

ELC EDUCATION LAW CENTER

January 17, 2012

Senator M. Teresa Ruiz, Chair
Senate Education Committee
166 Bloomfield Avenue
Newark, NJ 07104

Assemblyman Patrick J. Deignan, Chair
Assembly Education Committee
908 Oak Tree Avenue, Unit P
South Plainfield, NJ 07080

Re: Emergent Health and Safety Repairs in SDA Districts

Dear Senator Ruiz and Assemblyman Diegnan:

Education Law Center (ELC), in our capacity as counsel for the schoolchildren in Abbott v. Burke, has the responsibility to ensure the effective and timely completion of school facilities projects in Schools Development Authority (SDA) districts consistent with the Abbott rulings and the Education Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 et seq. On behalf of these children, I write to bring to your immediate attention the failure of the Department of Education (DOE) and SDA to properly and promptly evaluate and undertake hundreds of emergent repair projects requested by SDA districts. This inaction threatens the health, safety and well-being of thousands of students, teachers and staff in existing school buildings across the state.

On January 9, 2012, ELC sent a letter to the Director of the DOE Office of School Facilities raising serious concerns with the implementation of the Potential Emergent Projects Program (PEPP), a May 2011 joint initiative of the DOE and SDA to identify and evaluate health, safety and other hazardous conditions in SDA school buildings in need of emergent repair. Specifically, the letter raised the lack of action by DOE, on an expedited basis, to review and make determinations on hundreds of potential emergent conditions identified by SDA districts in June 2011, and the failure of DOE and SDA to take prompt action to undertake necessary repair projects, in accordance with the Abbott rulings, EFCFA and DOE implementing regulations. A copy of the January 9 letter is attached.

In response to this letter, SDA spokesperson Kristen MacLean released a statement about the current status of the PEPP initiative. Ms. MacLean indicates that SDA districts had identified over 700 conditions for consideration as emergent projects and that 400 of those potential projects have been preliminarily identified for rejection by DOE as not meeting regulatory criteria. Further, Ms. MacLean states that the remaining 300 potential projects involve over 190 different schools in SDA districts; the DOE has completed required site visits for each project; the results of the site visits are currently under review; the DOE and SDA are developing a strategy for advancing those emergent conditions that require attention; and the cost of the 300 emergent projects far exceed \$100 million in available funding.

This statement represents the first information about the PEPP initiative made public by either the DOE or SDA. More importantly, the statement raises substantial and grave issues regarding the conduct of these agencies in fulfilling their legal obligation to address school facilities needs in SDA districts. Among the most significant of these are:

- 1) The DOE failure to notify SDA districts of the 400 potential emergent projects that have been rejected, as required by DOE regulation;
- 2) The DOE failure to notify SDA districts of the 300 potential emergent projects that have been approved for repair, as required by DOE regulation;
- 3) The DOE failure to provide SDA districts with the preliminary eligible costs of the approved emergent projects, as required by DOE regulation;
- 4) The SDA failure to notify SDA districts that approved emergent projects have been transmitted to SDA for construction, including a schedule for undertaking and completing the repair project;
- 5) The SDA failure to issue construction bids, execute contracts, or proceed to construction and completion, on new emergent projects in SDA districts since January 2010, and since the PEPP initiative was launched in June 2011;
- 6) The failure of DOE and SDA to provide any information to the SDA districts, along with ELC and the public, about the

status of the PEPP initiative program since the initiative was launched in June 2011; and

7) The SDA's assertion that the cost of the 300 emergent projects exceeds \$100 million in "available" funding when the SDA has close to \$4 billion in unused bond financing for school construction projects, as expressly authorized by the Legislature in 2008.

These and other concerns require an immediate, thorough and complete investigation, especially given the imminent threat to the health and safety of thousands of children, teachers and other staff using SDA school buildings where these emergent conditions exist every school day.

Accordingly, we request that your Committees promptly schedule a oversight hearings to investigate this urgent matter. We further request that the Acting Commissioner of Education, the CEO of the SDA, the Director of the DOE Office of School Facilities, the State Treasurer, and others responsible for implementation of the school facilities program in SDA districts and the PEPP initiative, be compelled to testify at this hearing. Further, we are available to assist the Committees in preparing advance questions to be addressed by the witnesses, and to identify documents to be provided by the respective agencies.

Thank you for your consideration of this request. We will contact your offices to discuss further. I look forward to your cooperation in addressing this urgent and serious matter that affects the health, safety and well-being of children attending public schools in our SDA districts.

Sincerely,



David G. Sciarra
Executive Director

cc: Senate President Stephen Sweeney
Assembly Speaker Sheila Oliver
Education Committee Members
Acting Commissioner Christopher Cerf
SDA CEO Mark Larkins
Mr. Bernie Piaia, Director, Office of School Facilities
Michael Walters, Deputy Attorney General

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