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August 22, 2019

VIA HAND DELIVERY

Eric Boyette, State Chief Information Officer
North Carolina Department of Information Technology
3700 Wake Forest Road
Raleigh, NC 27609

Re: DPI's Motion for Reconsideration of Order for Temporary Motion to Stay
RFP No. 40-RQ20680730 (DPI)

Dear Mr. Boyette:

Pursuant to 9 NCAC 6B.1115, please find enclosed for filing with your office DPI's
Motion for Reconsideration of Order for Temporary Motion to Stay.

Thank you for your attention to this matter.

Sincerely,

Tiffany Y. Lucas
Special Deputy Attorney General

TYL:scd

Enclosures

Cc: Jessica Middlebrooks (Counsel for DIT) [Via E-mail]
Kieran J. Shanahan (Counsel for IStation) [Via E-mail and U.S. Mail]
J. Mitchell Armbruster (Counsel for Amplify) [Via E-mail and U.S. Mail]

**BEFORE THE CHIEF INFORMATION OFFICER
STATE OF NORTH CAROLINA
DEPARTMENT OF INFORMATION TECHNOLOGY
Proceeding No. 000-1000A**

AMPLIFY EDUCATION, INC.,)
)
Petitioner,)
)
v.)
)
NORTH CAROLINA DEPARTMENT)
OF PUBLIC INSTRUCTION,)
)
Respondent,)
)
and)
)
IMAGINATION STATION, INC.,)
)
Intervenor-Respondent)
_____)

**MOTION FOR
RECONSIDERATION OF
ORDER FOR TEMPORARY
MOTION TO STAY**

NOW COMES Respondent North Carolina Department of Public Instruction (“DPI”), pursuant to Rule 09 NCAC 06B .1115(b) of the North Carolina Administrative Code and Rule 54 of the North Carolina Rules of Civil Procedure, and files this Motion for Reconsideration of the North Carolina Department of Information Technology’s (“DIT”) Order for Temporary Motion to Stay. In support of this Motion for Reconsideration, DPI shows DIT the following:

INTRODUCTION

On June 7, 2019, DPI awarded the State’s Read to Achieve contract to Imagination Station, Inc. (“Istation”). More than 15 calendar days later, Amplify filed its untimely protest letter. Without

waiving Amplify's procedurally defective filing, DPI agreed to meet with Amplify on July 18, 2019. After carefully considering Amplify allegations and concerns, as well as the arguments delineated in Amplify's July 24 Supplemental Letter, the State Superintendent issued his final decision denying Amplify's protest. On August 2, 2019, Amplify filed a Request for Administrative Hearing and Final Decision, as well as a Motion for Stay. On August 20, 2019, DIT entered an "Order for Temporary Motion to Stay" summarily enjoining DPI's contract with Istation and as well as a Notice of Contested Case.

I. DIT's Order Staying the Contract Constitutes a Defective Injunction

Although entitled a "Motion for Stay," Amplify's motion seeks a preliminary injunction pursuant to North Carolina Rule of Civil Procedure 65(a) to prohibit DPI from finalizing implementation of Istation's reading diagnostic tool. (Brief of Petitioner In Support of Motion for Stay p. 18). The Information Technology Procurement Rules, (as promulgated by DIT), make clear that the North Carolina Rules of Civil Procedure apply in contested cases before a hearing officer. 09 NCAC 06B .1105(a). North Carolina law explicitly provides that a preliminary injunction may not issue without notice and a hearing. NCRCP 65(a); *see also Perry v. Baxley Dev., Inc.* 188 N.C. App. 158, 655 S.E2d 460 (2008). The notice requirement is mandatory and affords an adverse party an opportunity to be heard and present evidence before the injunction takes effect. *Id.* A preliminary injunction entered without notice impairs a substantial right of the adverse party and contradicts the statute's intent to provide each party with a "full and fair investigation

and determination according to strict legal proofs and the principles of equity.” *Jolliff v. Winslow*, 24 N.C. App. 107, 109, 210 S.E.2d 221, 222 (1974).

Moreover, the proceeding between Amplify and DPI constitutes a contested case as defined by N.C. Gen. Stat. § 150B-2(2); *see also* 9 NCAC 06B .1104. Prior to taking any action in a contested case, the adjudicating agency, (DIT in this instance), is required to give all parties an opportunity for a hearing “without undue delay” and must provide notice no fewer than fifteen days before the hearing. N.C. Gen. Stat. § 150B-38(b).

DIT entered its one-sentence Order without holding the mandatory hearing or providing DPI with the statutorily required notice. In fact, DPI had not received any notice or acknowledgement of the contested case until DIT entered the injunction on August 20, 2019. This procedure appears to conflict with both state law and DPI’s own procurement rules.

Beyond its procedural defects, the injunction is also inadequate in substance. In its one-sentence Order, DIT does not make any findings of fact or conclusions of law; nor could DIT do so having given only one party – Amplify – an opportunity to be heard and present evidence. By rule, every injunction “...shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail . . . the act or acts enjoined . . .” NCRCP 65(d). Further, the directives of an injunction may not be so vague and ambiguous that a party “cannot comply with its terms in the absence of clarification.” *See Hopper v. Mason*, 71 N.C. App. 448, 322 S.E.2d 193 (1984).

DIT's order entering the injunction states only that Amplify's motion is granted. The operative language fails to set forth the specific relief granted or any directives outlining the actions that DPI must take or actions that DPI is enjoined from taking. DIT's failure to comply with this rule renders the Order vague and has left DPI with no guidance on whether to or how to halt the state's Read to Achieve programs.

DIT's procedure in granting the injunction deprived DPI of any opportunity to present favorable evidence and has irreparably harmed the agency's ability to fulfill its statutory duties. By entering a procedurally and substantively defective injunction, DIT acted in violation its own procurement rules, the North Carolina Administrative Procedure Act, and fundamental due process.

II. DIT Failed to Give DPI Adequate Opportunity to Respond

Under DIT's procurement rules, a non-moving party is permitted to file a response to any motion "within the time permitted by the Rules of Civil Procedure." 09 NCAC 06B .1115(b). The North Carolina Rules of Civil Procedure allow DPI thirty days in which to file a response to Amplify's Motion for Stay, which was served on August 2, 2019. NCRCP 12. By rule, DPI has until September 3, 2019 to file a response to Amplify's motion. NCRCP 6(a).

By granting the injunction during the pendency of DPI's response period, DIT has improperly abrogated DPI's procedural rights as specified in the North Carolina Rules of Civil Procedure and DIT's own procurement rules. This premature action deprived DPI of an opportunity to present favorable arguments and deprived DIT of an opportunity to consider all evidence, rather than relying on only one party's brief

before rendering a decision with chaotic statewide ramifications. DIT's nonadherence to its own contested case procedures have unduly prejudiced DPI and necessitate that the injunction be immediately dissolved.

CONCLUSION

The purpose of a stay, preliminary injunction, or similar equitable relief is to preserve the *status quo* during the pendency of an action. This stasis is meant to provide relative certainty and protect both parties from concrete, irreparable harm. By suddenly halting the Read to Achieve contract, DIT has accomplished the opposite. By acting contrary to statute and its own rules, DIT deprived DPI of an opportunity to demonstrate the significant confusion, disorder, and harm that abruptly stopping the Read to Achieve program would have and is now causing.

Specifically, due to this injunction, students will not have access to any diagnostic reading assessment tool after Amplify's current contract with DPI expires this Saturday, August 24, 2019. Further, there are schools around the state that have already started the school year and implemented Istation. Over 327,000 students have successfully enrolled in Istation, and thousands of educators have completed Istation trainings. This procedurally questionable injunction will force DPI and schools around the state to cancel teacher trainings, pause data migrations, and delay vital learning activities.

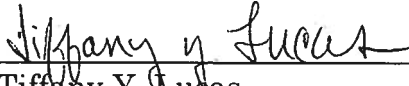
Students, teachers, and school administrators have now been thrust into an untenable state of uncertainty mere days before the start of the school year for most schools. Unfortunately, DIT's failure to follow proper procedures when granting the

injunction precluded DPI from raising these issues before they could cause harm to our state's public school system.

Therefore, DPI respectfully requests that DIT immediately dissolve its injunction and afford DPI the full time to respond, as provided by the North Carolina Rules of Civil Procedure.

Respectfully submitted this 22nd day of August 2019.

JOSHUA H. STEIN
Attorney General



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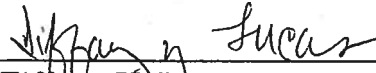
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MOTION FOR RECONSIDERATION OF ORDER FOR TEMPORARY MOTION TO STAY** was served on counsel via electronic mail transmission and by depositing the same in the United States mail, first class postage prepaid, and addressed to:

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This the 22nd day of August 2019.



Tiffany Y. Lucas
Special Deputy Attorney General