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DEPARTMENT OF PUBLIC INSTRUCTION | Mark Johnson, *Superintendent of Public Instruction*

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December 17, 2019

Via email and USPS

J. Eric Boyette
Secretary and State Chief Information Officer
NC Department of Information Technology
P.O. Box 17209
Raleigh, NC 28709-6833

Re: *Amplify Education, Inc. v. NC Department of Public Instruction, et al.* Procedural Concerns

Dear Secretary Boyette:

The contested case of *Amplify Education, Inc. v. NC Department of Public Instruction, et al.* is pending before the Department of Information Technology (“NCDIT”) and your designated hearing officer, Jonathan Shaw. This case involves a contract to provide the one statewide reading diagnostic assessment tool that the Department of Public Instruction (“NCDPI”) is statutorily required to provide to all kindergarten through third grade students.

This matter is of significant public concern as any ruling will impact nearly 500,000 students and approximately 24,000 teachers across North Carolina’s 100 counties. Regrettably, NCDIT’s recent actions in this matter raise significant concerns over whether NCDIT can properly adjudicate a contested case of such complexity and public interest. The intent of this letter is not to discuss the merits of the case but instead inform you of significant errors that you, as the agency head, have the sole authority to rectify.

Request for Contested Case and August 19th Order to Stay

Amplify Education, Inc. (“Amplify”) initiated the current action by filing a “Request for Administrative Hearing and Final Decision” with NCDIT on August 2, 2019. This request went unacknowledged for over two weeks. NCDIT failed to provide any acknowledgement until it entered an “Order Granting Motion for Temporary Stay” dated August 19, 2019. (Although dated August 19, the stay order was not provided to the parties until after the close of business on August 20.)

As has been discussed in subsequent filings, the one-page order granting Amplify’s request for a stay had procedural errors. The order violated NCDIT’s own administrative rule which clearly states that the North Carolina Rules of Civil Procedure apply in contested cases such as this one. First, the order was summarily entered without giving NCDPI (or other interested parties) notice or an opportunity to be heard as required by state law. NCDIT was unfairly biased because this serious flaw meant NCDIT’s decision was made after hearing the alleged facts from only one party, Amplify. Second, NCDIT failed to follow the established legal standard for entering a

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stay. Specifically, the order failed to make any factual findings or conclusions of law relevant to the well-established standard that must be met before a stay can be issued. NCDIT failed to base its decision on the evidence in this case. NCDIT's vague and flawed order caused unnecessary confusion in school systems throughout the state. In an attempt to clear up this confusion, NCDPI filed a "Motion to Reconsider" the stay order on August 22, 2019. As will be discussed later, NCDIT failed to rule on this motion until December 9, 2019, leaving the improper stay in place for almost four months – almost an entire semester of school.

November 19th Settlement Conference

After you designated him as the hearing officer, Mr. Shaw ordered that all parties appear for a settlement conference on November 19. The purpose of the conference was to discuss any options for settlement with Mr. Shaw acting as the mediator.

With the parties in separate rooms, Mr. Shaw opened the discussion with each in an unorthodox manner by proposing his own settlement offer to the parties. Mr. Shaw suggested that the parties allow NCDIT to assume the Read to Achieve contract and that NCDIT would then add Amplify to the contract. Mr. Shaw asserted this would allow Amplify to operate as a second vendor providing statewide reading diagnostic and assessment services.

When NCDPI's counsel explained to Mr. Shaw that this proposal would violate the state's Read to Achieve law, Mr. Shaw requested that NCDPI ask the General Assembly to change the law in order to accommodate his proposal. When told that the General Assembly was not in session, Mr. Shaw stated that it was important to NCDIT that the protest be resolved quickly. He asked if NCDPI would be willing to enter an agreement *contrary* to state law and then ask for a retroactive statutory change during the next legislative session. NCDPI counsel again advised that it could not agree to any course of action that violated the state law which requires the agency to designate one statewide diagnostic assessment tool. But to be clear, telling NCDPI how to approach legislative affairs is not Mr. Shaw's role as the hearing officer.

During settlement discussions, a participant reminded Mr. Shaw that the parties were still awaiting an order on the motion for stay. Mr. Shaw responded that he had "not been lazy" but had intentionally avoided ruling on the pending motion prior to the settlement conference. Mr. Shaw indicated that he hoped that the parties could reach a settlement that would allow him to avoid rendering a decision.

Mr. Shaw's statements during the settlement conference raise concerns over both his impartiality as a mediator and his potential conflict of interest as NCDIT's general counsel. Before the parties could raise their own settlement offers, Mr. Shaw put forward a proposal which he indicated he developed with assistance from NCDIT staff.¹

¹ Please note that if Mr. Shaw worked with any of the NCDIT staff involved in the procurement under review, this would constitute another serious concern.

Mr. Shaw's actions and statements suggesting that NCDPI agree to a settlement that would force the agency to violate state law indicate that his primary interest in the settlement conference was relieving NCDIT of having to adjudicate the contested case, rather than mediating the parties to a mutually-agreeable resolution that complied with state law.

To be clear, all parties were aware of Mr. Shaw's status as general counsel when he was designated as hearing officer. All assented to his appointment following his assertions at the October hearing that he was coming in with "a blank slate" and had "no preconceived notions" on the contested case. Mr. Shaw's conduct during the mandatory settlement conference demonstrated that he has difficulty separating his dual roles as hearing officer and as NCDIT agency counsel. Further, Mr. Shaw intentionally delaying his ruling on an urgent motion for months in the hopes of a settlement for NCDIT's sake, raises concerns on his diligence and impartiality.

December 9th Order on Motion to Stay

On December 4, 2019, NCDPI and Imagination Station, Inc. filed a joint notice with Mr. Shaw indicating that the uncertainty created by the deficient stay order had worsened and that the parties would be forced to seek relief in superior court if Mr. Shaw did not render a ruling on the motion to stay by December 9, 2019. On that date, Mr. Shaw entered an order that "upheld" Amplify's motion to stay.

Unfortunately, this order, while more substantive in content, contains the same flaws as the August 19, 2019 order. Specifically, Mr. Shaw violates NCDIT's own administrative rules by ignoring the NC Rules of Civil Procedure and fails to apply the proper legal standard for entering a stay. Further, Mr. Shaw makes the legal conclusion that his designation as the hearing officer in this matter empowers him to disregard procedural law and cloaks him with broad authority to terminate or pause information technology contracts at his sole discretion. This assertion is wrong and a clear abuse of his limited authority as a hearing officer in a contested case.

Mr. Shaw's ruling violates the evidentiary standard set forth in the North Carolina Administrative Procedure Act by failing to make factual findings based upon "substantial evidence." Surprisingly, Mr. Shaw goes so far as to create his own standard of evidentiary review and labels it "sufficient information." This contrived standard is without meaning and has no basis in North Carolina law.

Further, Mr. Shaw's ruling contains multiple findings of fact which are not supported by any evidence in the record. Most egregiously, one of Mr. Shaw's findings contains *new* language which does not appear in the final contract award recommendation that he cites. Obviously, it is not proper for a hearing officer to make up his own facts.

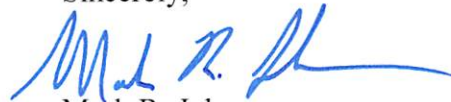
Mr. Shaw's ruling contains multiple conclusions of law which either misstate the law or are not supported by evidence. Specifically, Mr. Shaw bases several conclusions of law on evidence

that does not exist in his factual findings. A more complete record of these errors can be found in NCDPI's Petition for Writ of Certiorari and Request for Stay of Administrative Order, a copy of which I have enclosed with this letter.

Conclusion:

As I have previously stated, my intent is not to discuss the merits of this contested case but rather to make you aware of the numerous serious errors that have plagued NCDIT's adjudication of this matter over the past four months. Please take whatever immediate remedial action you deem necessary to ensure that NCDIT and the hearing officer conduct all matters within this contested case in accordance with North Carolina law and NCDIT's administrative rules. If NCDIT cannot properly adjudicate this matter, NCDPI will seek an alternative, impartial venue to ensure that all parties receive a fair hearing. Thank you for your assistance.

Sincerely,



Mark R. Johnson
NC Superintendent

cc: J. Mitchell Armbruster
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