

ELC EDUCATION LAW CENTER

January 9, 2012

VIA EMAIL AND REGULAR MAIL

Bernie Piaia, Director
Office of School Facilities
Department of Education
P.O. Box 500
Trenton, NJ 08625-500

Re: 2011 Potential Emergent Projects Program

Dear Director Piaia:

Education Law Center (ELC) works to ensure implementation of school facilities improvements in Schools Development Authority (SDA) districts, pursuant to the Educational Facilities Construction and Financing Act (EFCFA) and the Abbott v. Burke rulings. On behalf of school children in SDA districts, we submit this letter regarding the Department of Education's (DOE or Department) implementation of the 2011 New Jersey Emergent Projects Program (PEPP). Launched in May 2011, PEPP is a joint initiative of the DOE and the SDA to identify and evaluate potential emergent conditions in those districts pursuant to N.J.A.C. 6A:26-3.16 and, after certifying the existence of an emergent condition, to advance applications for emergent projects in order to remediate such conditions on an expedited basis pursuant to N.J.A.C. 6A:26-3.3.

Pursuant to PEPP instructions issued by the DOE and SDA, the SDA districts were directed to submit lists of conditions requiring remediation through emergent projects to the DOE in June 2011. By letter from the DOE and SDA dated May 24, 2011, the districts were advised to "identify the universe of emergent projects" so the DOE, through the Office of School Facilities (Office), could "evaluate potential emergent projects in over 475 school facilities" in SDA districts statewide. It is our understanding that most, if not all, districts, submitted lists of potential emergent conditions projects to your Office for review and approval in accordance with these instructions.

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For example, the Newark district submitted a list identifying 128 potential emergent conditions projects in various school facilities throughout the district. Similarly, the Camden district submitted a list that included 158 potential emergent projects in that district's facilities.

It is also our understanding that, at some point in August or September 2011, each SDA district received from the DOE, via email, a list of potential emergent projects substantially reduced from the districts' initial submission. The only information transmitted to the districts was that DOE would conduct site visits, as required by N.J.A.C. 6A:26-3.16(e), to determine eligibility as emergent projects for those on the reduced list, termed a "short list." Neither the "short list" nor the transmittal email contained any explanation, determination or information setting forth the reasons why substantial numbers of potential emergent projects were not approved as a "school facilities project for an emergent condition" under N.J.A.C. 6A:26-3.16(e) and not eligible for further review by the Division and remediation by the SDA as an emergent project pursuant to N.J.A.C. 6A:26-3.3.

For example, the Newark district, on September 20, 2011, received, via email, a short list from DOE that included only 35 of the 128 emergent projects initially submitted by the district, and indicated that site visits would only be conducted for the short list projects. Similarly, the Camden district received a DOE short list containing only 48 of the 158 potential emergent projects submitted by the district. Neither district received any explanation, information or determination from the DOE or SDA specifying the reasons why significant numbers of projects were removed from further consideration.

The absence of any written determination with specific reasons for eliminating potential emergent projects from further review appears to directly conflict with the requirements of N.J.A.C. 6A:26-3.16(d). Under this regulation, your Office is required to "approve a school facilities project for an emergent condition" if, after an on-site inspection, the county superintendent certifies "that an emergent condition exists." It is clear with respect to those potential emergent projects submitted by SDA districts through PEPP, and then removed from consideration through the distribution of "short lists," that the DOE did not even conduct site visits, let alone provide a written determination or explanation of reasons, before eliminating a significant number of potential emergent projects from review and final consideration.

Moreover, it is our understanding that, even with regard to those potential projects included on the "short lists," the DOE has yet to certify that "an emergent condition exists," N.J.A.C. 6A:26-3.16(d)(1), and, upon approval, conducted the requisite review, pursuant to N.J.A.C. 6A:26-3-3(a) through (o), "on an expedited basis." N.J.A.C. 6A:26-3.16(d)(2). Not only does this regulation require the certification of an emergent condition be completed on an "expedited basis," but also, under N.J.A.C. 6A:26-3.1(d) and (e), the DOE must make a final determination, including preliminary eligible costs, within 90 days, for transmittal to the SDA. These expedited timeframes are crucial given that these projects relate to potential imminent hazards to the health and safety of students, teachers and other staff.

Accordingly, we request that you provide a detailed response to the above described concerns related to implementation of the PEPP program, including the standards or criteria used to eliminate potential emergent condition projects from the initial lists submitted by SDA districts, and any information related to the preparation and distribution of the reduced or "short list" of potential projects. Further, we request that you explain why the Department has failed, to date, to issue any determinations, including certifications of emergent conditions, on those projects on the DOE-short list, along with a timetable for review and transmittal to the SDA.

As you know, the EFCFA and the Abbott rulings require the DOE and SDA to address all facilities needs in SDA districts, including emergent repairs in existing buildings. Because this matter involves conditions that, if not promptly remediated, directly impact the health and safety of thousands of students, teachers and staff in SDA districts, we request that you provide a response within ten (10) days of receipt of this letter.

Please do not hesitate to contact me to discuss this matter with you further. I look forward to your response.

Sincerely,



David G. Sciarra
Executive Director

Cc: Acting Commissioner Christopher Cerf
Marc Larkins, CEO, SDA
Deputy Attorney General Michael Walters