SUPREME COURT OF NEW JERSEY

MOSHE ROZENBLIT and QWON KYU RIM,

Plaintiffs/Appellants/
Cross-Respondents

v.

MARCIA V. LYLES, in her official capacity as Superintendent of the Jersey City Board of Education, et al.,

Defendants/Respondents,

And

JERSEY CITY EDUCATION ASSOCIATION,

Defendant/Respondent/
Cross-Appellant.

CIVIL ACTION

DOCKET NO.: 083434

On Cross-Petition for Certification of the Final Order of the Superior Court, Appellate Division

Appellate Division Docket No. A-1611-17T1

Sat below:
Hon. Jose L. Fuentes, P.J.A.D.,
Hon. Francis J. Vernoia, J.A.D.,
Hon. Scott J. Moynihan, J.A.D.

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SUPREME COURT OF NEW JERSEY

RESPONSE TO PETITIONER JERSEY CITY EDUCATION ASSOCIATION'S PETITION FOR CERTIFICATION

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PRELIMINARY STATEMENT

At issue in this case is the legality of a government practice called "release time," whereby the Jersey City School Board of Education ("Board") spends taxpayer dollars to employ two full-time public school teachers *not* to educate Jersey City's youth, but instead to work under the exclusive direction and control of the Jersey City Education Association ("JCEA"), a private labor organization, for its own private benefit. No controls, limits, or other rules of accountability are imposed on the JCEA's use of these taxpayer resources. And the purpose of the release time provisions at issue, as the decision below makes plain, is to advance JCEA's own private interests, *not* those of the Board or city and state taxpayers.

The Appellate Division correctly held that the Board lacks statutory authority to sanction release time. The Appellate Division based its holding on a settled principle of law that is both axiomatic and unremarkable. Specifically, as this Court has repeatedly held, school boards "are creations of the State and, as such, can only exercise those powers granted to them by the Legislature…" *Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ.*, 79 N.J. 574, 579 (1979); *see also N.J. Dep't of Labor v. Pepsi-Cola Co.,* 170 N.J. 59, 61 (2001); Because the Legislature has never authorized release time, or anything that even remotely resembles it, either in the Education Code or any other statute, the

Appellate Division correctly held that New Jersey law does not empower the Board to expend public funds on release time. Appellant/Cross-Petitioners' Appendix to Cross-Petition at Pa008, Pa014.

In its Petition for Certification, the JCEA attempts to invert this settled principle of law by contending that the Employer-Employee Relations Act ("EERA") (N.J.S.A. § 34:13A-1 et seq.)—which does not directly govern education in this state—somehow gives school boards blanket authority to spend public resources on anything the board determines is related to a "term or condition" of teacher employment, so long as their actions are not specifically prohibited by statute. Pet. at 9-11. Contrary to the JCEA's contention that the Board has "unilateral control" to negotiate the "terms and conditions" (*Id.* at 9) of employment with the JCEA, the Board's powers do not extend to negotiating a form of compensation that was never authorized by the Legislature.

Not only does that reading of the law conflict with the settled principle that school districts have only those powers granted to them by the Legislature, but this Court has already ruled that EERA does not expand the authority of local school boards to spend public funds in ways that are not authorized by the Legislature. *Fair Lawn Educ. Ass'n.* 79 N.J. at 580-81. Neither is release time a mandatory subject of negotiation as a

"term and condition of employment" for all teachers, because it bears no relation to teaching services.

In the court below, Petitioner JCEA relied on one statute, and one statute alone, to justify the release time expenditures: N.J.S.A. § 18A:30-7. In giving that law its plain and obvious meaning, the Appellate Division correctly held that that statute—which does not mention release time or anything that even remotely resembles release time—does not authorize the public expenditures at issue.

Because the Appellate Division's holding is correct and its statutory analysis is based on settled law, this Court should deny the JCEA's petition for certification.

QUESTION PRESENTED

Local school boards in New Jersey can only exercise powers, and expend public funds, if authority has been delegated to the boards by the Legislature. The Legislature has never delegated authority to school boards to pay government salaries to two employees who devote their full time not to any teaching duties but rather to working exclusively for a private labor union. Was the Appellate Division correct in finding that N.J.S.A. § 18A:30-7—a state statute that governs cases of absence for public teachers for reasons other than sick leave—does not sanction this disbursement of public funds?

STATEMENT OF FACTS & PROCEDURAL BACKGROUND

Plaintiffs Moshe Rozenblit and Won Kyu Rim ("Taxpayers") are citizens and taxpayers of the United States and of the State of New Jersey. Mr. Rozenblit pays property taxes and sales taxes in Jersey City, and Mr. Rim pays income tax to the State of New Jersey. The release time benefits challenged here are financed by the Board, which receives State income tax revenue and local tax revenue. Thus, Taxpayers finance the practice of "release time."

Defendant Jersey City Board of Education ("Board") is a local school board that is responsible for providing educational services to students in Jersey City, as authorized by statute.

Defendant JCEA is a labor organization representing teachers, attendance counselors, and teachers' assistants in the Board's school districts. JCEA is a private entity that exists to advocate for the interests of its members.

In 2015, the Board and JCEA entered a Collective Bargaining Agreement ("CBA"). The release time provisions challenged in this case are in Section 7-2.3 of the CBA. Among other things, these provisions specify that JCEA's President and his designee "shall be permitted to devote *all* of his/her time to the Association business and affairs." Pls.'-Appellants' Corrected Appendix Volume 1 filed with the Appeal Court April 18, 2018 ("App.V1.") at 44a. (Emphasis added.) Thus, two full-time Board teachers are

permitted (in fact, required) to devote *all* their working hours to JCEA's "business and affairs." *Id.*

While on full-time release, these employees receive their salaries, benefits, and pensions from the Board, just as if they were teachers who were performing instructional duties. But they are not. Instead, release time is used for activities that advance JCEA's private interests, including political activities, contract negotiations between the JCEA and the Board, filing grievances against the Board, and representing JCEA members in disciplinary proceedings.

Neither the JCEA nor the release time employees themselves are *obligated* to perform *any* function for, or provide *any* service to, the Board under either the CBA or any other policy or procedure. Release time employees spend all their time working solely for JCEA. They are not accountable to the Board, and although they are paid by the Board and Jersey City taxpayers, they do not work *for* the Board. They work *for* the JCEA. Over the term of the CBA, release time costs taxpayers roughly $1.1 million. App.V1.112a.

On January 4, 2017, Taxpayers filed a Complaint challenging the release time provisions of the CBA under both the New Jersey Constitution's Gift Clause, N.J. Const., art. VIII, § 3, ¶¶ 2-3[1]—

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[1] The JCEA contends that "multiple other jurisdictions have recently … reject[ed] similar [anti-subsidy] challenges" to

which prohibits public aid to private organizations, associations, and individuals—and the New Jersey Civil Rights Act ("CRA"), N.J.S.A. § 10:6-2(c) and (d). Taxpayers sought declaratory and injunctive relief against the release time provisions.

Upon completion of discovery, Taxpayers and the JCEA filed cross motions for summary judgment. The Board joined the JCEA's brief, but did not file its own. By a letter opinion dated October 31, 2017, the Chancery Division denied Taxpayers' motion for summary judgment and granted the JCEA's and the Board's motion for summary judgment. Taxpayers timely appealed.

On August 21, 2019, the Appellate Division reversed and entered an opinion in favor of Taxpayers finding that the Board has no statutory authority "to disburse public funds in this fashion," Pa014, and consequently that Section 7-2.3 of the CBA "is against public policy and unenforceable." Pa019.

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release time, Pet. at 17, but cites only one: *Cheatham v. DiCiccio*, 379 P.3d 211 (Ariz. 2016). In that case, release time was enjoined twice by the trial court in a decision that was affirmed by a unanimous court of appeals, although it was reversed in a 3-2 decision by the Arizona Supreme Court. *See Cheatham v. Diciccio*, 356 P.3d 814, 816 (Ariz. Ct. App. 2015), *vacated,* 379 P.3d 211 (Ariz. 2016). Moreover, that case involved a differently-worded constitutional provision, and an entirely different legal test for applying that provision, as well as different facts. Additionally, while the Arizona court found that the particular CBA at issue in the *Cheatham* case was constitutional, it and other Arizona cases make it likely that a CBA including provisions such as are at issue here would be found unconstitutional. *See Wistuber v. Paradise Valley Unified Sch. Dist.*, 687 P.2d 354, 357 (Ariz. 1984) (there must be sufficient control and consideration for release time to withstand a Gift Clause challenge).

Following the Appellate Division's decision, the JCEA filed a notice to petition this Court for certification, and Taxpayers filed a notice of cross-petition for certification.

The JCEA also filed a motion to stay the Appellate Division's decision pending the outcome of a petition for certification to this Court. The Appellate Division denied that motion on September 26, 2019.

REASONS WHY CERTIFICATION SHOULD BE DENIED

I. The Appellate Division's decision is based on a long-settled principle that local school boards cannot exceed the scope of their statutory authorization in expending public funds.

The Appellate Division based its decision on a proper statutory analysis under a settled rule of law and correctly found that the Board lacked statutory authority to authorize taxpayer-funded release time. Pa018.

The Appellate Division's decision is based on a principle of law that is clear and well-settled: A school board's powers are limited to those granted by the Legislature. *Pepsi-Cola Co.,* 170 N.J. at 61; *see also Edmondson v. Bd. of Educ. of Borough of Elmer,* 424 N.J. Super. 256, 261 (App. Div. 2012) (a local school board "is a creature of the state and may exercise only those powers granted to it by the Legislature either expressly or by necessity or fair implication") (internal citation omitted). What's more, if there is "reasonable doubt as to whether the Legislature has granted … a power" to a Board, "that power should not be implied."

Atl. City Educ. Ass'n v. Bd. of Educ. of the City of Atl. City, 299 N.J. Super. 649, 654-55 (App. Div. 1997).

School boards therefore may not make payments, or otherwise expend public funds, that are not authorized by statute. *Fair Lawn Educ. Ass'n*, 79 N.J. at 581 (the Legislature must grant school boards spending powers and the school district lacked statutory authority to make supplemental retirement payments).

Other state supreme courts that have examined this issue have found precisely as this Court has: school districts may only exercise powers and expend public resources if they are authorized by the Legislature to do so. *See, e.g., Rauert v. Sch. Dist. 1-R*, 555 N.W.2d 763, 764 (Neb. 1996) (finding that a "school district is a creature of statute and possesses no other powers than those granted by the Legislature"); *Barth v. Sch. Dist.*, 143 A.2d 909, 911 (Pa. 1958) (holding that "a School District is a creature … of the Legislature and has only the powers that are granted by statute, specifically or by necessary implication").

Here, as the Appellate Division held, the Board may only exercise power granted to it by the Legislature, and may not expend public funds unless it does so pursuant to statutory authorization. Pa019. In other words, the Board does not have plenary authority to act or to spend public resources as it pleases. Because neither Title 18A, which governs education in this state, nor any other state statute, grants the Board power to authorize or fund the

release time provisions at issue, Pa014, the Appellate Division's decision was correct as a matter of settled law.

In its Petition for Certification, the JCEA attempts to invert this settled principle of law and to argue instead that Boards have any power that is not expressly prohibited. According to the JCEA, because the Education Code in Title 18A contains "no words of abrogation or prohibition," Pet. at 5, the Court should ask not "whether [release time expenditures] are specifically authorized" by statute, "but … whether a clear statutory directive removes them from the scope of negotiations." Pet. at 10. The JCEA bases this novel theory on the proposition that the EERA expands the scope of the Board's delegated authority to expend public funds. Pet. at 9-10. In other words, when 18A-7 is "read together" with the EERA, for purposes of collective bargaining between school boards and labor unions, according to the JCEA, everything is allowed that is not specifically prohibited. Pet. at 12.

But this Court has already rejected that exact argument. In *Fair Lawn Educ. Ass'n,* 79 N.J. at 581. In that case, a public labor union sought to enforce provisions of a collective bargaining agreement between a school board and a union that conferred supplemental retirement benefits on teachers that were not authorized by statute. This Court reiterated the principle that "[l]ocal boards of education are creations of the State and, as such, may exercise only those powers granted to them by the

Legislature," *id.* at 579, and cited many cases supporting that proposition. It then expressly rejected the argument that the EERA "enlarge[s] the areas in which the Board has been delegated the responsibility to act." *Id.* at 580-81. It held the EERA "*does not* confer upon local boards an unlimited power to negotiate all types of financial benefits for their teaching employees," and "*does not* enlarge the areas in which the Board has been delegated the responsibility to act." *Id.* at 580-81 (emphasis added). In other words, rather than finding that all payments by a school board are permissible unless they are specifically prohibited, this Court held that public payments made by school boards must fall within a Board's statutorily-granted authority before they are permissible.

II. The EERA does not expand the scope of a local school board's delegated authority, as this Court has already held.

The *Fair Lawn Educ. Ass'n* Court expressly held that the EERA does not enlarge a school board's delegated authority to act. *Id.* Nevertheless, the JCEA argues here that the "EERA's general authorization to negotiate 'the terms and conditions of employment,' N.J.S.A. 34:13A-5.3, do not require further authorization to negotiate the working conditions that would otherwise be within their unilateral control."[2] Pet. at 9. This

[2] The JCEA contends that the Appellate Division addressed the issue of statutory interpretation under 18A:30-7 "sua sponte." Pet. at 7. That is not accurate. In the courts below, it was the *JCEA*

Court held to the contrary in *Fair Lawn Educ. Ass'n*, when it said that the same exact provision of the EERA, N.J.S.A. 34:13A-5.3, on which the JCEA now relies, "does not enlarge the areas in which the Board has been delegated the responsibility to act." 79 N.J. at 580-81. This alone should dispose of the primary reason on which the JCEA claims certification is necessary.

The fact that this Court has already expressly rejected the JCEA's argument may explain, however, why the JCEA attempts to characterize release time as just another type of "compensation" to teachers, and consequently as a negotiable term and condition of employment. Pet. at 9-10. But *Fair Lawn Educ. Ass'n* addressed that argument as well. It held that the EERA does "not operate to confer authority upon the Board to agree to compensation schemes which bear no relation to the amount and quality of the services which its teaching employees have rendered." 79 N.J. at 581. Likewise, in this case, the Board has entered into a compensation

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that argued that 18A:30-7 "expressly authorizes" paid release time. JCEA Resp. Br. filed with the Appellate Div. on July 16, 2018 ("JCEA Resp.") at 30. The JCEA never raised or argued that the EERA, N.J.S.A. 34:13A-5.3, was a separate grant of statutory authority for release time. To the extent the JCEA is attempting to do so *for the first time* in this Court, that argument is waived. *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973) ("It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available …").

scheme for two teachers that bears no relation to teaching services.

As the Appellate Division found, "the contractual arrangement which permits two teachers to devote their entire professional time to exclusive service of the interests of the JCEA confers no reciprocal benefit to the school district." Pa016. And there is no statutory authority "permitting the Board to pay the salaries of teachers whose job duties are exclusively devoted to the service of another organization, in this case the JCEA." Pa016-17. The release time teachers are not performing teaching duties *at all.* They are therefore not receiving compensation for teaching services. As a result, their salaries are not a term and condition of employment for all employees that can unilaterally be negotiated by the Board absent statutory authorization.

The Appellate Division confronted a similar issue in *Bossart v. Bd. Of Trs. of Teachers' Pension & Annuity Fund*, TPAF # 1-10-86561, 2012 WL 75069 (N.J. App. Div. Jan. 11, 2012). In that case, a school superintendent was on leave, but under contract with the district for 17 months before she retired. *Id.* at *1. The superintendent's pension originally included these months of leave as compensation until the New Jersey State Commission of Investigation issued a report disqualifying it. *Id.* at *2. The retired superintendent appealed, and the Appellate Division held that her salary for the 17 months was not compensation for services

as a teacher or superintendent. *Id.* at *4. The Appellate Division came to this conclusion "because she did not provide any services to the school board" during these 17 months. *Id.* Therefore, the leave time could not be used to calculate her pension, which was based on her compensation.

Here, like the superintendent in *Bossart*, who performed *no* services as a teacher or administrator for 17 months, the release time employees do not *ever* perform *any* functions as teachers or district employees. They simply work for the labor union full-time. As a result, release time cannot be considered employee *compensation* or a term and condition of employment. In order to qualify as a term or condition of employment, the funding of release time would have to bear some "relation to … services which its teaching employees have rendered" to the Board, *Fair Lawn Ed. Ass'n*, 79 N.J. at 581, but they do not.

There are other reasons why release time is not a term and condition of employment and thus a subject of mandatory bargaining. First, release time is not treated as compensation by either the Board or the JCEA. The release time provisions appear in the CBA in a section labeled "Association Rights," App.V1.41a-42a, *not* in the sections pertaining to "Teacher Salary" (or even "Leave of Absence," "Maternity Leave, etc."). App.V1.55a; 58a-62a. Unlike employee compensation packages that include fringe benefits, there are no "conditions of employment" attached to the release time

provisions in the CBA. On the contrary, as the record establishes, the JCEA is not obligated to provide *anything* to the Board in return for release time, and the release time employees are not accountable to the Board in *any* meaningful way.

Actual nonmonetary compensation—such as military leave, pensions, or other fringe benefits—run directly to the *employee,* in exchange for services rendered *by* the employee. But the release time provisions run directly to *the JCEA* with *no* accountability, control, or consideration. It would be one thing if all district employees received a certain amount of leave and then voluntarily donated it to the JCEA for use as release time. Many municipalities follow this practice, in fact. But that is not what is happening here. Instead, release time goes directly to the JCEA release time employees for JCEA to use for its *own* business and purposes in any manner it deems fit. That is not a "term and condition" of employment to all teachers; that is a gratuity to one private organization.

The Appellate Division's decision upheld an axiomatic proposition of law that local school boards must be delegated authority by the Legislature in order to expend public funds. This ruling simply applied a principle of law that this Court set out long ago in *Fair Lawn Educ. Ass'n.* The EERA does not expand the authority of the Board to negotiate contract terms that are not authorized by statute or related to teaching duties, nor does that

statute impact the modest statutory analysis on which the Appellate Division based its decision. The decision below was correct as a matter of law, and certification on the statutory issue should therefore be denied.

III. The Appellate Division correctly found that N.J. Stat. Ann. § 18A:30-7 on its plain terms does not authorize the release time payments at issue.

The JCEA next contends that certification is necessary because the "Appellate Division misread 18A:30-7." Pet. at 13. In its Petition, the JCEA mischaracterizes the Appellate Division's decision. It claims the court misinterpreted the word "absence" in 18A:30-7, because it found that the release time employees were not absent under that statute on the basis of the fact that they reported to work each day *on property* provided by the district. Pet. at 14. But that is simply not what the Appellate Division said.

The Appellate Division did not hold that the release time employees were not absent from work within the meaning of 18A:30-7 on account of *who* provided their office space. Instead, it held that they were not absent in the legally relevant sense because of *what* the release time employees were doing while they were being paid by taxpayers.

This is obvious when one reads in its entirety the sentence to which the JCEA is referring: The release time employees, the court said, "reported to work every day to an office located on

property provided by the school district *to attend to the affairs of the JCEA*" (emphasis added). Pa012.[3] In other words, the Appellate Division held that the release time employees were not "absent from work" because they were, in fact, *working* each day; it's just that they were working *for the JCEA*, not the district. This is true regardless of *where* they were working, or *who* provided their office space. The JCEA's argument (Pet. at 14-15) about the location of JCEA offices and how that impacts the analysis of whether they are absent from work is, put simply, a red herring, and provides no basis for granting certification.

Instead, a plain reading of 18A:30-7 shows that the Legislature did not authorize the Board to fund release time. That statute reads as follows:

> Nothing in this chapter shall affect the right of the board of education to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year.

On its face, this statute does not authorize the Board to expend public funds for release time. It doesn't mention release

[3] The Appellate Division appears to have made this finding based on the plain language of the CBA, which provides: "The Association may be granted permission to use school buildings, at reasonable hours, for meetings, provided it does not interfere with the educational program." 42a at § 7-7.

time at all, or anything even closely related to release time. Tellingly, this is the *only* statute on which the JCEA relied below to support their original argument (now apparently abandoned) that release time is expressly permitted by statute. What's more, despite the JCEA's argument about the "long standing" practice of release time (Pet. at 1), neither the JCEA, nor the Board, can point to any "rule" in which release time has been authorized—because there is none.

Rather, as the Appellate Division found, the only delegation authorized by this statute is that school boards may pay salaries for *absences* that are not taken as sick leave. "Absence" in this statute means "[a] failure to appear, or to be available and reachable, when expected." ABSENCE, Black's Law Dictionary (11th ed. 2019); *see also* American Heritage Dictionary (5th ed. 2019) (defining absent as "[n]ot present, missing") and Merriam-Webster Collegiate Dictionary (2019) ("not present at a usual or expected place; missing"). The release time employees are not *absent* as that word is widely understood. Even the JCEA admits that they are not *absent*. *See* Pet. at 19 (referring to "the District's retention of authority over [the release time employees] as employees …"); *Id.* at 20 (citing the "requirement that they report on their activities and whereabout to District administrators …"; "District administrators routinely request that JCEA's releasees … undertake 'peacekeeping' activities in their schools …"; and

"releasees report the outcome of their efforts to administrators.") Indeed, it cannot be seriously suggested that the release time employees are "absent" from work. They are indeed working—for the JCEA, not the district. The Appellate Division thus rightly concluded that the word "absence" within 18A:30-7 means *actually* absent. Pa012.

The Appellate Division went on to cite six separate instances in which the CBA contemplates actual absences from work, and which, unlike release time, are all within the Board's statutory authority to compensate. Pa014. These include authorized absences for bereavement, sabbatical, or legal obligations. The Education Code also expressly provides for authorized absence for district employees who qualify to participate in the Olympic Games. *See* Pa018; N.J.S.A. 18A:30-8. In all of these instances, as with sick leave, a teacher is genuinely absent from his or her teaching duties—i.e., not actually working. But here, the release time employees *are* working—for the JCEA, not the district. The release time employees are thus not "absent" within the meaning of § 18A:30-7.

The Appellate Division, therefore, was correct in making the unremarkable holding that § 18A:30-7—the only statutory authority on which the JCEA relied below—does not authorize release time in any way. Certification should be denied on this simple issue of

statutory construction on which the Appellate Division based its decision.

CONCLUSION

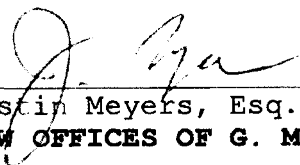
Based on the foregoing, this Court should deny the JCEA's Petition for Certification, or enter an Order affirming the judgment of the Appellate Division that Title 18A of New Jersey statute does not authorize the challenged release time provisions.

CERTIFICATION

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: November 5, 2019

Jonathan Riches, Esq.
GOLDWATER INSTITUTE



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SUPREME COURT OF NEW JERSEY

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Hon. Scott J. Moynihan, J.A.D.

CERTIFICATION OF SERVICE

Kris Schlott, of full age, hereby certifies as follows:

1. I am a Paralegal employed by the Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute,

attorneys for the Plaintiffs/Appellants/Cross-Respondents ("Appellants") in the within matter.

2. On November 5, 2019, I sent an Original and three copies of Response to Petitioner Jersey City Education Association's Petition for Certification and Certification of Service via Federal Express for delivery on Wednesday, November 6, 2019 to:

   Heather Joy Baker, Clerk
   Supreme Court of New Jersey
   R.J. Hughes Justice Complex
   25 West Market Street
   Trenton, NJ 08625-0970

3. On November 5, 2019, I sent copies of the Response to Petitioner Jersey City Education Association's Petition for Certification and Certification of Service via Federal Express for delivery on Wednesday, November 6, 2019 to:

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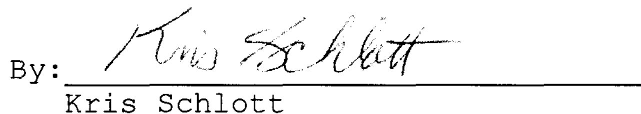
4. I hereby certify that the foregoing statements are true and correct. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: November 5, 2019

By: 
Kris Schlott

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