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April 4, 2012

Honorable Judges of the Appellate Division
Superior Court of New Jersey
Attn: Joseph H. Orlando, Clerk
Hughes Justice Complex, P.O. Box 006
Trenton, New Jersey 08625

Re: Arturo Cortes v. Higher Education Student Assistance Authority
Docket No. A-002142-11

May It Please the Court:

Pursuant to R. 2:6-2(b), please accept this letter brief in lieu of a more formal brief on behalf of Arturo Cortes, in response to HESAA's motion to dismiss.

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PRELIMINARY STATEMENT

In this appeal, Appellant Arturo Cortes, a natural born adult citizen of the United States who resides in New Jersey, challenges the legal determination of HESAA that he is ineligible for state tuition assistance because his mother cannot currently establish that she is a lawful resident of the United States under federal immigration law. This motion to dismiss is substantially similar to that made by HESAA and denied by this Court in the related case of A.Z. by B.Z. v. HESAA, No. A-4827-10T1 (Aug. 2, 2011)(order denying motion to dismiss). (Pa1).[1] This Court should reach the same result here.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

Cortes attended public schools in New Jersey for twelve years, and received his high school diploma in June 2009. (Pa2). In preparation for college, Appellant applied to the New Jersey

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[1] Appellant employs the following notation to the record: "Rbr" refers to the Respondent's Letter Brief in Support of Respondent's Motion to Dismiss the Appeal; "Pa" refers to Appellant's Appendix to his Letter Brief in Opposition to HESAA's Motion to Dismiss, attached hereto.

[2] Because in this appeal from an administrative agency determination, the facts and procedural history are inextricably intertwined, they are combined in one section in this letter brief.

Higher Education Student Assistance Authority for an EOF grant in 2009. Appellant was initially a recipient of both an Educational Opportunity Fund Grant and federal loans. (Pa3).

In furtherance of his grant renewal for 2010, Appellant completed the Free Application for Student Aid (FAFSA) online. (Pa4-21). Among other information, he indicated in field 7 that he is a citizen of the United States, he indicated New Jersey as his state of residence in field 6, and in field 6E affirmed that he has been a legal resident of New Jersey since before January 1, 2006 (Pa5). For his mother's social security number (field 45F), he entered nine zeros, in compliance with the FAFSA instructions. (Pa7). After calling FAFSA customer service for assistance, in field 17, Appellant listed "FC" as his mother's state of legal residence (Pa6), although she had actually resided in New Jersey since 1997 (Pa22). He indicated that his mother filed a 2010 tax return in field 24. (Pa6, Pa23).

On August 06, 2011, HESAA sent to Appellant an "Applicant Information Request" ("AIR"), informing him "[y]ou are ineligible because your parents are not legal residents. If this is incorrect, return this form with copies of their 2010 NJ Resident Income Tax Return and their NJ Driver Licenses issued before September 16, 2010." (Pa31). Cortes immediately completed and signed the AIR and returned it to HESAA, along with a copy of his mother's 2010 federal and state income tax

returns.[3] (Pa22, Pa23-30). The tax returns indicated the same address that Cortes provided on his FAFSA (Pa4). They also included his mother's Individual Taxpayer Identification Number ("ITIN"). (Pa23). However, after having received Appellant's response, on August 15, 2011, HESAA sent to Appellant a "Student Eligibility Notice" (SEN), which stated definitively that Appellant was "ineligible for the 2011-2012 academic year at Ramapo College because your parents are not legal New Jersey residents." (Pa32).

On October 11, 2011, pursuant to N.J.A.C. 9A:9-9-2.15, Appellant administratively appealed this initial eligibility determination to HESAA. (Pa34-52). However, on November, 21, 2012, HESAA sent a renewed SEN, substantially similar to the initial denial of August 15, 2011, stating that the Appellant was "ineligible" for State aid under both the Tuition Aid Grant and the Equal Opportunity Fund programs for the 2011-2012 academic year. (Pa53).[4]

On January 5, 2012, therefore, Appellant filed a Notice of Appeal with this Court. On or about March 23, 2012, HESAA filed

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[3] Cortes's mother is not eligible for a New Jersey driver's license because she cannot prove that her presence in the United States is lawful, and therefore no copy was attached. See N.J.S.A. 39:3-10; N.J.A.C. 13:21-8.2(a)(7).

[4] For reasons unknown to Appellant, HESAA has also sent another notice, dated January 17, 2012, stating that the Appellant was "ineligible" for State tuition aid for the Spring 2012 semester. (Pa54).

the pending motion to dismiss based on failure to exhaust administrative remedies. Appellant Cortes did not receive the motion to dismiss until Monday, March 26, and pursuant to the previously entered scheduling order of this Court, filed and served its initial brief on the merits on that date.

LEGAL ARGUMENT

I. HESAA'S SECOND STUDENT ELIGIBILITY NOTICE CONSTITUTES A FINAL AGENCY DECISION

An interested party may appeal to the Appellate Division "as of right" any final state administrative agency decision, "except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise." R. 2:2-3(a)(2). Exhaustion of administrative remedies serves three purposes: "(1) the rule ensures that claims will be heard . . . by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to the courts." Atlantic City v. Laezza, 80 N.J. 255, 265 (1979).

The three purposes served by exhaustion have all been addressed in this case or are not at issue. (1) This matter does not involve invocation of agency expertise or require

application of technical knowledge. Rather, it involves pure issues of statutory and constitutional law that the courts are not only competent to handle, but wield exclusive authority to do so. (2) There are no disputed facts in this case that require further development of a record. (3) HESAA has clearly decided to pursue its unfortunate policy of denying eligibility to students who are United States citizens based on the immigration status of their parents, and nothing other than complete reversal of that policy could satisfy Appellant. To the extent that Appellant's administrative appeal was a last polite invitation for HESAA to reverse its policy, that invitation has clearly been refused, and there is therefore nothing more the administrative appeal can accomplish except unwarranted and indefinite delay.

A. HESAA's Second Student Eligibility Notice Constitutes A Final Agency Decision.

Determining whether an agency action is final for purposes of appeal includes assessing "whether there was any available avenue of internal administrative review." Bouie v. New Jersey Dept. of Comm. Affairs, 407 N.J. Super. 518, 527 (App. Div. 2009)(citing In re Stoeco Dev., Ltd., 262 N.J. Super. 326, 334 (App. Div. 1993)). Appellant has in fact exhausted his administrative remedies, since no further review before HESAA exists. The Administrative Code provides only one method of

appeal: a letter addressed to HESAA that must "contain the student's full name, social security number, college of attendance, and a description of the basis for the appeal." N.J.A.C. 9A:9-2.15. On October 13, 2011, Appellant submitted his appeal in writing, in the form of a letter, containing his full name, his SSN, the fact that he was attending Ramapo College, and the basis for his appeal: that HESAA's denial of his application for a tuition grant based on the immigration status of his parents was unlawful. (Pa34-35).

HESAA's main contention is that Appellant has not exhausted his administrative remedies because it believes his administrative appeal submitted October 13, 2011, is still pending. While acknowledging that it sent a new SEN on November 21, 2011, which reaffirmed the denial of eligibility based upon his parent's immigration status, HESAA claims that it was and is still considering the appeal, but for some unexplained reason "its data processing system generated a SEN, which was forwarded to Cortes." RBr8.

Whatever may have been its subjective intent in sending the November 21 SEN, HESAA's administrative actions must judged objectively from its own outward conduct. HESAA's second Student Eligibility Notice dated November 21, 2011, bears every indicator of a final decision. HESAA sent the November SEN to Arturo Cortes well after his written appeal of the first SEN.

(PaBr34-35). As of November 21, 2011, all avenues of internal administrative review were closed to Mr. Cortes. He filed a written appeal pursuant to N.J.A.C. 9A:9-2.15, and received only another notification of his ineligibility in return. (PaBr53). Neither the text of the SEN nor the Administrative Code reveal additional avenues of administrative appeal that Appellant could have taken. In fact, the text at the bottom of the November SEN states: "THIS SEN SUPERSEDES ALL PRIOR 2011-2012 SENs YOU MAY HAVE RECEIVED." (PaBr53).

Presumably, HESAA has designed its data processing system to send notices to applicants for a reason, and not merely to randomly remind students of final eligibility determinations that HESAA has already rendered. Certainly, HESAA's applicants are entitled to assume that new notices they receive from HESAA warrant their renewed attention and announce some change in status. One can therefore ask rhetorically what could this second SEN be in response to, if not Appellant's written appeal? HESAA's assertion strains credulity, and does not comport with what a reasonable person would construe the November 21 SEN to be -- a final agency decision after his administrative appeal had been considered. Appellant was clearly correct in construing the November 21, 2011, as HESAA's final decision after administrative appeal. Indeed, had Cortes not done so, he

would have been at peril of allowing his time to appeal to this Court to lapse.

B. HESAA's Denial of Eligibility is Having Immediate Injurious Effects on Appellant's Education and Is Therefore Effectively a Final Agency Determination.

On a more practical level, HESAA's continued denial of eligibility to Mr. Cortes for the 2011-2012 academic year (which is fast drawing to a close) is having immediate deleterious effects. The Supreme Court has stated that administrative agency decisions become final when the decision-making process is complete and "its effects [are] felt in a concrete way by the challenging parties." New Jersey Civil Service Ass'n v. State, 88 N.J. 605, 612 (1982). Stated otherwise, agency action is final where it marks the "'consummation of the agency's decisionmaking process,' and is one from which 'legal consequences flow.'" In re Application for a Rental Increase at Zion Towers Apartments (HMFA # 2), 344 N.J. Super. 530, 535 (App. Div. 2001) (internal citations omitted).

Thus, in New Jersey Civil Service Ass'n, the Supreme Court of New Jersey held that the Director of the Office of Administrative Law's (OAL) refusal to appoint employees of a separate state agency as Administrative Law Judges (ALJs) was a final agency action because the "effect of that action [was] directly felt by [the] appellants" in the case. 88 N.J. at 612. The appellants, former hearing officers at the Division of Motor

Vehicles, were not given jobs as ALJs in the newly-formed OAL and were no longer able to preside over DMV hearings, as they had previously done and would have continued to do had they been appointed ALJs. Id. In finding that there was an appealable agency decision, the Court observed:

> Our principal aim in avoiding premature review of administrative determinations has been to protect the Court from becoming entangled in abstract disagreements over administrative policies, and also to refrain from judicial interference until an administrative decision has been formed and its effects felt in a concrete way by the challenging parties. In this case, although administrative policy has not been formally expressed, three years have passed since the Director of the Office of Administrative Law received the Attorney General's opinion. The Director's failure to appoint any of the individual appellants as an administrative law judge is tantamount to final agency action. The effect of that action is directly felt by appellants. In considering their claim we do not intrude into agency policymaking.

Id. at 612.

Here, the consequences of HESAA's denial of eligibility for the 2011-2012 academic year are likewise being felt in a way that is both "concrete" and injurious to Appellant. HESAA's second SEN has had a significant impact on the Appellant. Appellant has suffered the practical consequences of HESAA's decision-making process in the denial of his application for aid. He has been declared ineligible for a TAG grant, and has been forced to use his personal finances to fund his secondary

education. (Cortes Cert. ¶4i).[5] As indicated in his accompanying certification, those private resources have now been exhausted, and HESAA's denial has now required him to withdraw from Ramapo College, where he had matriculated in 2009, has been forced to transfer to a community college, due to the financial exigencies caused by the withdrawal of eligibility for HESAA tuition assistance. (Cortes Cert. ¶4j). It is patently clear from the second SEN that the agency has made its final decision as to the applicant's eligibility for tuition assistance. Further time for it to pontificate on the reasons for its denial would be pointless.

II. EVEN IF THE NOVEMBER SEN DOES NOT CONSTITUTE FINAL AGENCY ACTION, HESAA'S LACK OF RESPONSE TO APPELLANT'S OCTOBER 2011 LETTER OF APPEAL OPERATES AS A FINAL AGENCY DECISION

Even if the November 21, 2011, SEN were not conclusive evidence of a final agency determination, there comes a time when inordinate delay renders agency inaction to be appealable.

> The exhaustion of administrative remedies is not an absolute prerequisite to seeking appellate review, however. Exceptions are made when the administrative remedies would be futile, when irreparable harm would result, when jurisdiction of the agency is doubtful, or when an overriding public interest calls for a prompt judicial decision. We have frequently held that in a case involving only legal questions, the doctrine of exhaustion of administrative remedies does not apply.

[5] "Cortes Cert." refers to the Certification of Arturo D. Cortes, dated ????, and attached hereto.

New Jersey Civil Service Ass'n, 88 N.J. at 613; accord, Garrow v. Elizabeth General Hospital and Dispensary, 79 N.J. 549, 561 (1979). Exhaustion of administrative remedies is not a jurisdictional prerequisite to review, but instead is a rule "of convenience." Swede v. City of Clifton, 22 N.J. 303, 315 (1956). Even if administrative appeals are available, this court "must determine whether exhaustion will serve the interests of justice." Rumana v. County of Passaic, 397 N.J. Super. 157, 174 (App. Div. 2007) (citing Abbott v. Burke, 100 N.J. 269, 297 (1985)); East Cape May v. Dep't of Env. Protection, 300 N.J. Super. 325, 339 (App. Div. 1997).

First, this appeal presents pure issues of statutory interpretation and constitutional law. There are no undisputed facts. "The only result of requiring an exhaustion of administrative remedies where only a question of law is in issue would be useless delay, and this in the interest of justice cannot be countenanced." Nolan v. Fitzpatrick, 9 N.J. 477, 487 (1952); see also, S. Burlington County NAACP v. Mt. Laurel, 92 N.J. 158, 342 (1983) (citing Nolan and holding that no exhaustion of administrative remedies necessary where pure issues of constitutional law presented).

Imposing an exhaustion requirement in this case would interpose such "useless delay." As HESAA acknowledged in its Civil Case Information Statement, this case presents

substantially the same issues as the related case of A.Z. by B.Z. v. HESAA, No. A-4827-10T1, in which a similar motion to dismiss has been denied and for which HESAA (after four extensions of time) has just submitted its initial brief as Respondent (indeed, on the same day it submitted this motion to dismiss). Unless HESAA is willing to abandon its legal position in both these cases and declare Cortes and A.Z., and all the other citizen students with undocumented parents who have been declared ineligible, suddenly eligible for tuition assistance -- which it obviously is not willing to do -- then imposing an exhaustion requirement would simply place this matter in indefinite limbo until such time as HESAA decides to articulate a decision restating its legal position in more elegant fashion, which it is under no incentive to do with dispatch.

Even assuming the November SEN issued to Appellant is not its final decision, its lack of movement on Appellant's letter of administrative appeal does constitute final agency action. Even if HESAA is correct, and its November SEN was merely a random form automatically generated by its data system, RBr4, HESAA's actions followed the determination on that form. Essentially, HESAA adopted the eligibility determination of the November SEN when it continued to deny Appellant access to higher education funding. The fact that HESAA has essentially let the November SEN eligibility determination stand for six

months, from October of 2011 to the present, and has followed that determination in refusing Appellant aid, compels the conclusion that HESAA has made its final agency decision.

The only communication Appellant received from HESAA after the November eligibility determination was the January SEN, which again stated that he was ineligible to receive aid because his parents are not legal New Jersey residents. (Pa__). While HESAA protests that it has not had a chance to make a final agency determination because it halted all work on the case after the Appellate Division took jurisdiction over the case, Rbr9, it issued a renewed January SEN on January 17, 2012, five days after the appeal was docketed on January 12, 2012. In essence, HESAA's lack of response to Appellant's letter of appeal and its continuing implementation of the eligibility determination it made in the November SEN constitute final agency action. Like the OAL Director who followed the Attorney General's Opinion for three years, Civil Service Ass'n, 88 N.J. at 612, HESAA has carried out the determination of eligibility it made in the November SEN for six months, through the most recent SEN issued in January. (Pa53). Thus, even if the November SEN is not a final agency determination, HESAA's actions in carrying out that determination are, in fact, final since those actions have engendered concretely-felt legal consequences for the Appellant.

In Rumana, a group of local officials challenged the decision of the state Department of Local Government Services to approve a county budget which they alleged improperly included revenue from a sale of a county-owned golf course. 397 N.J. Super. at 168. The state argued that the appeal should be dismissed, because the officials had a statutory right to appeal the decision to the Local Finance Board. Id. at 172–73; N.J.S.A. 52:27BB-15. The court rejected the state's argument for two reasons. First, it determined that further administrative review would be pointless as the LFB had "already considered the core issue" in adopting resolutions approving other County actions. Rumana, 397 N.J. Super. at 175. Second, because the issues in the case were time-sensitive and the LFB lacked jurisdiction over the other claims made by the local officials, exhaustion would defeat "rapid, thorough, complete and impartial determination" of the issues by the court. Id.

In the recent case of Vas v. Roberts, the Speaker of the State Assembly suspended the salary and benefits of an Assemblyman who had been indicted on a number of corruption-related offenses. 418 N.J. Super. 509, 513–14 (App. Div. 2011). In a single sentence, this court declined the Speaker's invitation to dismiss the appeal for the Assemblyman's failure to exhaust his remedies by seeking review of the decision before the entire Assembly. Id. at 524 ("[T]he doctrine of exhaustion

may be relaxed in cases, as here, involving only a question of law.").

As the Supreme Court has stated, when a case involves "only legal questions not calling for the exercise of administrative expertise," then the "interests of justice and expedition dictate that the exhaustion doctrine be found inapplicable." Farmingdale Realty Co. v. Farmingdale, 55 N.J. 103, 112 (1969). Likewise, in Roberts v. Division of State Police, this court declined to require exhaustion, because invoking the doctrine "would serve no useful purpose," and because the issue was "solely a legal one of statutory interpretation." 386 N.J. Super. 546, 550 (App. Div. 2006).

As in Vas and Roberts, this case involves issues of law; to Appellant's knowledge no facts are in dispute. Appellant is challenging only the validity of HESAA's policy of denying assistance to citizen children of undocumented parents under the agency's authorizing statute and federal and state constitutions. The only issues before this Court are a purely legal ones: (1) in making HESAA-administered financial assistance available to "residents of this State," do N.J.S.A. 18A:71A-9, N.J.S.A. 18A:71B-2(b), and accompanying administrative regulations, include natural born citizens of the United States who live, sleep, go to school, and conduct their daily lives in New Jersey, even though they are financially

dependent upon a parent whose "true, fixed and permanent home" is in New Jersey but who cannot establish authorized presence in the United States; and (2) even if those state statutes are interpreted to exclude Appellant, would denying a United States citizen residing in New Jersey the benefits to which he would otherwise be entitled because of the immigration status of his parents violate due process and equal protection principles under the United States and New Jersey Constitutions, and the Citizenship Clause of Section 1 of the Fourteenth Amendment? Since no further amplification of these legal issues is possible through further administrative proceedings, the interests of justice require that this Court resolve those issues now.

As in Rumana, the interests of justice here are served by expediting consideration of this issue. New Jersey colleges and universities require tuition payments before the beginning of the fall semester. HESAA's refusal to grant aid to qualified children who appear to have undocumented parents will force these children either to find that money from another source, potentially at significant cost to themselves and their families, or to forgo the opportunity to attend college. Delaying consideration of this appeal will potentially visit irreparable harm on perhaps hundreds of students.

Indeed, Appellant himself has suffered irreparable harm. Ineligible for HESAA aid, he has been forced to take out other

loans and use his own money to pay for Ramapo's tuition. (Cortes Cert. ¶4h). Appellant also receives Social Security Disability benefits, and was forced to use those funds, which he usually needs for rent and necessities, to pay part of his tuition bill. (Cortes Cert. ¶4i). The cost of Ramapo's tuition has forced Appellant to temporarily leave the school and instead take his courses at Brookdale Community College. (Cortes Cert. ¶4j). Although his credits at Brookdale will eventually transfer back to Ramapo, his GPA will not, damaging the GPA he has maintained. (Cortes Cert. ¶4k). Finally, Brookdale, as a community college, will only accept twenty of Appellant's credits from Ramapo, and the remaining half of his credits will not transfer. (Cortes Cert. ¶4l). Prompt judicial review of HESAA's policy will not only vitiate the irreparable harm visited on New Jersey students with undocumented parents generally, but also the irreparable harm Appellant presently suffers.

Prompt judicial review of HESAA's policy also furthers the public interest. HESAA's policy affects a broad class of New Jersey citizen-residents, and its interpretation of its statute arguably violates the U.S. Constitution. Furthermore, administrative efficiency is promoted by omitting an administrative appeal that serves no useful purpose, in light of the absence of any factual dispute and long odds that the agency will reconsider its policy in such a forum.

III. IT IS NOT NECESSARY TO ALLOW HESAA TO AMPLIFY ITS FINAL AGENCY DETERMINATION AS WITHIN TIME

HESAA requests that it be allowed to submit an amplification of its determination of Appellant's eligibility "as within time." Pursuant to Rule 2:5-1(b), within fifteen (15) days of receiving a notice of appeal, a state agency "may file and mail to the parties an amplification of a prior statement, opinion or memorandum made either in writing or orally and recorded." HESAA asserts that such a statement is warranted because "the record is devoid of reasons upon which [its] decision was based." (RBr9). HESAA claims that "[n]either the August nor the November SEN includes the basis" its determinations on Appellant's eligibility. (RBr9-10).

Of course, both the August 15 and November 21 SENs do contain an explanation of HESAA's reasoning. Mr. Cortes was declared ineligible for tuition assistance "because your parents are not legal New Jersey residents." (Pa32, Pa53, Pa54). That HESAA issued a one-line eligibility determination and declined to offer a more expansive explanation does not mean the record fails to state the reasons for HESAA's determination, or that the record is inadequate for judicial review, particularly where, as here, Appellant will be irreparably harmed by delay, and is challenging a purely legal determination.

HESAA's somewhat terse explanation of its reasoning, which is derived from its legal interpretation of the relevant statutes, can of course be amplified at length by HESAA in its brief on the merits. Appellant Cortes encourages HESAA to do so, but does not understand what further opportunity to express itself HESAA needs. But if the Court would find such amplification desirable, Appellant does not interpose any objection, so long as these proceedings are not further delayed as a result.

CONCLUSION

For the reasons stated above, this Court should deny Respondent's motion to dismiss, and order Respondent to file its responsive brief in a timely manner.

Respectfully submitted,

Ronald K. Chen