Letter to Ingerman and Smith including all the partners

January 13, 2022

Re: Bellmore-Merrick Central High School District
Merrick Union Free School District
North Bellmore Union Free School District
North Merrick Union Free School District

Dear Mr. Block and Mr. Powers:

My name is Chad. J. LaVeglia. My children are in the North Merrick School District. But I am not writing this for my children. It is for all children. Your "explanations" at the North Merrick and BMCHD respectively, were flawed, and unacceptable. They were also nearly identical. Which is problematic. Mr. Block, I sent you very relevant statutory authority on Tuesday, January 11, 2022. Nevertheless, yesterday, January 12, 2022, I heard Mr. Powers repeat the same flawed reasoning you did the night before. Either you didn't share the correct law with Mr. Powers, or you did, and he ignored it. Just as he ignored comments from myself and another attorney regarding dispositive law. You didn't correct the mistake, but REPEATED IT. That's negligent and unethical.

Frankly, it seems you both have no consideration for the trauma children are experiencing. It's as though the very, very, remote possibility that the district will lose funding is more plausible to you than the harm children are experiencing in the present. Even though there is no precedent in which the State whimsically denied aid based on some fake DOH determination. If you present remote, unlikely possibilities as real, likely, possibilities to our school board, then you are culpable. Furthermore, Mr. Powers you cited a statement from the Commissioner of Education as authority. You understand that it is inconsequential whether Dr. Rosa supports Hochul and the DOH, right? No, you don't. This is not how our system of Government works. I know your areas of practice are limited, but we live in a democracy. You can't validate an unlawful rule because others in power support those who authored it. That is exactly how tyranny gains traction. In addition, public statements are not law.

I recently commenced an Article 78 proceeding against the Governor, the Department of Health ("DOH"), and other entities on behalf of fifteen parents, throughout Long Island.[1] My clients have eight separate causes of action. We have also moved for a preliminary and permanent injunction. The causes of actions span the Public Health Law, Constitutional Law, Administrative Law, the State Administrative Procedure Act ("SAPA"), and the State sanitary code. Neither of you familiarized yourself with these areas. Considering what's at stake here, you have no excuse.

MASSAPEQUA AND LOCUST VALLEY CASE UNRELATED

Massapequa Union Free School District v. Hochul et al has no bearing on our school district. First, it is not binding. The Albany Supreme Court is in the Third Judicial department. We are in the Second. Further, it is merely a trial court. Second, the Petitioners primarily lost because of standing. To the extent the opinion touches on the merits, it is superfluous or merely dicta. Third, and most importantly, Petitioners did not, and could not at the time, argue that the **regulation violated SAPA**. In fact, the Albany court's decision came out the same day as the emergency regulation you're advising the district to rely on. How in good faith can you cite this case to support the proposition that Commissioner's determination is binding? Mr. Powers, you even called the Commissioner's determination a mandate. Are you serious? Do you truly believe that this is acceptable?

[1] The action was commenced prior to Executive Blakeman's Executive Order. It is pending in Nassau County Supreme Court, under Index No: 616124/2021.

THE LAW: SAPA

An emergency regulation cannot be continued, it can only be re-adapted.[2] Further, a second or subsequent emergency rule can only be extended for 60 days *i.d.* On August 24, 2021, the State promulgated an emergency regulation "repealing and replacing" 10 NYCRR §2.60. On November 24, 2021, The State continued it for 90 days. However, it could only be extended for 60 days. The Compliance Schedule on page 7 of the November regulation states the following:

> "The Department will continuously evaluate the expected duration of these emergency regulations throughout the aforementioned 90-day effective period in making determinations on the need for continuing this regulation on an emergency basis or issuing a notice of proposed ruling-making for permanent adoption. This notice does not constitute a notice of proposed or revised rulemaking for permanent adoption."

Therefore, the November emergency regulation was unlawfully, extended an additional 30 days. The following is a more compelling procedural error though.

A second or subsequent emergency regulation must contain a notice of proposed rulemaking pursuant to SAPA 202.6 (e). The notice allows for public commenting. In our participative democracy, public comments are vital. But the State did not provide notice of proposed rulemaking. To the contrary, they explicitly stated that it was not a notice of proposed rulemaking; shutting the public out in the process. As such, the November regulation is per se invalid.

What part of this is unclear? How could you conceal law that eviscerates the "Massapequa" lawsuit justification? Why are you giving one sided, overly cautious, unrealistic advice? At no point, did either of you say something to the effect "on one hand there's the un-elected Governor's implicit threat to cut funding, but on the other hand the Commissioner has no authority to promulgate rules over 19 million people." Do you think that this is covering your clients from liability? It's not.

WE THE PEOPLE IN ORDER TO FORM A MORE PERFECT UNION…

The Constitutional arguments are more compelling. We can distill all of them to one principle: absent legislative authority, the appointed head of an administrative agency cannot expand her power to make a determination into law. Especially, one that orders 19 million New Yorkers to wear masks. There is no legislative authority here. Furthermore, the Commissioner cannot promulgate rules outside of SAPA. But that is exactly what 10 NYCRR §2.60(a) provides for.

In 2020, the legislature amended Executive Law §29-A to give Cuomo the power to issue directives. The legislature then removed the directive powers in 2021. And in June 2021, New York was not in a state of emergency. If the Governor cannot mandate masks through an Executive Order, she certainly cannot do it through the DOH. The determination being followed is invalid. Advising school boards to continue requiring masks is no longer the safest course of action for you, or your clients. To the contrary,

CHILDREN ARE BEING TRAUMATIZED

Children are hurting. For instance, many children have experienced nose bleeds, fatigue, light headedness, anxiety, depression, dental issues, and developmental delays. Yet, you both are telling our school boards to follow the lead of someone without power. You steered the boards into a place where they didn't even think a vote was required. Do you think you can do so with impunity? As though, parents will just go along "the attorney said it." True, this was possible before COVID. But with other attorneys like myself in the community looking into the law, you don't get the luxury of hiding in the shadows.

WE DEMAND BETTER REPRESENTATION

In addition to the above, watching Locust Valley's work session on 1-11-22 clarified that Ingerman-Smith is not providing Bellmore-Merrick proper representation. Mr. Venator cogently, concisely, and intelligently provided answers to many of the same issues raised by us. Except we were ignored. Instead, Mr. Block and Mr. Powers robotically spouted out incorrect facts. From the same old script. In fact, the board member asking Mr. Venator questions (around the 2-hour mark) has more subject matter knowledge than both of them. But more importantly, Mr. Venator gave honest, objective advice. How can you explain this disparity?

YOU ARE SLEEPING IN A FIRE

There is no legal authority to muzzle our children anymore. Even giving you the benefit of every doubt, neither of you are in a position to say that the DOH directive is lawful while the County Executive's Order is unlawful. You blindly give authority to that which lacks it. If you think that we will allow our children's health to be placed in your incompetent hands, you are mistaken. If you think that we will silently allow our children to suffer you are dead wrong. If you believe that your immune from accountability, you are wrong. Damages flow down to you. You are sleeping in a fire; you just don't feel the heat yet.

Respectfully,

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