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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002142-11

ARTURO D. CORTES, :
 :
 :
 Appellant, : CIVIL ACTION
 :
 v. :
 :
 HIGHER EDUCATION STUDENT :
 ASSISTANCE AUTHORITY, :
 :
 Respondent. : NOTICE OF MOTION
 : TO DISMISS APPEAL
 :
 :

To: Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

Ronald K. Chen
Rutgers Constitutional Litigation Clinic
Center for Law & Justice
123 Washington Street
Newark, New Jersey 07102

PLEASE TAKE NOTICE that the undersigned, attorney for
respondent, the Higher Education Student Assistance Authority,
hereby moves in the Superior Court, Appellate Division, for an

order dismissing the present appeal for failure to exhaust administrative remedies.

In support of its motion, respondent relies upon the brief annexed hereto.

Respectfully submitted,

JEFFREY S. CHIESA
ATTORNEY GENERAL OF NEW JERSEY

By:


Melissa Dutton Schaffer
Deputy Attorney General

Dated: March 21, 2012



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March 22, 2012

Joseph H. Orlando, Clerk
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 Appellate Division
 R. J. Hughes Justice Complex
 25 Market Street
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 Trenton, New Jersey 08625-0006

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

Letter Brief in Support of Respondent's Motion to Dismiss

Dear Mr. Orlando:

Please accept this letter brief on behalf of respondent New Jersey Higher Education Student Assistance Authority in support of its Motion to Dismiss the above-captioned appeal.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

Appellant, Arturo Cortes, applied for State financial aid on or about February 4, 2011, through the submission of a Free Application for Federal Student Aid ("FAFSA")². (Ra1-18). Based upon Cortes' responses to the FAFSA, he was determined to be a financially dependent student as defined by N.J.A.C. 9A:9-2.6.

¹Because they are closely intertwined, the Procedural History and Statement of Facts are combined for the convenience of the Court and of the parties.

²The FAFSA application is used to determine eligibility for both Federal and State financial aid.

(Ra1). For the purposes of qualifying for a State scholarship or grant, an applicant must be a resident of New Jersey. N.J.S.A. 18A:71B-2; N.J.A.C. 9A:9-2.2. For financially dependent students, residency is determined by the domicile of the parent(s). N.J.A.C. 9A:9-2.2(a)(1). On the FAFSA, Cortes listed his mother's social security number as "000-00-0000," consistent with FAFSA instructions regarding parents without social security numbers. (Ra4).

Based on this information, on March 9, 2011, HESAA sent Cortes an Applicant Information Request ("AIR"), notifying him that he was ineligible for State financial aid because his "parents are not legal residents of New Jersey." (Ra19). HESAA gave Cortes the opportunity to submit his parents' 2010 New Jersey Resident Income Tax Return and driver's licenses to the extent the determination was incorrect. Ibid. In response, on August 8, 2011, Cortes submitted his mother's 2010 1040 Federal Tax Return (Ra21) and 2010 New Jersey Income Tax Return (Ra25). He explained that he was unable to provide a copy of his mother's green card because "she does not have a legal status in the United States." (Ra20). HESAA issued a Student Eligibility Notice (SEN) on August 15, 2011, advising Cortes that he was not eligible for tuition assistance because "your parents are not legal New Jersey residents." (Ra29).

On October 13, 2011, Cortes, filed a timely administrative appeal of HESAA's initial determination pursuant to

N.J.A.C. 9A:9-2.15. (Ra31). That provision expressly provides:

If, for any reason a student, his or her family or an institution feels that the application of these rules results in an unfair determination of eligibility, an appeal shall be filed with the Higher Education Student Assistance Authority within 60 days of notification of eligibility or ineligibility. Appeals should be in the form of a letter addressed to the Director of Grants and Scholarships in the Authority, PO Box 540, Trenton, New Jersey 08625-0540, and shall contain the student's full name, social security number, college of attendance, and a description of the basis for the appeal. Appeals will be considered on the basis of this appeals process approved by the Authority.

[Ibid.]

In the interim, another SEN was generated by HESAA's data system on November 21, 2011, reiterating that Cortes was ineligible for financial aid. (Ra50). Rather than waiting for HESAA to issue a decision regarding his administrative appeal, Cortes filed the instant appeal with the Appellate Division on January 4, 2012, mistakenly identifying the November SEN as the final agency decision. HESAA now moves to dismiss the appeal to allow the Authority the opportunity to review the record before it and issue a final agency decision containing factual findings and legal conclusions. In the alternative, HESAA moves for permission to amplify its decision.

ARGUMENT

POINT I

RESPONDENT'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE APPELLANT HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

The requirement that a party exhaust any available administrative remedies before seeking appellate review is well-established. The Court Rules provide that final decisions by a State agency or officer may be appealed to the Appellate Division, except that such review "shall not be maintainable so long as there is available a right of review before any administrative agency or officer" R. 2:2-3(a)(2). The courts have applied this principle in finding generally that a party must pursue administrative remedies before seeking judicial relief. Abbott v. Burke, 100 N.J. 269, 296 (1985); Garrow v. Elizabeth Gen. Hosp. and Dispensary, 79 N.J. 549, 558-59 (1979); Triano v. Div. of State Lottery, 306 N.J. Super. 114, 126 (App. Div. 1997).

The exhaustion requirement serves three major goals: (1) ensuring that matters falling within a particular agency's area of expertise are thoroughly adjudicated by that agency; (2) production of a complete factual record that will ensure proper judicial review; and (3) potential conservation of judicial resources, considering that the agency decision may satisfy the parties. City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979); Triano, supra,

306 N.J. Super. at 121; see also Archway Programs, Inc. v. Pemberton Township Bd. of Educ., 352 N.J. Super. 420, 425 (App. Div. 2002) (doctrines of primary jurisdiction and administrative remedy exhaustion both further "proper relationships between courts and regulatory agencies").

In this matter, permitting HESAA to review and consider Cortes' administrative appeal and issue a final agency decision would ensure that the matter is thoroughly adjudicated before the agency. HESAA should be afforded the opportunity to apply its expertise in determining whether Cortes meets the eligibility criteria pursuant to its regulation. Moreover, allowing HESAA to issue a final agency decision would assist the court by providing the reasons upon which HESAA's determination was based. Finally, allowing HESAA to issue a decision on the administrative appeal may conserve judicial resources because Cortes could receive a favorable outcome.

In general, courts strongly favor deference to administrative agencies where administrative remedies are available, except under limited circumstances: (1) when only a question of law exists; (2) when resort to administrative remedies would be futile; (3) when irreparable harm would result without immediate judicial relief; (4) when the agency's jurisdiction is

doubtful; or (5) when an overriding public interest requires a prompt judicial determination. Triano, supra, 306 N.J. Super. at 121-22. Furthermore, even in cases falling under the first enumerated factor, "jurisdiction should remain with the agency where the agency is in a special position to interpret its enabling legislation, can conclusively resolve the issue or issues, and can provide relief for the plaintiff." Id. at 122, citing Abbott, supra, 100 N.J. at 298.

None of the Triano factors apply in this case to effect a waiver of the exhaustion requirement. To the extent that the issues presented in this appeal constitute purely legal questions, the court should still allow HESAA to articulate its interpretation of its enabling legislation. In addition, it would not be futile to await a final agency decision; rather, it would allow the opportunity for a reviewing body possessing expertise in the area of eligibility for State grants and scholarships to consider Cortes' arguments. Cortes would suffer no irreparable harm by such an appeal, as this is a purely financial matter, and if appellant ultimately prevails he will receive the funds at issue. There is no question of HESAA's jurisdiction here as Cortes already filed an appeal through the applicable administrative process. Furthermore, if HESAA is permitted to consider his appeal, Cortes may promptly appeal that decision as of right to this court, pursuant to R. 2:2-3(a)(2).

For all of these reasons, HESAA's motion to dismiss the appeal should be granted.

POINT II

**ALTERNATIVELY, HESAA SHOULD BE PERMITTED TO
AMPLIFY ITS ELIGIBILITY DETERMINATION AS
WITHIN TIME.**

For the reasons articulated above, HESAA asserts this appeal should be dismissed. Alternatively, if the court retains jurisdiction over the matter, HESAA should be permitted to amplify its determination finding that Cortes is ineligible for State tuition assistance.

Rule 2:5-1(b) allows a trial judge, agency, or officer to file an amplification of "a prior statement, opinion or memorandum" to provide the findings of fact and conclusions of law upon which the appealed decision was premised. Ordinarily, the amplification must be filed within 15 days of the appeal; however, under the current circumstances, HESAA should be permitted to file an amplification as within time.

As set forth in the facts, Cortes filed an administrative appeal of his ineligibility determination on October 13, 2011. While HESAA was considering this appeal, its data system electronically generated a SEN, which was forwarded to Cortes. The November SEN reiterated the August determination that Cortes was ineligible for tuition assistance because his parents are not legal New Jersey residents. (Ra50). Neither the August nor the November

SEN includes the basis for HESAA's determination.

Cortes filed the instant appeal before allowing HESAA the opportunity to issue a written final agency decision. Once the appeal was filed with the Appellate Division, HESAA no longer retained jurisdiction over the matter and accordingly refrained from issuing its administrative decision. Therefore, the record is devoid of the reasons upon which the Authority's decision was based. In order to assist the court, if it decides to retain jurisdiction, HESAA should be permitted to file an amplification of its decision as within time.

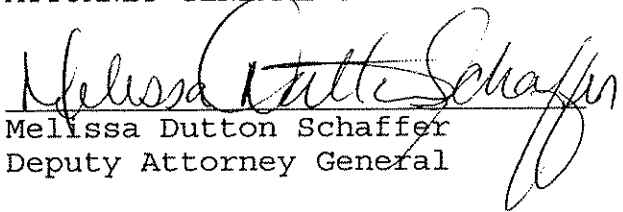
CONCLUSION

For the forgoing reasons, HESAA' motion to dismiss the appeal for failure to exhaust administrative remedies should be granted or, in the alternative, HESAA should be permitted to amplify its November 21, 2011 determination

Respectfully submitted,

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