, if the current overcrowding and poor facilities conditions in Freehold remain unabated, then the gap between the district's students and their more affluent peers in the secondary grades will only grow wider.

Fourth, the failure to grant the facilities relief sought by Freehold in its petition will have an impermissible disparate

impact on the largely Latino students enrolled in the district's schools. There is no doubt that adequate school facilities are an essential resource that impact the quality of a student's education. The United States Department of Education, Office for Civil Rights ("OCR") has alerted all states and school districts to the existence of research showing that "the quality and condition of the physical spaces of a school are tied to student achievement and teacher retention." OCR Dear Colleague Letter dated October 1, 2014, p. 17. New Jersey, through EFCFA, has made facilities grants available to districts that can raise their local share,¹ and has created a safety valve for communities that cannot do so by enacting N.J.S.A. 18A:7G-12 (authorizing the Commissioner to "authorize the issuance of school bonds to fund the local share" when voter approval has been denied twice and the project is necessary for the provision of a thorough and efficient education). To avoid "[c]hronic and widespread racial disparities in access to ... safe and appropriate school buildings and facilities," OCR letter, p. 2, New Jersey must ensure that school districts with large percentages of students of color are able to maintain comparable school facilities to those without. In this case, denial of Freehold's petition to utilize the safety valve, will have a disparate impact on a school district that is 70.9% Latino. Particularly in light of the *animus* described below, such a denial could justifiably trigger an investigation under Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin by programs receiving Federal financial assistance. Similarly, depriving Freehold of access to the resources necessary to provide constitutionally adequate facilities for its largely Latino student body appears to constitute a violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2.

Finally, LAN and Latino Coalition believe that the denial of bond authorization by the Freehold Borough voters was motivated, at least in part, by negative *animus* towards the increasing numbers of district students whose parents are undocumented. At a minimum, the older, white voting population of the town is clearly not representative of the younger Latino families whose children are crammed into Freehold's schools, and its vote against bond authorization violates the United States Supreme Court's ruling that the children of undocumented parents cannot be penalized in obtaining a free public

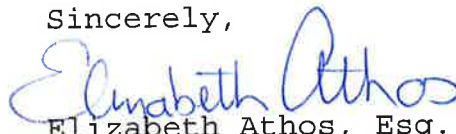
¹ Pursuant to N.J.S.A. 18A:7G-14, the State has authorized and disbursed \$3.5 billion in bonds to support facilities projects in regularly operating districts.

education. Plyler v. Doe 457 U.S. 202, 220 (1982) ("directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice"). While the Plyler Court struck down a law which barred the children of undocumented parents from receiving a free public education at all, its rationale applies equally to the deprivation of a constitutionally adequate education to such students. Influenced by the "lasting impact" of such a deprivation, the Court refused to ignore "the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." Id. at 221. The Court found no justification to deprive immigrant children of the recognizable benefits of a decent public education, reaffirming the principles of Brown v. Board of Education regarding "the importance of education to our democratic society." Plyler, 457 U.S. at 222-223, quoting Brown, 347 U.S. 483, 493 (1954). By exercising your authority under N.J.S.A. 18A:7G-12, you will be protecting the children of Freehold Borough against the short-sighted or discriminatory views of the voters and will be fulfilling your legal obligation to those students.

For all of these reasons, LAN and Latino Coalition urge you to grant the relief requested by Freehold in its petition. Should you determine that directing the issuance of facilities bonds will impose an undue hardship on the taxpayers of Freehold Borough, then we request, in the alternative, that you exercise your authority to obtain funds from the Legislature to provide 100% State support for the district's facilities projects, pursuant to N.J.S.A. 18A:7G-5(k). The unconstitutional conditions faced by the Freehold Borough students cannot be left unremedied.

Thank you for your consideration of these comments.

Sincerely,


Elizabeth Athos, Esq.
Senior Attorney

cc: John Jay Hoffman, Acting Attorney General
Mr. Joseph Howe, Board Secretary
Ronald J. Ianoale, Esq.