

March 28, 2016

Charles McKenna, CEO  
Schools Development Authority  
32 E Front Street  
Trenton, NJ 08608

David Hespe, Commissioner  
Department of Education  
200 Riverview Plaza  
Trenton, NJ 08625

Re: Elevated lead levels in Newark Public Schools

Dear Mr. McKenna and Commissioner Hespe:

Education Law Center (ELC) serves as counsel to the school children in the Abbott v. Burke litigation, which includes all children attending the State-operated Newark Public Schools (NPS). On their behalf, we write to bring to your attention the urgent need for the Office of School Facilities in the Department of Education (DOE) and the Schools Development Authority (SDA) to immediately initiate a Potential Emergent Projects (PEP) program to identify and remediate the elevated levels of lead recently found in the water supply of dozens of NPS buildings.

As I am sure you are aware, the New Jersey Department of Environmental Protection recently released data showing that 12% of the water quality samples collected in NPS between 2012 and 2015 reflect lead levels above the federal action level of 15 parts per billion. And even more troubling, on March 16, NPS officials announced that elevated lead levels in the schools may date back as far as 2004. As a temporary stop gap measure, school officials have shut off the water in 30 buildings and are supplying bottled water for drinking and cooking.

Given the well-known negative health effects of ingesting lead, particularly for children, this emergency plainly constitutes a health and safety condition in NPS school facilities that must be addressed by DOE and SDA under the mandates established in Abbott v. Burke and the Education Facilities Construction and Financing Act (EFCFA), N.J.S.A. 18A:7G-1 et seq. The EFCFA regulations define an emergent school facilities project as a “capital project(s) necessitating expedited review and, if applicable, approval, in order to alleviate a condition that, if not corrected on an expedited basis, would render a building or facility so potentially injurious or hazardous that it causes an imminent peril to the health and safety of students or staff.” N.J.A.C. 6A:26-1.2. Elevated levels of lead in the drinking water of NPS school facilities clearly falls within this definition.

#### Legal Mandates

The State is required to fully fund, undertake and complete all school facilities improvements in districts classified as “SDA districts” under EFCFA to ensure those students a constitutional “thorough and efficient” education. Specifically, in the Abbott rulings, the Supreme Court found that “adequate physical facilities are an essential component of [the]

constitutional mandate [for a thorough and efficient education].” Abbott v. Burke, 149 N.J. 145, 186 (1997) (“Abbott IV”). The Court has reaffirmed that “[t]he State’s constitutional obligation under the thorough and efficient clause, N.J. Const. Art. VIII, §4, includes the provision of adequate school facilities.” Abbott v. Burke, 153 N.J. 480, 519-20 (1998) (“Abbott V”). Moreover, the Court has explicitly directed the State to fund “the complete cost” of “remediating the infrastructure and life cycle deficiencies that have been identified in the Abbott districts.” Id. at 524.

In implementing the Court’s decrees via the EFCFA, the Legislature delegated to the DOE and SDA the responsibility to take appropriate steps in a timely fashion to provide safe, healthy and educationally adequate facilities for students in SDA districts. In light of these constitutional and statutory obligations, the DOE and SDA must act expeditiously to address hazardous condition of elevated lead in NPS facilities, a condition that poses an imminent threat to the health and safety of NPS students. A failure to do so by DOE and SDA, in the face of compelling evidence of such conditions, would constitute an egregious violation of the State’s constitutional and statutory obligations and duties.

#### Action Needed and Immediate Next Steps

Given the imminent threat to health and safety posed by lead exposure, we request that the DOE and SDA immediately initiate a Potential Emergent Projects (PEP) program – following the approach taken by your agencies to identify emergent repairs in SDA district facilities statewide in 2011. This PEP program must assess all the NPS schools identified as having elevated levels of lead in drinking water, which assessment must include: the piping, plumbing and other systems in or adjacent to these schools contributing or potentially contributing to the elevated lead levels; any systems replacement or other repairs required to remediate the condition; an estimate of the SDA capital funds needed to undertake the systems replacement or repair projects; and a schedule for SDA to promptly undertake and complete the work. We would also expect the full cooperation of NPS officials to take whatever steps are necessary to facilitate the PEP program, including requesting any amendments to the district’s current Long Range Facilities Plan (LRFP), as required by EFCFA.

On behalf of our clients, we stand ready to assist your agencies to take, at a minimum, the immediate action set forth above to fully address this condition in NPS facilities and ensure the health, safety and well-being of students attending these facilities as quickly as possible.

Sincerely,



David Sciarra, Esq., Counsel to NPS Students

cc: State District Superintendent Christopher Cerf  
Honorable Ras Baraka, Newark Mayor  
Newark Legislative Delegation  
Donna Arons, Office of Attorney General