STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE. NO. 49D01-2308-PL-032783

BOARD OF SCHOOL COMMISSIONERS FOR THE CITY OF INDIANAPOLIS,

Plaintiff-Counterclaim Defendants,

v.

TODD ROKITA, *in his official capacity as Indiana Attorney General*, DR. KATIE JENNER, *in her official capacity as Indiana Secretary of Education and Board Member of the Indiana State Board of Education*, SCOTT BESS, ERIKA DILOSA, WILLIAM E. DURHAM, JR., DR. BYRON ERNEST, IRIS HAMMEL, GREGORY F. GASTINEAU, PAT MAPES, KATHLEEN MOTE, KRISTIN RENTSCHLER, and B.J. WATTS, *in their official capacities as Board Members of the Indiana State Board of Education*,

Defendants-Counterclaim Plaintiffs.

OPPOSITION TO STATE'S EMERGENCY MOTION FOR STAY PENDING APPEAL

The Plaintiff, Board of School Commissioners for the City of Indianapolis ("IPS"), by counsel, respectfully files its Opposition to the emergency Motion for Stay Pending Appeal ("Motion") filed by defendants ("State").

INTRODUCTION

Eclectic Soul VOICES Corp. ("Voices")) has offered to purchase Francis Bellamy School 102 ("Bellamy 102") for $550,000. The Purchase Agreement provides that time is of the essence and closing is to occur by November 30, 2023. The reason for this urgency is undisputed because Voices "must vacate their currently leased space in Fountain Square in early 2024." (Mulholland

Preliminary Injunction Aff. ¶ 29.) Despite this, the State asks this Court to enter an extraordinary remedy of prohibiting IPS from completing this sale during the pendency of an appeal, which cannot be completed in time to save the Voices transaction. In the Motion, the State never addresses or disputes that this Court granting the Motion will very likely kill this deal—costing IPS and its taxpayers $550,000.

Ignoring this genuine, substantial harm, the State seeks a stay (really a reversal of the Court's decision and grant of preliminary injunction against IPS) based on a generalized harm. This is not a case where charter schools have intervened to protect a strong interest or have filed petitions under Indiana Code § 20-26-7-47 to preserve their interests. Indeed, the State's filing does not mention any particular interest of a charter school. Rather, the State is seeking to protect a generalized policy interest while refusing to engage the statutory text as to the twin bases for its extraordinary relief.

But the Indiana General Assembly crafted a ***legal*** remedy as a perfect fit for this generalized risk of harm. Indiana Code § 20-26-7.1-9(b) provides that "if a school corporation does not comply with the requirements to sell or lease a covered school building under this chapter, ***the school corporation shall submit any proceeds from the sale of the covered school building to the state board***, which shall ***be distributed equally between each charter school*** located in the attendance area of the school." (Emphases added.) The State does not choose to engage this clear statutory language. Since IPS must turn over proceeds of any sale to be dispersed among the very charter schools that the State is seeking to protect, any systemic risk of harm is abated by the legal remedy.

The Legislature's legal remedy is the appropriate remedy if an appellate court later determined that the Dollar Law applies to IPS because it protects all parties involved. It protects IPS by allowing it to close on a transaction with a known buyer that has an immediate need for

space. It also protects charter schools because if it were later determined that the Dollar Law applied to IPS, IPS would need to disgorge the proceeds from the sale to charter schools. Ignoring palpable harms, the State asks this Court to terminate a known deal on the off chance it may win on appeal and on the chance a charter school actually wants the buildings. The State is willing to kill a bird in the hand because there might be a different bird in the bush.

Continuing the same analytical mistakes as before, the State omits serious analysis of the legal remedy provided by the General Assembly. A case cited by the State holds that the existence of a recoupment remedy supports denying a stay. *Angleton v. Est. of Angleton*, 671 N.E.2d 921, 929 (Ind. Ct. App. 1996) (holding denial of a stay was appropriate when the movant "has not demonstrated, or even argued, that he will be without a remedy to recoup those assets"). "Thus, even the sale or closing of some facilities in the class does not justify the issuance of a preliminary injunction when there is an adequate remedy at law available to them." *Indiana State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 575 N.E.2d 303, 306 (Ind. Ct. App. 1991).

The State also contends that the Indiana Supreme Court supposedly got it wrong by requiring a party seeking a stay that is really a preliminary injunction to demonstrate the criteria for a preliminary injunction. *Doe v. O'Connor*, 781 N.E.2d 672, 674 (Ind. 2003). But that is exactly the relief the State seeks, and as the Supreme Court has held, it should demonstrate the preliminary injunction standards. This is especially true when this Court already rejected the State's request for a preliminary injunction. The State does not merely ask this Court to stay its Order. Rather, the State asks this Court to go far beyond that and issue a preliminary injunction barring IPS from selling a building. The fact that the State seeks to eschew the preliminary injunction standards demonstrates that it cannot meet them. Granting the Motion will cause substantial harm to IPS by scuttling a $550,000 sale, while at the same time the Legislature provided a legal remedy for a

violation of the Dollar Law—disgorgement of proceeds. Ind. Code § 20-26-7.1-9(b). There is no basis for a stay that is really a preliminary injunction.

The State then asks this Court permission to file lis pendens notices for Bellamy 102 and Brandes 65. Once again, the State does not engage the statutory text because it does not meet the statutory requirements for this relief (and the legal statutory remedy is sufficient).

As will be detailed, this Court should deny the Motion.

I. Background and Procedural History

Beginning in 2021, IPS began distributing referendum tax levy funds to innovation network charter schools. (Order Granting IPS' Motion for Injunctive Relief and Denying the State's Cross Motion for Injunctive Relief ("Order") p.4.) Effective July 1, 2023, the Legislature enacted the Dollar Law exemption ("Dollar Law Exemption"), which provides that the Dollar Law does not apply to a "school corporation that distributes money that is received as part of a tax levy collected under IC 20-46-1 or IC 20-46-9 to an applicable charter school." Ind. Code § 20-26-7.1-1(2).

IPS then declared Raymond Brandes School 65 ("Brandes 65") and Francis Bellamy School 102 ("Bellamy 102") surplus, and IPS's board directed the IPS administration to pursue disposing the properties. (Order pp.5-6.) Voices has offered $550,000 to purchase Bellamy 102. (Motion Ex. C; Purchase Agreement p.1.) The Purchase Agreement provides that IPS had until November 30, 2023, to obtain a judicial determination that the Dollar Law did not apply to IPS. (Purchase Agreement ¶ 3(a)). The period for obtaining such a determination could be extended for a maximum of ninety days, and after that, Voices could terminate the Purchase Agreement. (*Id.*) On November 13, 2023, IPS obtained such a determination when this Court held the Dollar Law does not apply to IPS, and this Court held that "the proposed sales of the two buildings at issue can proceed as planned." (Order ¶ 35.)

IPS has an urgent need to close on the sale of Bellamy 102.[1] Under the Purchase Agreement, closing is to occur by November 30, 2023. (Ex. C; Purchase Agreement p.3.) The Purchase Agreement expressly provides that "[t]ime is of the essence hereof." (*Id.*)

The reason for this urgency is undisputed. Voices "must vacate their currently leased space in Fountain Square in early 2024, creating urgency in securing and planning for their relocation." (Mulholland Preliminary Injunction Aff. ¶ 29.) In the Motion, the State does not address or dispute any of this. The State does not dispute that if this Court granted the Motion that it would very likely kill the sale to Voices and cost IPS—and its taxpayers—$550,000.

The State also does not provide any evidence that any charter schools actually want Brandes 65 or Bellamy 102. Instead, the State vaguely claims that "it is at least feasible that a charter school" would want the buildings. (Motion p.10.) That is, the State asks this Court to effectively terminate a known deal with a known buyer for $550,000 on the off chance that perhaps the State will win on appeal and perhaps a charter school may want one of the buildings. In that regard, it is telling that no charter schools have sought to intervene in this matter to assert an interest in either of the buildings.

In support of its cross-motion for preliminary injunction, the State introduced a September 13, 2023 hearsay letter from the Andrew J. Brown Academy that it may be interested in Bellamy 102 "for the academic year 2024-2025." (State Preliminary Injunction Motion Ex. A.) Notably, the letter came over 45 days after IPS publicly announced it was pursuing a buyer for Bellamy 102 and nearly a month after IPS filed its Complaint. In its October 25, 2023 Amended Response to

[1] The State's new counsel suggests that IPS hastily scheduled the November 16, 2023, Board of Commissioners meeting to rush through the Voices transaction. Not so. Beginning with its initial filings on August 21, 2023, IPS throughout this case consistently maintained how time is of the essence. The November 16, 2023, meeting has been on the books since January 2023. Moreover, in its October 25, 2023 Amended Response to the Notice to the Court, IPS expressly stated that it intended to oppose any stay request because it would endanger the Voices deal. The State cannot claim it was surprised by IPS's actions.

Notice to the Court (pp.4-5), IPS detailed how an appeal and the lengthy procedures detailed by the Dollar Law could not play out by the start of the 2024 academic year. (*Id.*) Moreover, the Dollar Law only guarantees that the Andrew J. Brown Academy may compete to receive Bellamy 102—there is no guarantee that Andrew J. Brown Academy would win that competition. Ind. Code § 20-26-7.1-4(g). In the Motion, the State does not dispute that even if it were to prevail on an appeal that Bellamy 102 would not be available under the Dollar Law in time for the start of the academic year 2024-2025. The State asks this Court to terminate a known deal with a known purchaser without any assurance that any charter school actually wants or can use Bellamy 102 or Brandes 65.

II. Analysis

A. The Legislature has provided the remedy for failure to comply with the Dollar Law.

In the Motion, the State largely ignores that the Legislature has provided the remedy for a failure to comply with the Dollar Law—disgorgement of funds from a sale to charter schools—let alone demonstrate that it is inadequate.

Indiana Code § 20-26-7.1-9(b) provides that the remedy for a violation of the Dollar Law is that "the school corporation shall submit any proceeds from the sale of the covered school building to the state board, which shall be distributed equally between each charter school." (Emphases added.) In the Motion, the State does not acknowledge this remedy or explain why it is allegedly inadequate.

This remedy protects all interested entities. It protects IPS because it allows IPS to go through with the sale of Bellamy 102 to Voices, which has an urgent need for the building. It also protects charter schools because if an appellate Court reversed this Court, the proceeds from the sale would be distributed to charter schools. This would help all charter schools, even if none had any interest in acquiring Brandes 65 or Bellamy 102 because they would still receive the proceeds

from a sale if an appellate court determined a sale violated the Dollar Law. In this regard, no charter school has intervened in this matter claiming to want to acquire either school. The disgorgement remedy protects everyone involved. This is an especially appropriate remedy here—not only because the Legislature expressly provided for it—but because this Court has already ruled that the Dollar Law does not apply to IPS. IPS should not be precluded from completing a sale to a known buyer for $550,000 based on a statute that this Court already held does not apply to IPS, when the Legislature has provided a remedy if an appellate court later determined the Dollar Law applied to IPS.

Case law cited by the State confirms that the existence of a legal remedy means this Court should deny the Motion. In *Angleton v. Estate of Angleton*, 671 N.E.2d 921, 929 (Ind. Ct. App. 1996), the Court of Appeals held that "[t]o demonstrate that the trial court abused its discretion in denying his request for a stay, Brad must show in essence that without the stay of proceedings, he will be without a remedy." The Court of Appeals held the trial court did not abuse its discretion denying a stay motion because "Brad has not demonstrated, or even argued, that he will be without a remedy to recoup those assets." *Id.* Likewise, in this case, the State has not demonstrated that it will not be able to recoup the proceeds of any sale of a building because that is the exact remedy provided by the Legislature for a violation of the Dollar Law. Ind. Code § 20-26-7.1-9(b). The State has certainly not shown that the remedy provided by the Legislature is somehow inadequate since it failed to acknowledge it.

The Dollar Law contains a remedy for a sale that violates its provisions—disgorgement of proceeds to charter schools. This remedy protects all interested entities. This is especially true since this Court has already ruled that the Dollar Law does not apply to IPS. This Court should deny the Motion because granting it would very likely terminate a sale for $550,000—harming

IPS and its taxpayers—and there is an adequate legal remedy if an appellate court determined the Dollar Law applies to IPS.

B. The State asks this Court to preliminarily enjoin IPS, which the Court already denied, and doing so would cause grave financial harm to IPS.

In the Motion, the State claims that it is only asking this Court to stay its Order. (Motion p.10.) But that is not the relief the State actually seeks. The State wants to stop IPS from selling Bellamy 102 or Brandes 65. Merely staying this Court's Order won't provide the State the relief it seeks. If this Court merely stayed its Order, that would not preclude IPS from selling the buildings. What the State is actually asking this Court to do is to enter a preliminary injunction barring IPS from selling the buildings based on a statute that this Court has already held does not apply to IPS. But the State has not made any attempt to demonstrate that it meets the standards for a preliminary injunction, and the State's claim that those standards do not apply is a tacit admission that it cannot meet them.

The Indiana Supreme Court has addressed a situation where a party does not merely seek a stay, but actually seeks a preliminary injunction. In *Doe v. O'Connor*, 781 N.E.2d 672, 674 (Ind. 2003), the "plaintiffs[] request[ed] . . . a stay[] in the form of a preliminary injunction." "There are four requirements to justify a preliminary injunction: (1) irreparable harm, (2) likelihood of success on the merits, (3) balance of harms, and (4) public interest." *Id.* In that case, the Supreme Court granted the stay in the form of preliminary injunction, in part, because "[t]here appears to be no financial harm to the defendants from the grant of the requested delay." *Id.*

Federal courts apply this same standard and have concluded that "a stay is generally considered 'extraordinary relief' and the moving party bears a 'heavy burden of proof.'" *Cmty. Pharmacies of Indiana, Inc. v. Indiana Fam. & Soc. Servs. Admin.*, 823 F. Supp. 2d 876, 878 (S.D. Ind. 2011) (quoting *Winston–Salem/Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers)). The district court then applied the same four-part standard for

a preliminary injunction to determine whether to issue a stay: "(1) 'whether the stay applicant has made a strong showing that he is likely to succeed on the merits' on appeal; (2) 'whether the applicant will be irreparably injured absent a stay'; (3) 'whether issuance of the stay will substantially injure the other parties interested in the proceeding'; and (4) 'where the public interest lies.'" *Id.* (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). To obtain a stay that is really a preliminary injunction, the State bears a heavy burden and the State must meet the standards for a preliminary injunction. In the Motion, the State makes no attempt to do so.

In the Motion, the State cited *Doe*, (Motion p.7), but the State does not then address how it allegedly meets the criteria for the preliminary injunction it seeks. First, the State does not address that before a preliminary injunction may be entered a court must "balance [the] harms." *Doe*, 781 N.E.2d at 74. In *Doe*, the Supreme Court entered a stay because there was no "financial harm" to the enjoined party. *Id.* If this Court stayed (really preliminarily enjoined) IPS from selling Bellamy 102, IPS would likely lose a sale worth $550,000. That is a significant "financial harm" to IPS and supports not granting a stay (really a preliminary injunction).

As to the balance of the harms, there is no harm to the State if this Court denies the Motion. The State does not want to use a school building itself. While the State claims to represent the interests of charter schools, no charter school has intervened in this matter. And Indiana law already protects charter schools' interests if a school violates the Dollar Law by providing that a school district disgorge the proceeds of a sale to charter schools. Ind. Code § 20-26-7.1-9(b). Because Indiana law provides an adequate remedy for a violation of the Dollar Law, there is no basis to enter a preliminary injunction. *Indiana State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 575 N.E.2d 303, 306 (Ind. Ct. App. 1991) ("Thus, even the sale or closing of some facilities in the class does not justify the issuance of a preliminary injunction when there is an adequate remedy at law available to them."). Also, because Indiana law provides a remedy if an

appellate court were to later find that IPS violated the Dollar Law by selling a building, the balance of harms strongly favors IPS because it will suffer financial harm if the Motion is granted.

Second, the State did not make any effort to demonstrate that it is likely to "succe[ed] on the merits" of an appeal. *Doe*, 781 N.E.2d at 74. The State does not explain why it believes this Court's Order is erroneous or why it believes that it is likely to succeed on the merits. Despite this, the State asks this Court to stay (really preliminarily enjoin) IPS based on a statute this Court already held does not apply to IPS.

In tacit recognition that it cannot meet the criteria laid out in *Doe,* and despite citing *Doe*, the State then claims that the Indiana Supreme Court allegedly got it wrong by applying the test for a preliminary injunction because, according to the State, "the analysis under Rule 62(C) is different, however." (Motion p.8 n.1.) The State then essentially acknowledges that it cannot meet the standard for a preliminary injunction and argues that "when the Court of Appeal has considered trial court rulings on motions for stays under that rule, it has not engaged in the weighing of these factors." (*Id.*)

But the three cases cited by the State do not support its theory. First, in *Kennedy v. Jester*, 700 N.E.2d 1170, 1172 (Ind. Ct. App. 1998), the trial court stayed distribution of life insurance funds during a criminal appeal. The case did not involve a stay that was the functional equivalent of a preliminary injunction. Moreover, *Kennedy* cannot cast doubt on *Doe*'s invocation of the preliminary injunction standards because *Kennedy* predates *Doe* by ***five*** years.

Second, in *Angleton,* 671 N.E.2d at 929—a case that predates *Doe* by ***seven*** years—the Court of Appeals affirmed a probate court's refusal to stay distribution of funds pending an appeal because the appellant "will be entitled to recoup those assets from the beneficiaries," if he prevailed on appeal. Finally, in *Hilliard v. Jacobs*, 927 N.E.2d 393, 404 (Ind. Ct. App. 2010), the Court of Appeals affirmed a trial court's denial of a stay to prevent distribution of life insurance policies

because "Hilliard requested the stay pending her petition to the United States Supreme Court; however, she made no claim that the litigation involved federal questions or conflicted with federal caselaw." Both of these cases are consistent with preliminary injunction standards. *Angleton* denied a stay because there was a legal remedy of recoupment. Likewise, under the Dollar Law, recoupment of funds is the express remedy for a violation of the Dollar Law. Ind. Code § 20-26-7.1-9(b). *Hilliard* denied a stay because the requesting party did not show a likelihood of success on the merits. Likewise, the State has made no effort to point to any alleged error in this Court's Order.

The State purportedly requests a stay but what it really asks this Court to do is to preliminarily enjoin IPS based on a statute this Court already held does not apply to IPS. The State has not made any effort to demonstrate that it satisfies the preliminary injunction standards and it tacitly admits that it cannot do so. The cases the State cites support that this Court should deny the Motion. Because the State cannot demonstrate that it meets the standards for a preliminary injunction, and has not attempted to do so, this Court should deny the Motion.

C. This Court should deny the State's request to file lis pendens notices.

In the alternative, the State requests that this Court permit it to file lis pendens notices on Brandes 65 and Bellamy 102. (Motion pp.10-11.) The State does not explain why the disgorgement provision in the Dollar Law is not the proper remedy if a building is sold in violation of the Dollar Law and the State does not explain what interest in the buildings it has that would permit it to file lis pendens notices. In the end, the State (again) trips up on application of unambiguous, plain statutory language that precludes its request. This Court should deny the State's request.

The lis pendens statute provides that a party may file a lis pendens notice "to enforce any lien upon, right to, or interest in any real estate." Ind. Code § 32-30-11-3. Alternatively, lis pendens may be available in a suit filed that is upon an official bond, and the State offers no such bond

here. Ind. Code § 32-30-11-2. In the Motion, the State does not claim to have a "lien" on the buildings. The State does not claim the Dollar Law grants it any "right to" the buildings. The State also does not claim that the Dollar Law grants it any "interest in any real estate." The State has not shown that it has any interest in Brandes 65 or Bellamy 102 that would permit it to file lis pendens notices.

The State also does not explain why this Court should permit it to file lis pendens notices when the Legislature has provided an express remedy for a violation of the Dollar Law. Ind. Code § 20-26-7.1-9(b). The Legislature has provided that the proceeds from any sale that violates the Dollar Law go to charter schools. *Id.* The Dollar Law does not provide that the State has the authority to unwind a sale in violation of the Dollar Law. Instead, it provides for disgorgement of the proceeds. In such a circumstance, there is no basis for filing lis pendens notices.

This Court should deny the State's request to file lis pendens notices.

III. Conclusion

This Court should deny the Motion. Granting it would cause grave harm to IPS and its taxpayers by terminating a known deal to a known buyer for $550,000. The State does not claim or provide any evidence that any charter school actually wants to acquire Brandes 65 or Bellamy 102. Granting a stay (essentially a preliminary injunction) is particularly inappropriate because the Legislature has already provided a remedy for a violation of the Dollar Law—disgorgement of proceeds to charter schools. This remedy protects the interests of IPS and charter schools if an appellate court later determined that the Dollar Law applies to IPS. This Court should also deny the State's request to file lis pendens notices.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 16, 2023, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on that same date the foregoing document was served upon the following person(s) via IEFS:

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