

SUPREME COURT OF NEW JERSEY

Docket No. _____

IN THE MATTER OF RUTGERS,
THE STATE UNIVERSITY OF
NEW JERSEY,

Petitioner-Appellant

and

AFSCME LOCAL 888,
AMERICAN FEDERATION OF
STATE, COUNTY, AND
MUNICIPAL EMPLOYEES,

Respondent-Appellee

On Petition for Certification from the
Superior Court of New Jersey,
Appellate Division
Docket No.: A-0277-23

Sat Below:

Hon. Lisa Perez Friscia, J.A.D.

Hon. Stanley L. Bergman, Jr., J.A.D.

CIVIL ACTION

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR CERTIFICATION**

PETER B. PARIS, ESQ. (Attorney #044022002)
BECKETT & PARIS, LLC.
105 COLLEGE ROAD EAST
PRINCETON, NJ 08540
TEL. 609-356-0270
FAX 609-356-0469
EMAIL: pparis@beckettparislaw.com

Counsel for Respondent, AFSCME Local 888

TABLE OF CONTENTS

REASONS WHY CERTIFICATION SHOULD BE DENIED	1
STATEMENT OF THE MATTER INVOLVED	4
A. Facts and Procedural History	4
THE QUESTION PRESENTED.....	7
LEGAL ARGUMENT.....	9
A. Standard of Review	9
B. The Law of Preemption in the Context of Negotiability is Well Settled.....	9
C. Rutgers' Own Title IX Policy Defers to Employees Collectively Negotiated Rights	11
D. The Department of Education Has Specifically Stated that Title IX Does Not Preempt Collectively Negotiated Rights.....	13
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<u>Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass’n</u> , 91 N.J. 38, 44 (1982)	<i>passim</i>
<u>County of Atlantic</u> , 445 N.J. Super. 1, 11 (2016).....	11
<u>Council of New Jersey State College Locals</u> , 91 N.J. 18, 30 (1982).....	3, 10
<u>In re Hunterdon County Bd. of Chosen Freeholders</u> , 116 N.J. 322, 328 (1989).....	11
<u>Hager v. M&K Construction</u> , 246 N.J. 1 (2021).....	<i>passim</i>
<u>Galloway Twp. Bd. Of Educ. V. Galloway Twp. Educ. Ass’n</u> , 78 N.J. 25 (1978).....	9
<u>Kean Federation of Teachers v. Morell</u> , 233 N.J. 566, 582 (App. Div. 2018).....	10
<u>Matter of Ridgefield Park Bd. of Ed.</u> , 244 N.J. 1 (2020)	3, 9
<u>New Jersey Turnpike Authority v. New Jersey Turnpike Authority Supervisors Ass’n</u> , 143 N.J. 185 (1996).....	3, 18

New Jersey Statutes

N.J.S.A. 34:13A-5.4(d).....	7
N.J.S.A. 34:13A-5.3.....	20,24, 32
N.J.S.A. 18A:60-2	36
N.J.S.A. 18A:6-18	36

Rules of Court

R. 2:12-4.....	3
----------------	---

Federal Statutes

Title IX of the Education Amendments Act of 1972.....*passim*

Regulations and Federal Register

34 C.F.R. §106.45*passim*

85 Fed. Reg. 30298 *3044114

85 Fed. Reg. 30298 *3044214

85 Fed. Reg. 30298 *3044315

85 Fed. Reg. 30298 *3044416

REASONS WHY CERTIFICATION SHOULD BE DENIED

Respondent AFSCME Local 888 (“AFSCME” or “Respondent”) respectfully submits that there are no legitimate grounds for granting the petition for certification submitted by Petitioner, Rutgers, the State University of New Jersey (“Rutgers” or “Petitioner”). The Appellate Division decision below constitutes an unremarkable, standard application of well settled law in which the Appellate Division correctly deferred to the sound judgment of the Public Employee Relations Commission (“PERC”) in denying Petitioner’s petition to restrain disciplinary grievance arbitration because such arbitration is clearly not preempted by Title IX of the federal Education Amendments Act of 1972 (“Title IX”). Indeed, there is nothing controversial about an employer conducting a pre-termination disciplinary hearing that is later subject to review in another forum. The New Jersey Civil Service Commission (CSC) disciplinary system, for example, calls for a local pre-termination hearing that is controlled by the employer, followed by a post-termination appeal to CSC.

Petitioner’s grandiose proclamation that federal anti-sexual harassment laws are “at stake” in this appeal is preposterous. (Petition at 1). Title IX remains in effect and viable because it has always contemplated its disciplinary procedures to be subject to collective negotiations agreements that provide for “just cause” arbitration.

In upholding PERC's decision not to restrain arbitration, the Appellate Division simply followed decades of New Jersey law that has consistently upheld contractual rights to neutral, post-termination review of disciplinary terminations pursuant to collective negotiations agreements. By doing so, the Appellate Panel certainly did not "jeopardize the rights of protections of over 69,000 students and 27,500 employees." (Petition at 1). In fact, the opposite is true. It is Rutgers that seeks to eliminate the negotiated job protections of millions of union members. Contrary to Rutgers' position here, Title IX did not erase decades of New Jersey labor law as properly interpreted by PERC and affirmed in numerous cases before this Court and the Appellate Division.

As the Appellate Division correctly noted, and as remains true today, "Rutgers provides no authority demonstrating the grievance process under Title IX Regulations was the sole disciplinary process for an employee deemed responsible for sexual harassment." (Aa20). Indeed, Rutgers' own Title IX policy expressly states that "the decision concerning discipline shall be consistent with the terms of all University policies and the terms of any [collective negotiations agreements] that may be applicable." (Aa19). Accordingly, the Petition before the Court merely constitutes a disagreement with the Appellate Division's decision and fails to set forth any issue that are worthy of certification.

R 2:12-4 “Grounds for Certification” provides:

Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court’s supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.”

Petitioner satisfies none of the considerations in R. 2:12-4. In seeking to restrain arbitration of an employee’s termination of employment, which is a matter unique to one employee and one employer, Petitioner does not present any “question of general public importance.”

Moreover, PERC’s longstanding interpretation of preemption in the context of the scope of negotiations has been examined, decided, and well settled by this Court in numerous cases for at least the past 40-plus years, as discussed at length throughout the Appellate Division’s decision in this case. See, e.g., In Re Ridgefield Park Bd. of Educ., 244 N.J. 1 (2020); N.J. Tpk. Auth. v. N.J. Tpk. Supervisors Ass’n, 143 N.J. 185 (1996); Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass’n, 91 N.J. 38 (1982); Council of New Jersey State College Locals, etc. v. State Bd. of Higher Education, 91 N.J. 18 (1982). Thus, there can be no genuine claim that “the decision under review is in conflict with any other decision of the same or a higher court.” R 2:12-4.

There is no similar appeal pending before the Supreme Court, nor does the Appellate Division decision call for an exercise of Supreme Court supervision.

The interests of justice do not support certification in a case that was decided with numerous citations to longstanding and non-controversial legal precedent.

Instead of satisfying any of the proper grounds for certification, Petitioner merely recites the same arguments that were properly rejected by the Appellate Division. Certification to this Court is not intended to be a “second bite at the apple.” Rather, the sole grounds for certification are set forth in R. 2:12-4, none of which is availing to Petitioner.

STATEMENT OF THE MATTER INVOLVED

A. Facts and Procedural History

Petitioner and Respondent are parties to a collective negotiations agreement covering the period between July 1, 2018 and June 30, 2024. (Pa154-Pa169). The agreement governs the negotiable terms and conditions of employment of “all regular maintenance and service employees, both full time and part time” employed at Rutgers. (Pa160). Article 4 of the contract sets forth a grievance procedure which culminates in binding arbitration before an arbitrator appointed by PERC. (Pa162-Pa164). Article 4, section 8, of the contract specifically provides that:

No employee shall be discharged, suspended, or disciplined in any way except for just cause. The sole right and remedy of any employee who claims that he or she has been discharged, suspended, or disciplined in any way without just cause shall be to file a grievance through and in accordance with the grievance procedure.

(Pa165.) (Emphasis added.) Thus, if a member of the Local 888 bargaining unit is disciplined or discharged, their only recourse is to appeal through the contractual grievance procedure. (Pa165).

In February 2022, unit member J.M. was accused of sexual harassment by a female co-worker. (Pa120). Both J.M. and the female complainant were members of the Local 888 bargaining unit. (Pa178-Pa180). J.M. was charged with two violations of Rutgers' Title IX Policy and Grievance Procedure (University Policy 60.1.33) and one violation of the University Policy Prohibiting Discrimination and Harassment (University Policy 60.1.12). (Pa119). The allegations were investigated, and a pre-termination hearing conducted, pursuant to the Title IX Policy and Grievance Procedure, University Policy 60.1.33.(Pa53-Pa112). The hearing was held before two "decision-makers", one (Ralph Mara) assigned to determine whether J.M. was responsible for the conduct alleged, and another (John Malley) to make a recommendation concerning sanctions. (Pa119-Pa128, Pa147). On July 28, 2022, the decision makers issued a determination that J.M. was responsible for the alleged violations and recommended that he be terminated from employment. (Pa119-Pa128). The sanctions decision maker, Mr. Mally, specifically referred to his

determination as a “recommended sanction.” (Pa126). Pursuant to Policy 60.1.33, Section VIII.M, J.M. was permitted to appeal only on the issue of responsibility. (Pa84). That appeal was limited to three bases; (a) procedural irregularity affecting the outcome, (b) new information that was not available at the time the determination was made, and (c) a conflict of interest or bias. (Pa84, Pa127). Notably, under Rutgers’ Title IX Policy, the right to appeal a recommended sanction is reserved only for Rutgers’ students and does not extend to its employees. (Pa84).

On August 2, 2022, J.M. submitted a Notice of Appeal of the decision-maker’s determination of responsibility. (Pa147). On August 30, 2022, the appeal was denied by Assistant Vice President Carolyn Dellatore in her capacity as Appellate Decision Maker. (Pa147-149). Ms. Dellatore noted that there were “no further levels of appeal” available under Rutgers’ policy. (Pa149).

On September 26, 2022, nearly a month after the Title IX process had concluded, Rutgers adopted the recommended sanction and notified J.M. that he was being terminated from employment “effective immediately.” (Pa152). The termination letter was copied to both the President and Vice President of Local 888. (Pa152). Local 888 filed a grievance on behalf of J.M. alleging a violation of Article 4 of the contract and seeking that J.M. “be made whole in every way including any and all losses to which the grievant is entitled.” (Pa173). The University refused to process the grievance on the basis that “Title IX and its implementing regulations

preempt any further review under the collective negotiation agreement.” (Pa50). On October 3, 2022, consistent with Article 4, paragraph 3 (Step 4) of the contract, Local 888 filed a Request for Submission of a Panel of Arbitrators with PERC. (Pa163, Pa177). In response, on February 2, 2023, Rutgers filed a Scope of Negotiations Petition seeking to restrain arbitration on the grounds that further proceedings were preempted by Title IX’s governing regulations. (Pa39). On August 24, 2023, PERC issued a decision denying Rutgers’ Petition and directing that the grievance proceed to binding arbitration. (Pa8-Pa32). Rutgers subsequently appealed to the Appellate Division. (Pa1, Pa4). After briefing and oral argument, the Appellate Division properly affirmed PERC’s refusal to restrain arbitration. (Aa2-Aa22).

For the reasons set forth below, the decisions of PERC and the Appellate Division were correct as a matter of law. Since Petitioner offers no legitimate grounds for certification, the Petition should be denied.

THE QUESTION PRESENTED

Petitioner’s proposed question reads: “Does the grievance process for sexual harassment mandated by the federal government’s Title IX rules preempt a conflicting process set forth in the terms of a collective negotiations agreement?” (Emphasis added.)

Contrary to Petitioner’s implication, the arbitration and “just cause” clauses of the CNA are not a “conflicting process” to the Title IX grievance

process. Rather, these processes are complementary, as Rutgers' Title IX policy states, and as the DOE has stated.

Throughout its Petition, Rutgers incorrectly presupposes that an arbitration concerning the termination of J.M. would necessarily "conflict" with the determination of the Title XI decision-makers; yet, the result of arbitration could also result in an affirmation of the termination.

Thus, properly worded, the Question Presented should be: "Does the pre-termination grievance process mandated by Title IX rules preempt an employee's right to post-termination arbitration as set forth in the terms of the parties' collective negotiations agreement?" Consistent with decades of jurisprudence on the subject of preemption in the context of the scope of negotiations, PERC and the Appellate Division properly found that Title IX does not preempt post-termination arbitration.

In short, Petitioner merely repeats the arguments it set forth before the Appellate Division and fails to offer persuasive argument in favor of certification.

LEGAL ARGUMENT

Respondent incorporates, but does not repeat, the legal arguments contained in Respondent's Appellate Briefs. In addition, Respondent makes the following points in rebuttal to the Petition.

A. Standard of Review

Appellate review of "PERC decisions and orders shall be of a very limited scope. Galloway Twp. Bd. Of Educ. V. Galloway Twp. Educ. Ass'n., 78 N.J. 25, 35 (1978). In the absence of a legal issue that is outside PERC's expertise, Courts properly afford substantial deference to PERC's expertise in the area of scope of negotiations. See, e.g., In Re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020). Petitioner offers no rational basis for this Court to question PERC's expertise in this case or the Appellate Division's affirmation thereof.

B. The Law of Preemption in the Context of Negotiability is Well Settled

The Appellate Division properly upheld PERC's decision which relied on decades of expertise on the law of preemption in the context of negotiability. It is black letter law that the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. In Re Ridgefield Park Bd. of Educ., 244 N.J. at 17 *quoting* Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n., 91 N.J. 38, 44 (1982). Instead, negotiations are only preempted if the regulation fixes a term and condition of employment "expressly,

specifically and comprehensively.” *Id.* quoting Council of New Jersey State College Locals, 91 N.J. 18, 30 (1982). This Court has long held that to find a law or regulation to be preemptive:

the legislative provision must “speak in the imperative and leave nothing to the discretion of the public employer.” If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiations will be confined within these limits. Thus, the rule established is that legislation “which expressly sets terms and conditions of employment...for public employees may not be contravened by negotiated agreement.”

Id. at 18 [citations omitted]. In construing whether a statute or regulation is preemptive, the analysis must begin with the language of the law, ascribing to its words their ordinary meaning. *Id.* citing Kean Federation of Teachers v. Morell, 233 N.J. 566, 582 (App. Div. 2018). Thus, the question before PERC was whether the regulation, 34 C.F.R. §106.45, “expressly, specifically and comprehensively” prohibits a union member from arbitrating discipline imposed upon him/her following a Title IX investigation. PERC correctly found that it does not.

Here, there is no language in the text of 34 C.F.R. §106.45 which speaks to the right of employees to appeal discipline. Not only does the regulation not speak “expressly, specifically and comprehensively” to disciplinary appeal rights, it is completely silent on the issue. After a thorough review, PERC found that “Nothing in 34 C.F.R. §106.45 suggests that the ‘grievance process’ required by Title IX pertains to, or preempts, collectively negotiated grievance procedures that may be

available to represented employees after discipline has been imposed...” (Pa26-Pa27). In the absence of any language in 34 C.F.R. §106.45 pertaining to disciplinary appeal rights, the Commission properly denied the Petition. PERC’s decision is consistent with both its own case law and the courts’ and should be affirmed. See Bethlehem Twp. Bd of Ed., 91 N.J. 38, 48 (1982) (to be preemptive regulations must leave no room for discussion and say all there is to be said); Matter of Hunterdon County Board of Chosen Freeholders, 116 N.J. 322, 330-331 (1989) (statute not preemptive unless it specifically fixes term of employment); County of Atlantic, 445 N.J. Super. 1, 21-22 (App. Div. 2016) (statute not preemptive absent specific conflicting language); New Jersey State Troopers, 7 NJPER ¶ 12026 (1981) (subject matter not preempted where regulation is silent); City of Hackensack, 45 NJPER ¶ 5 (2018) (no preemption where statute did not specifically address subject matter of union grievance).

C. Rutgers’ Own Title IX Policy Defers to Employee’s Collectively Negotiated Rights

Rutgers’ position in this matter is disingenuous since its own Title IX policy refers to the preservation of employees’ contractual rights. Rutgers Policy 60.1.33 is entitled “Title IX Policy and Grievance Process.” (Pa53-Pa112). That Policy specifically provides that any discipline imposed upon a Rutgers’ employee must be consistent with the terms of their union contract which obviously includes binding arbitration for all disciplinary appeals.

Section VIII.L of Policy 60.1.33 is entitled “Sanctions and Other Remedial Measures.” (Pa82). Section L, subsection 1, entitled “How Sanctions are Determined”, provides that “In all cases involving employee Respondents, the decision concerning discipline shall be consistent with the terms of all University policies and the terms of any collective negotiations agreements” (Pa82). (Emphasis added.) Similarly, Section L, subsection 3, entitled “Sanctions for Employee Respondents”, provides that “For employees, sanctions may include discipline up to and including termination from employment, consistent with the terms of all University Policies concerning personnel actions and the terms of any applicable collective negotiations agreements.” (Pa83).

The collective negotiations agreement between Rutgers and Local 888 expressly provides that the only way to appeal discipline or discharge is through the union grievance procedure set forth at Article 4. (Pa165). Thus, when Rutgers drafted its own policy, it knowingly conceded that any discipline imposed through the Title XI process upon a Local 888 member would be subject to appeal through the contractual grievance procedure.

In this case, Rutgers conveniently forgets its own policy. However, neither PERC nor the Appellate Division forgot that Rutgers’ own policy concedes Respondent’s point: by seeking to restrain the union’s request for arbitration in

this matter, Rutgers ignored and violated subsections (1) and (3) of Section VIII.L of Rutgers' "Title IX Policy and Grievance Process." Most importantly, Rutgers' policy implicitly and explicitly concedes that its Title IX Policy was intended to coexist with the collectively bargained rights of employees.

D. The Department of Education Has Specifically Stated that Title IX Does Not Preempt Collectively Negotiated Rights

Petitioner ignores the dispositive fact that the U.S. Department of Education has expressly stated that Title IX grievance regulations do not preempt arbitration of discipline under a union contract because the procedures are complementary, not exclusive.

The Title IX sexual harassment grievance process set forth at 34 C.F.R. §106.45 exists "for the purpose of addressing formal complaints of sexual harassment..." 34 C.F.R. §106.45(b). Importantly, the grievance process established by the regulation applies "before the imposition of any disciplinary sanctions..." 34 C.F.R. §106.45(b)(1)(i) (Emphasis added). Although the Title IX grievance process must specify what discipline might be imposed, it contains no language restricting disciplinary appeals of any kind, much less contractual grievance procedures. 34 C.F.R. §106.45(b)(1)(vi). Clearly, the regulation establishes a process in which the employer must initially process complaints of sexual harassment prior to the imposition of discipline. It does not, however, restrict in any way the collectively negotiated rights of employees to review discipline that is imposed.

During the public comment phase of the 2020 revisions, one commentator “suggested that the final regulations clearly state they do not preclude recipients’ obligation to honor additional rights negotiated by faculty in any collective bargaining agreement...” 85 Fed. Reg. 30298 *30441 (May 19, 2020). Obviously, this comment presented DOE with an opportunity to state that the Title XI regulations preempt arbitration pursuant to collective negotiations agreements. Instead, DOE stated the opposite, namely that the regulations do not preempt rights under collective negotiations agreements.

Specifically, DOE stated:

These final regulations do not preclude a recipients’ obligations to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations. In the Department’s 2001 Guidance, and specifically in the context of the due process rights of the accused, the Department recognized that “additional or separate rights may be created for employees...by...institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements.” The Department has never impeded a recipients’ ability to provide parties with additional rights as long as the recipient fulfils its obligations under Title IX. The Department has never suggested otherwise, and we believe it is unnecessary to expressly address this concern in the regulatory text.

85 Fed. Reg. 30298 *30442 (May 19, 2020). (Emphasis added.)

This unequivocal statement of non-preemption by the federal agency charged with interpreting and implementing Title IX is dispositive of the preemption argument erroneously propounded by Rutgers in its petition. Not only did DOE reject outright the notion that the regulation preempts employee

rights under a union contract, the agency viewed the lack of preemption as so obvious from the history of Title IX regulations that there was no need to specifically address the question in the text of the regulation. Indeed, DOE simply reaffirmed its 2001 Guidance that employers like Rutgers that receive federal funds remain obligated to honor the “additional rights” of employees that are set forth in union contracts, as long as the pre-termination process envisioned by 34 C.F.R. §106.45 was followed.

DOE’s comments also draw a clear distinction between the pre-termination process governed by 34 C.F.R. §106.45 and the post-termination process governed by the union contract. One commentator observed that “the live hearing requirement for postsecondary institutions creates an unnecessary and duplicative process for employees who are subject to a collective bargaining agreement.” 85 Fed. Reg. 30298 *30443 (May 19, 2020). That comment presumed the existence of two hearings and suggested that only one hearing was necessary. But DOE noted that the parties could negotiate any process they chose, as long as at least one of the hearings was consistent with the Title IX regulations. In its response to that comment, DOE again presupposed the viability of collectively negotiated rights to disciplinary review of the Title IX process:

...some [collectively bargained] agreements provide a pre-termination hearing, while other agreements provide a post termination hearing...If a

recipient chooses to accept Federal financial assistance and thus becomes subject to these final regulations, then the recipient may negotiate a collective bargaining agreement that requires a pre-termination hearing consistent with the requirements for a hearing under §106.45(b)(6). Nothing precludes a recipient and a union from renegotiating agreements to preclude the possibility of having both a pre-termination live hearing that complies with §106.45(b)(6) and a post termination arbitration hearing that requires a hearing with cross examination. These final regulations do not require both a pre-termination hearing and a post termination hearing, and recipients have discretion to negotiate and bargain with unions acting on behalf of employees for the most suitable process that complies with these final regulations.

85 Fed. Reg. 30298 *30444 (May 19, 2020). (Emphasis added.)

Here, DOE affirms that a pre-termination process is required by §106.45. However, DOE also affirms that “some [collectively bargained] agreements provide a pre-termination hearing, while other agreements provide a post termination hearing...” Again, if Rutgers’ argument is correct, DOE would have stated here that post-termination proceedings are prohibited because the pre-termination hearing is final and unreviewable. But, DOE did not say that. Instead, DOE expressly stated that it is entirely permissible for the employer and the union to negotiate a process that includes two hearings - a pre-termination hearing and a post-termination hearing.

Thus, DOE itself stands in opposition to Rutgers’ unfounded claim that Title IX preempts collectively negotiated arbitration rights of employees.

Surprisingly, Petitioner cites this Court’s decision in Hager v. M&K Construction, 246 N.J. 1 (2021) in support of its specious assertion that the Appellate

Division erred by focusing “too closely” on “a statute’s plain language [as] the best indicator of legislative intent.” (Pet. Br. at 12). Petitioner attempts unsuccessfully to draw the Court’s eye away from Rutgers’ Title IX policy and DOE’s express statements negating preemption by complaining that the Appellate Division “focused too closely” on plain language. Instead of relying on DOE’s clear and plain language that stands in opposition to Petitioner’s argument, Petitioner urges this Court to “look beyond the language of the [regulation]” and seek out the purposes the agency “sought to serve” in order to “decipher” the regulation’s true intent, irrespective of what the regulation and agency comments actually state.

To the extent that the Court needs to consider this curious proposition at all, it is obvious that Hager does not support Petitioner’s argument. Indeed, Hager is consistent with the decisions of PERC and the Appellate Division in this case, albeit in a different context.

Hager is a medical cannabis case involving the unique conflict between New Jersey’s legal cannabis laws and the federal Controlled Substances Act (CSA). While the intersection of the CSA and state laws that legalize cannabis is a complex and evolving question, the cannabis controversy does not fit into Petitioner’s cropped and distorted theory of preemption.

In Hager, the relevant question was whether an employer, M&K, could lawfully refuse to reimburse an injured worker (Hager) for his medical cannabis

treatment under New Jersey workers compensation law by arguing that the federal CSA preempts New Jersey law, thereby prohibiting the company from lawfully providing medical cannabis to the employee. After an exhaustive analysis not relevant here, this Court found no preemption for various reasons, most notably the express statements of Congress against preemption. Those clear statements against preemption resemble the DOE's statements in this case.

Contrary to Petitioner's asserted notion of "implied preemption," Hager relied on Congress' express intent to disavow federal preemption of state legal cannabis laws. Subsequent to the enactment of the Controlled Substances Act, Congress had repeatedly stated that the Department of Justice must not enforce the CSA in states that had legalized medical cannabis. Because Congress had expressed such anti-preemption intent for several years, this Court found that Congress surely did not intend for the CSA to preempt New Jersey medical cannabis laws in the context of workers compensation reimbursement.

In sum, the Hager case actually supports Respondent's case, not Petitioner's. In Hager, the Court found that Congress had subsequently spoken against preemption of state law, despite the apparent intent of the CSA. Similarly, here, the Department of Education has expressly spoken against preemption by making clear that Title IX procedures can co-exist with negotiated employee rights. The Hager decision is consistent with New Jersey Turnpike Authority v. New Jersey Turnpike

Authority Supervisors Ass'n., 143 N.J. 185 (1996) which was discussed at length by the Appellate Division. Therefore, this Court's jurisprudence on this question is long-settled and need not be revisited by this case.

CONCLUSION

For the reasons set forth herein, in PERC's briefs, and in Respondent's Appellate briefs, it is clear that Petitioner has failed to carry its burden of showing why certification should be granted to this Court. Accordingly, the Petition must be denied.

Respectfully submitted,

/s/ Peter B. Paris

PETER B. PARIS

Counsel for Respondent AFSCME Local 888

DATED: February 2, 2025