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Via regular mail and fax to (609) 689-4100

Honorable John S. Kennnedy, ALJ
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, NJ 08625-0049

Re: Alcantara et al. v. Hespe, Commissioner of Education, et al.
OAL Docket No.: EDU 11069-2014 S
Agency Ref. No.: 156-6/14

Dear Judge Kennedy:

Please accept this letter in lieu of a more formal brief as my response to the State Respondents' motion to dismiss the amended petition in the above-captioned case and to the parties' briefs in support of and opposition to that motion. I have served the attorneys for the parties by regular and electronic mail and by fax.

Because the parties in their briefs dealt adequately with the context and the relatively brief procedural history of this matter, I am proceeding directly to the legal issues the State Respondents have raised.

## PRELIMINARY STATEMENT

State Respondents assert three legal arguments in support of their motion:

1. That Petitioners have failed to join the Lakewood School District, a necessary or indispensable party;

2. That the amended petition fails to allege a sufficient factual basis to demonstrate the standing of the student petitioners; and

3. That the petition seeks remedies unavailable in this type of proceeding.

For the reasons set forth below, none of those legal arguments has merit and this tribunal should move promptly to consider the substance of the petitioners' case. Further delay in addressing the petitioners' claims that they are being denied an education satisfying their constitutional rights can only exacerbate the harm they allege.

Unfortunately, during the long history of school finance litigation in New Jersey, the State has all too often used delay as a litigation strategy. The State also has demonstrated an ahistorical and contradictory invocation of doctrine, and the letter brief in support of its motion to dismiss is no exception.

## LEGAL ARGUMENT

### I. THE LAKEWOOD SCHOOL DISTRICT IS NOT A NECESSARY PARTY AND FAILURE TO JOIN IT IS NOT A BASIS FOR DISMISSING THE AMENDED PETITION.

The State's first legal argument in support of its motion to dismiss—that the Lakewood school district is a necessary or indispensable party—runs head-on into a more than 40-year history of New Jersey school finance litigation in *Robinson v. Cahill* and *Abbott v. Burke* in which no school district has ever been a party. The only plaintiffs/petitioners have been students and their parents. As far as I can recall, the State has never moved to dismiss those actions because school districts were not joined as parties.

Indeed, when *Bacon v. N.J. State Dept. of Educ.* was filed by school districts in 1997, the State moved to dismiss for lack of standing and, as a consequence, the petition was amended to add several students and their parents. *See Bacon v. N.J. State Dept. of Educ.*, 398 N.J. Super. 600, 607 (App.Div. 2008).

The State's disinterest, for the past 43 years, in arguing that school districts were indispensable to the resolution of school finance challenges was hardly because the State gave the districts a pass. Actually, one of the State's main defenses throughout the years has been that mismanagement, not inadequate funding, was the cause of any educational deficiencies in poor, low-income districts. That argument has been consistently rejected by the New Jersey courts and especially the state supreme court. As one of many examples, here's what the court said in 1990 in *Abbott II*:

> One aspect of the State's claims--that the deficiencies in education are not related either to expenditures per pupil or to property wealth—is that they are related to mismanagement in certain districts. The State's claim is that there has been incompetence, politics and worse in the operation of some urban districts.
>
> While mismanagement has undoubtedly occurred, we agree with the ALJ that it has not been a significant factor in the general failure to achieve a thorough and efficient education in poorer urban districts….No amount of administrative skill will redress this [funding] deficiency and disparity—and its cause is not mismanagement. Abbott v. Burke ("Abbott II"), 119 NJ 287, 381 (1990).

To demonstrate that this district mismanagement argument by the State, and the supreme court's rejection of it, are not ancient history, a similar scenario arose in the most recent *Abbott* litigation, *Abbott XXI*. In defending a $1.6 billion underfunding of SFRA, the State argued, among other things, that "the availability of alternative funding streams and systemic reforms could have enabled the delivery of a constitutional education despite the diminished level of state

aid." Abbott v. Burke ("Abbott XXII"), 206 NJ 332, 364 (2011). In other words, the districts could have managed their funds better.

The court decisively rejected both arguments, yet again. It is well-understood that federal funds are designed to supplement not supplant the state funds necessary for a constitutional education, and the court reaffirmed that. As to the ineffective educational management contention, the court dismissed it with a dig at the State:

> …[T]o the extent that the State asserts that there is room for greater efficiencies and cost-savings available from the tools presently in the hands of districts, this broad brush attempt at disparagement is unpersuasive. Moreover, we cannot help but note that a significant portion of the Abbott SFRA funds go to districts that remain under State supervision. The State should tend its own house. 206 NJ at 367.

Although Lakewood is not a state-operated district, the State has a substantial presence there in the form of a fiscal monitor, Michael Azzara, and a state auditor. Besides that, the Commissioner's broad powers to ensure that districts provide their students with a constitutional education have been well-recognized for more than a half century. *See, e.g.,* Jenkins v. Morris Township School District, 58 NJ 483 (1971).

This argument demonstrates that it is unnecessary for the petitioners to join the Lakewood School District in this matter. The petitioners' grievance is with the State and its educational authorities for not assuring adequate funding given Lakewood's unique circumstances. The Lakewood School District can do little or nothing to cure the petitioners' constitutional grievance. From its experience in other school funding litigation for more than four decades, the State should know this. It should come as no surprise.

## II. STUDENTS HAVE STANDING TO COMPLAIN ABOUT CONSTITUTIONALLY INADEQUATE SCHOOL FUNDING THAT CREATES A SYSTEMIC PROBLEM DISABLING A DISTRICT FROM PROVIDING ALL ITS STUDENTS WITH A THOROUGH AND EFFICIENT EDUCATION

There is absolutely no doubt that New Jersey students have standing to complain about a denial of their constitutional right to a through and efficient education under the state constitution's education clause. The State Respondents do not question that in their motion to dismiss and accompanying letter brief. Instead, they question whether the amended petition adequately links the named student petitioners to specific educational deficiencies directly affecting them. That is to miss the main point raised by the petition—its gravamen is that the constitutional problem is systemic, that the Lakewood School District, because of its unique characteristics, simply doesn't receive enough state funding to provide both its public school students, and the dramatically larger number of non- public school students, with educational funding and services to which they are statutorily and constitutionally entitled.

That is precisely the point of the videotaped statement of Michael Azzara, the state's monitor assigned to the Lakewood School District, which I provided to the tribunal by letter dated March 29, 2015. To authenticate that videotape recorded at the Lakewood Board of Education's public meeting on March 24, 2015, I am attaching a certificate of Eli Hasenfeld, dated April 14, 2015. As his certification indicates, Mr. Hasenfeld recorded the videotape, posted it on YouTube and downloaded it onto a CD, copies of which I am including in the regular mail copy of this letter to your honor and to the lawyers for the parties. Mr. Azzara makes explicit that the Lakewood School District has a revenue problem not a spending problem. In other words, any educational deficiencies are the result of inadequate state aid, not

administrative mismanagement or inefficiency. If petitioners can prove that to be the case before this tribunal, surely the State Respondents can't rectify the unconstitutionality by requiring, through its state fiscal monitor and auditor, that the district re-direct enough funds to assure that the named petitioners get their constitutional due, but other district students are further short-changed.

## III. THE ADMINISTRATIVE PROCESS CAN BE USED TO PRODUCE A UNIFIED AND COMPLETE RECORD TO INFORM THE COURTS' ULTIMATE ADJUDICATION OF THE CONSTITUTIONALITY OF A SCHOOL FUNDING LAW AS APPLIED TO THE LAKEWOOD SCHOOL DISTRICT, NOTWITHSTANDING THAT THE COMMISSIONER'S UNILATERAL POWERS TO DETERMINE THE EXISTENCE OF SUCH A VIOLATION OR TO RECTIFY IT MAY BE LIMITED

The State's third argument for dismissal in this matter—that the remedies sought are not available in this type of proceeding--reflects similar problems. Here the State argues that petitioners seek relief that the Commissioner cannot grant or that, even if he can, they have asked in the wrong way. In all of New Jersey's school funding cases, it has been obvious that the ultimate relief sought was of a constitutional dimension and that only the courts could provide it. That is manifestly the case here, too.

*Robinson v. Cahill* was litigated solely in the courts for that reason. *Abbott v. Burke* followed that approach initially until, virtually on the eve of trial in the superior court, the State moved to dismiss for plaintiffs' failure to exhaust administrative remedies. Presumably, that motion was premised on the State's view that the commissioner had an appropriate role to play in school funding challenges, short of constitutional adjudication, a premise that seems at odds

with the State's current position.

In its first of many *Abbott* decisions, the supreme court decided in 1985, four years after the case was filed, that the trial of that complex, multi-faceted case should proceed before an administrative law judge in the OAL. The court's reasoning, and its manifest concern that the administrative process should not become an instrument of delay, are instructive. The court began its consideration of this issue with the following statement:

> All litigants agree that the procedural desideratum in this case is the rapid, thorough, complete and impartial determination of all the relevant issues that have been properly and fairly presented. Toward this end, we are satisfied that the presence of constitutional issues and claims for ultimate constitutional relief does not, in the context of this litigation, preclude resort in the first instance to administrative adjudication. Abbott v. Burke ("Abbott I"), 100 N.J. 269, 495 A.2d 376, 391 (1985).

This statement was related to the State's argument in favor of exhaustion--that the ultimate constitutional issues in the case raised subjects that are "particularly amenable to specialized consideration and clearly related to areas of administrative regulatory concern." *Id*. In other words, both the ALJ and the Commissioner had clear roles to play and expertise to apply.

The court wound up being persuaded by that argument in an area where exhaustion of administrative remedies was clearly discretionary. In a case, which involved the constitutionality of the Public School Education Act of 1975 as applied, it was apparent to the court that:

> …the myriad, extraordinary, and complex factual issues presented in this case will cause the litigation to turn on the import of proofs that demand close and considered examination and evaluation. In

particular, in the far-ranging context of the claims and defenses, the issues of educational quality and municipal finance may be more effectively presented, comprehended, and assessed by a tribunal with the particular training, acquired expertise, actual experience, and direct regulatory responsibility in these fields. 495 A.2d at 393.

. . . .

We anticipate that the OAL will conduct a thorough hearing, where the parties shall present all their evidence relevant to the constitutional claims and defenses. This will serve to consolidate all fact-findings in a single proceeding. We intend that the proceedings will promote development of a complete and informed record, which will reflect determinations of appropriate administrative issues as well as the resolution of factual matters material to the ultimate constitutional issues. 495 A.2d at 394.

Finally, the court was very mindful of the potential that the administrative process could substantially delay the adjudicatory process and it sought to head off that possibility:

…we are confident that all the proceedings before the administrative agencies—the OAL, the Commissioner…and the State Board—can and will be expedited. This remand shall not be construed to postpone adjudication at the administrative level in order for the Commissioner to design, propose and implement new programs. However, the administrative hearing pursuant to this remand will not prevent the Commissioner and State Board from undertaking any remedial action under NJSA 18A:7A-14 to -16 that would otherwise be appropriate,

provided administrative adjudication of the claims is not delayed. *Id*.

With the benefit of hindsight and knowledge of history, how did the supreme court's decision, unique in the nation, to remand a constitutional school funding challenge to the administrative process turn out? It's a classic good news-bad news story.

The good news was the extraordinary fact-finding and constitutional analysis carried out by ALJ Steven Lefelt, which became the foundation of the supreme court's rulings in *Abbott*. The bad news is how long the administrative process took despite the supreme court's admonitions about it being expedited. In his massive 607-page initial decision, Judge Lefelt recognizes both the supreme court admonition and the long delays that occurred for a variety of reasons, including the State's requests for delays and stays as well as interlocutory rulings by the Commissioner.

The bottom-line is that the OAL process consumed almost three years from the transmittal of the case to OAL on September 3, 1985 until Judge Lefelt's issuance of his initial decision on August 24, 1988. Another period of more than a year was consumed by the Commissioner's rejection of Judge Lefelt's initial decision and the State Board's almost complete affirmance of the Commissioner's decision. In a curiosity of the administrative process, both the Commissioner and State Board were named defendants in *Abbott*, hardly cloaking their decisions with an aura of objectivity. All told, the administrative process consumed almost five years, from 1985 to 1990, before the supreme court determined in *Abbott II* that the Public School Education Act of 1975 was unconstitutional as applied to New Jersey's poor urban school districts. Abbott v. Burke ("Abbott II"), 119 N.J. 287 (1990).

This history suggests three important points relevant to the matter currently before the administrative tribunal:

1. Under *Abbott I*, exhaustion of administrative remedies may be appropriate, but is

discretionary and fact-specific;

2. If the *Alcantara* case is properly in the administrative process, the OAL is charged with important and weighty responsibilities to create a unified and complete record of facts necessary to an ultimate constitutional adjudication by the courts; and
3. Effective steps must be taken to avoid inordinate delays; after all, the lives and life prospects of thousands of children hang in the balance.

## CONCLUSION

This is an important and complex case, but not nearly as complex and comprehensive as the *Abbott* case, or even the *Bacon* case. Both those cases involved multiple districts—*Abbott* between 28 and 31, and *Bacon* between eight and 20, depending upon the particulars and timetable of the litigation.

This case involves a single district, unique in New Jersey and possibly in the nation. The state school funding law, the School Finance Reform Act of 2008, and related administrative actions, such as the District Factor Grouping assigned by the Commissioner to virtually every school district in New Jersey but not to Lakewood, simply do not reflect the Lakewood School District's unique demographic and educational circumstances. Many cases raise the specter of a slippery slope; this one does not. It is truly sui generis.

If the Lakewood School District problem is not dealt with now, however, it will quickly become far worse. The projected enormous population growth in Lakewood over the next 15 years, mostly in the nonpublic school sector, will make today's problems look trivial by comparison.

But the reason to act now is not merely pragmatic; it is because precious constitutional rights of children are at stake. The nearly 5,700 public school students in the Lakewood School District will have only one opportunity in their lives to benefit from a thorough and efficient education, and the time is now. If they are not provided with what is theirs by constitutional

command, they will forever be the victims of a system that just did not care enough about them.

Respectfully submitted,

Paul L. Tractenberg

Attachment: Certification of Eli Hasenfeld, dated April 14, 2015

cc (by regular and electronic mail and by fax): Arthur Lang, Esq.
Frank Corrado, Esq
Geoffrey N. Stark, Esq.