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VIA EMAIL

April 12, 2021

Dr. Angelica Allen-McMillan
Acting Commissioner of the Department of Education
Attn: Bureau of Controversies and Disputes
100 Riverview Plaza, 4th Floor, PO Box 500
Trenton, NJ 08625-0500

Re: Exceptions to Initial Decision of Susan M. Scarola, ALJ (Ret., on recall)
Leonor Alcantara et al. v. David Hespe et al.
OAL Docket No: EDU 11069-14
Agency Ref. No. 156-6/14

Dear Commissioner Allen-McMillan:

As a participant in this matter, I am submitting these exceptions to Administrative Law Judge (ALJ) Scarola's initial decision pursuant to N.J.A.C. 1:1-18.4. At the State's request, the deadline for submitting exceptions was extended by 30 days beyond the usual 13 days to April 13, 2021.

As the Agency Ref. No. indicates, the petition was filed in June 2014, almost seven years ago. I have been a participant since March 11, 2015 by order of the then-ALJ John Kennedy. Ever since, I have been actively involved in this case. In addition to participating in oral arguments, I have submitted to ALJ Kennedy initially and then to ALJ Susan Scarola a total of 23 letters, letter-briefs and other submissions.

Most of my submissions included urgings that time was of the essence for the Lakewood students if they were being denied their fundamental constitutional right to a thorough and efficient education (T&E). The need for the ALJs to move forward expeditiously should not have come as a surprise to them since New Jersey's Administrative Code provisions admonish them that "Hearings and other proceedings shall proceed with all reasonable expedition" (N.J.A.C. 1-1-14.2 (a)) and Rule 3.9 of the Code of Conduct for Administrative Law Judges provides that "An administrative law judge shall dispose promptly of the business of the court." (N.J.A.C. 1:1 App.)

There is an apt model of how the Office of Administrative Law (OAL) and the assigned ALJs can expeditiously discharge their duties and contribute to a positive and important advance of the

rights of New Jersey students to T&E. It is the landmark case of *Abbott v. Burke*, a vastly more complicated case than this one. Yet the role of ALJ Steven Lefelt took less than a year during which he conducted a 100-day hearing and wrote and submitted to the Commissioner a 607-page initial decision, which became the bedrock of the *Abbott* decisions by the New Jersey Supreme Court even though the Commissioner and State Board rejected it. Had this case been dealt with in remotely as expeditious a manner, the ALJ's initial decision would have been submitted to the Commissioner long before COVID-19 struck us and caused lengthy emergency delays.

In addition to my many submissions to the ALJs, I also sent a March 28, 2018 letter to Governor Murphy, Attorney General Grewal and Acting Commissioner of Education Repollet urging that the executive branch immediately take the necessary action to assure that the fundamental constitutional right of Lakewood public school students to a thorough and efficient education be vindicated. In that letter, I lamented how long the students' petition had already been in process before OAL, and how much longer that process could take if the State respondents continued to engage in delaying and obfuscating tactics.

As I feared it would, however, that letter fell on deaf ears. Here we are more than three years later with no end in sight to the State's inability to provide its most vulnerable students with their desperately needed, and constitutionally guaranteed, public education. Because, in my judgment, that letter set out so effectively the case for immediate state action, I am attaching a copy for your perusal.

If time was of the essence more than three years ago, imagine the urgency today. And now ALJ Scarola has confirmed what seemed obvious from the start—that Lakewood students are being denied a thorough and efficient education. Every additional day that they suffer from the deprivation of that fundamental constitutional right, is a day lost to them forever.

What they need now more than ever is someone with the caring, concern and courage to come to their aid immediately. It is my hope you are that person—that in your position as Commissioner of Education you are ready to cast aside political, bureaucratic, and legal process constraints and to act boldly for these children. The dire circumstances confronted by Lakewood public school students call for educational leadership of the highest order.

Introduction and Background

As I have stressed repeatedly, in my submissions to ALJ Scarola, this case actually is a simple and straightforward one, which, in truth, never even needed to be brought as a contested matter. The State should long ago have taken the necessary action, which is well within its power and duty.

In that connection, I found myself thinking back to my long experience in both *Robinson v. Cahill* and *Abbott v. Burke*, the cases that launched New Jersey's extraordinary effort to develop a school funding law that assured its students T&E. I also was reminded of George Santayana's famous aphorism: "Those who cannot remember the past are condemned to repeat it."¹

¹ Winston Churchill wrote another, perhaps even better known, version: "Those that fail to learn from history are doomed to repeat it."

What is the history we should remember and learn from that is relevant to the *Alcantara* case? I would suggest that it is best captured by the transition from *Robinson V* (69 N.J. 449 (1976)) to *Abbott II* (119 N.J. 287 (1990)). In *Robinson V*, a sharply divided New Jersey Supreme Court ruled that the Public School Education Act of 1975 (C. 212) was facially constitutional.² In the 50-year-long history of New Jersey’s school funding litigation only C. 212 and SFRA have been found facially constitutional.³ But the warning signs about C. 212’s constitutional vulnerability as applied were clearly apparent in *Robinson V*, and one statement in the court’s per curiam order foretold not only the court’s action in *Abbott II* invalidating C. 212 as applied, but also eerily predicted exactly the issue before the Commissioner in *Alcantara*:

The 1975 Act is silent as to how this contingency of local fiscal inability is to be met. It does not say, in so many words, where the money is to come from in the event of a showing that a local school district is performing inadequately due to a fiscal insufficiency, together with a further showing of inability at the local level to make up this monetary lack. **This omission is not fatal to the facial constitutionality of the Act since State school aid may obviate that predicament. Though such eventuality may never occur, the State must be prepared to meet this contingency if it does arise.** We think it would be wise were the Legislature to address itself to this potential problem. It would be helpful and expedient were there to be guidelines—legislative or administrative—as to what kind of showing must be made by a school district asking for state assistance due to local inability to recruit needed funds. (69 N.J. at 466) (Emphasis added.).

Of additional relevance to the case currently before the Commissioner were several other statements by the New Jersey Supreme Court in *Robinson V*:

[W]e note that whether [C. 212] may or may not pass constitutional muster **as applied in the future to any individual school district** at any particular time, must quite obviously await the event. (69 N.J. at 455) (Emphasis added.).

[The Commissioner’s ongoing assessment and evaluation role] recognizes that in seeking to achieve educational excellence and in attempting to gauge the success of any such effort, **each school district must be examined as a separate unit.** (69 N.J. at 459) (Emphasis added.).

² There was a relatively short per curiam order issued on behalf of the court with four of the seven justices issuing detailed opinions that joined the per curiam order in whole or in part and one justice dissenting. Thus, only two justices subscribed completely to the per curiam order. In their separate opinions, several of the justices, including Chief Justice Hughes, criticized the court for failing to even mention, let alone deal with, objections to C. 212’s constitutionality raised by the plaintiffs and amici.

³ The Bateman Act was struck down in *Robinson II*, 62 N.J. 473 (1973); the Quality Education Act (QEA) was struck down in *Abbott III*, 136 N.J. 444 (1994); and the Comprehensive Educational Improvement and Financing Act (CEIFA) was struck down in *Abbott IV*, 149 N.J. 145 (1997). The period between the two New Jersey school funding laws that were deemed even facially constitutional—C. 212 and the School Funding Reform Act (SFRA)—was 33 years. C. 212 was found unconstitutional as applied 15 years after it was enacted, 18 years before SFRA was enacted. New Jersey’s record of adopting even facially constitutional school funding laws, let alone ones that survive challenges as applied, is, frankly, dismal.

Had we learned from this history, we would have understood why *Alcantara* is an easy case that should not have required this elaborate and lengthy process. Despite the court’s warning in *Robinson V* quoted above, the State never prepared itself to meet the Lakewood contingency of a “fiscal insufficiency” to be able to provide its students with T&E and an “inability at the local level to make up this monetary lack.” According to the court, the way to “obviate that predicament” and salvage at least facial constitutionality of the school funding law was through “State school aid.” But, because the Legislature never adequately addressed “itself to this potential problem,” the Commissioner’s only recourse was to advance State aid to Lakewood in ever-increasing amounts, which has led to an unsustainable fiscal situation. That was clearly not a constitutionally adequate response thereby rendering SFRA unconstitutional as applied to Lakewood.

The solution to Lakewood’s problem now is the same as the solution proposed by the New Jersey Supreme Court 45 years ago in *Robinson V*—legislative and executive action to assure the district sufficient state aid to enable it to provide its public school students with T&E--and the Commissioner should move expeditiously to have that solution implemented.

This case is also an easy one because the rights of Lakewood public school students are based on four bedrock principles of New Jersey constitutional jurisprudence and on elaborate statutory provisions: (i) New Jersey students, including of course Lakewood students, have a fundamental constitutional right to T&E; (ii) the State is ultimately responsible for assuring that that constitutional right is provided; (iii) the State has more than adequate means to determine whether that right is being denied; and (iv) the State has both the duty, and whatever powers are necessary, to cure any violations.

Let me elaborate on those propositions in this introduction and background section before I turn to my exceptions to ALJ Scarola’s initial decision:

1. *Lakewood Students’ Constitutional Rights*. New Jersey’s landmark school funding litigation, *Abbott v. Burke*, has definitively established that students have a fundamental constitutional right to T&E. In the words of the New Jersey Supreme Court, “The lessons of the history of the struggle to bring these children a thorough and efficient education render it essential that their interests remain prominent, paramount, and fully protected.” (*Abbott v. Burke*, 153 N.J. 480, 527-8 (1998) (*Abbott V*)).
2. *State’s Ultimate Responsibility*. The State’s ultimate responsibility for assuring that those rights are satisfied was announced in ringing tones in the very first New Jersey Supreme Court opinion in the school funding litigation on April 3, 1973, just a few days more than 48 years ago:

It is also plain [from the state constitution’s education clause] that the ultimate responsibility for a thorough and efficient education was imposed upon the State. This has never been doubted.... (*Robinson v. Cahill*, 62 N.J. 473, 508-9 (1973)).

Whether the State acts directly or imposed the role upon local government, the end product must be what the Constitution commands. A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, the obligation is the State's to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must meet its continuing obligation. (Robinson at 509).

3. *State's Means of Identifying Violations of Students' Right to T&E.* A primary means to discharge the State's responsibility is the Commissioner's broad supervisory powers and duties regarding public education in New Jersey, directly and through her agents including the executive county superintendent.

These include:

- the Commissioner's having "supervision of all schools of the state receiving support or aid from state appropriations" (N.J.S.A. 18A:4-23);
- pursuant to rules and regulations of the State Board, the Commissioner's power and duty to "inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the State" (N.J.S.A. 18A:4-24);
- among an extensive list of statutory powers and duties, the Executive County Superintendent shall (a) "Visit and examine from time to time all of the schools under his general supervision and exercise general supervision over them,"
- (b) Keep himself informed as to the management, methods of instruction and discipline and the courses of study and textbooks in use...in the local districts under his general supervision, and make recommendations in connection therewith,"
- (d) "Promote administrative and operational efficiencies and cost savings within the school districts in the county while ensuring that the districts provide a thorough and efficient system of education,"
- (k) Request the commissioner to order a forensic audit and to select an auditor for any school district in the county upon the determination by the executive county superintendent...that the accounting practices in the district necessitate such an audit,"
- (l) review all school budgets of the school districts within the county, and...disapprove a portion of the school district's proposed budget if he determines that the district has not implemented all potential efficiencies in the administrative operations of the district,"
- (o through v) extensive powers and duties regarding special education programs mainly directed at reducing expensive out-of-district placements, ...
- (w) "Render a report to the commissioner annually on or before September 1 ... relating to the schools under his jurisdiction...."

In the case of Lakewood, the Commissioner has an even more direct, continuous, and on-site presence in the form of the State monitors who have been in the district continuously

since 2014, the same year in which the petition in this matter was filed. The Commissioner has the power to appoint “a State monitor and additional staff, as necessary, to provide direct oversight of a board of education’s business operations and personnel matters” if the school district meets stated statutory conditions mainly relating to adverse or inadequate audits. (N.J.S.A. 18A:7A-55). Pursuant to that same statute, the State monitor has extensive powers and duties to, among other things:

- “oversee the fiscal management and expenditures of school district funds, including, but not limited to, budget reallocations and reductions, approvals of purchase orders, budget transfers, and payment of bills and claims (N.J.S.A. 18A:7A-55 (b)(1))
- “oversee the operation and fiscal management of school district facilities, including the development and implementation of recommendations for redistricting and restructuring of schools” (id. at (b)(2))
- **“ensure development and implementation of an acceptable plan to address the circumstances set forth in subsection a. of this section which resulted in the appointment of the State monitor. The plan shall include measurable benchmarks and specific activities to address the deficiencies of the school district”** (id. at (b)(3) (Emphasis added.)
- “oversee all district staffing, including the ability to hire, promote, and terminate employees” (id. at (b)(4))
- “have authority to override a chief school administrator’s action and a vote by the board of education on any of the matters set forth in this subsection,” except to the extent they might encroach upon the New Jersey Employer-Employee Relations Act or collective bargaining agreements entered into by the school district (id. at (b)(5))
- “meet with the board of education on at least a quarterly basis to discuss with the members of the board the past actions of the board which led to the appointment of the State monitor and to provide board members with education and training that address the deficiencies identified in board actions” (id. at (b)(7))

Additionally, the next statutory subsection provides that “The State monitor shall report directly to the commissioner or his designee on a weekly basis” and “shall also report monthly to the board of education and members of the public at the regularly scheduled board of education meeting.” (id. at (c)).

Pursuant to this statute, the state monitor “shall provide oversight in the school district until the commissioner determines that all remedial actions required under the plan have been implemented and the necessary local capacity and fiscal controls have been restored to school district operations.” (id. at (e)). In the case of Lakewood, however, the State monitor’s duration may be substantially longer because the advance state aid provision requires the State monitor to remain in the school district until that advance state aid has been recouped, which is likely to extend 10 years beyond the last payment of such aid.

To anticipate two points, which will be addressed later in this letter, both the requirement of subsection (b)(3) highlighted above that the state monitor develop and implement a

corrective-action plan and the weekly reports required to be submitted directly to the Commissioner or her designee make it difficult to conceive of what purpose will be served by the new needs-assessment of the Lakewood school district urged by ALJ Scarola in her initial decision. One would think that the State monitors' plan for Lakewood and the approximately 350 weekly reports about the Lakewood School District's performance already provided by the State monitors would have exhaustively alerted the Commissioner to any issues regarding the district's ability to provide its students with T&E.

4. *State's Power and Duty to Remedy Violations of Students' Right to T&E.* New Jersey's voluminous education statutes make clear that the Commissioner has extensive powers and duties not only to assess whether students are receiving T&E, but also, if they are not, to remedy the denial. One of the clearest statements of the Commissioner's remedial authority comes from the case of *Jenkins v. Morris Township School District* (58 N.J. 483 (1971)). In that case what was at issue was the State's constitutional duty to prevent school segregation, a duty of comparable weight to the duty to assure T&E. In fact, the New Jersey Supreme Court suggested that, if there was correctable school segregation, it might violate the state constitution's T&E clause as well as its anti-segregation clause. Then, after chiding the Commissioner for undervaluing his powers, the court instructed him that he had whatever power was necessary to vindicate the paired constitutional commands of T&E and racial balance. The court's opinion concludes by stating that, pursuant to the Commissioner's "supervisory jurisdiction," he has "full power to direct a merger on his own if he finds such course ultimately necessary for fulfillment of the State's educational and desegregation policies in the public schools." (Id. at 508). Shortly thereafter that is precisely what the Commissioner did by creating the Morris School District out of the Morristown and Morris Township districts.

But the **State's** power and duty to remedy constitutional violations is not limited to those entrusted to the Commissioner. Obviously, other officers and agencies may have to act, including prominently the legislature. The wording of the state constitution's education clause, the T&E clause, is instructive in that regard. It reads: "The **Legislature** shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." (N.J. CONST. Art. 8, sec. 4, para. 1) (Emphasis added.). Of further relevance to this matter, the education clause is in the Taxation and Finance article of the state constitution, strongly indicating the essentiality of adequate funding to T&E.

Exceptions to ALJ Scarola's initial decision

In evaluating and stating exceptions to ALJ Scarola's initial decision in this matter, it is important to keep the context in mind. The petition launching this matter was filed with the Commissioner and referred to OAL, rather than being filed in the first instance with the state courts. That was because this matter raises important issues of educational policy and performance as to which the Commissioner is deemed to have special expertise. In such cases, the role of OAL, the ALJ assigned to hear the matter, and the Commissioner to whom the ALJ's "initial decision" (a non-binding recommendation) is submitted, is to resolve the matter if it falls

within the Commissioner’s authority to do so, and, if it does not, to compile a complete record for the likely ultimate decisionmaker—the state courts or the Legislature. Where, as here, the petitioners’ underlying claim is constitutional in nature, unless the State concedes there has been a constitutional violation and finds a way to cure it, the ultimate decision will have to be made in the courts. That is why the applicable procedures contemplate that petitioners can appeal from the Commissioner’s decision directly to the Appellate Division and, if there is special urgency, to the New Jersey Supreme Court.

What that means is that the ALJ’s findings of fact, if confirmed by the Commissioner, are more likely to be of relevance than her legal and constitutional analysis, which is uniquely the bailiwick of the courts not of administrative agencies.

With that as a context, the starting point for my analysis of ALJ Scarola’s initial decision and the basis for my exceptions to it is three straightforward questions that must be addressed:

1. Are Lakewood public school students being denied T&E?
2. If they are, what is the cause of that constitutional deprivation?
3. What should be done to cure that constitutional denial as quickly and as completely as possible?

1. Are Lakewood public school students being denied T&E?

The strongest and most important portion of ALJ Scarola’s initial decision is her determination that Lakewood public school students are in fact being denied their fundamental right to T&E. After hearing testimony from many witnesses and reviewing many exhibits and publicly available information and data, ALJ Scarola concluded in her Order that “The petitioners’ application to declare that Lakewood **cannot** provide a thorough and efficient education to its public school students is GRANTED.” (p. 104) (Emphasis added.).

The highlighted word “cannot” is important. It indicates that ALJ Scarola had concluded that the source of the constitutional violation was beyond the power and control of the local school district. It, therefore, must lie with the State.

ALJ Scarola elaborates on that conclusion in her Legal Discussion at pages 91-95. There she persuasively makes the case that based on both input and outcome measures “petitioners have shown by a preponderance of the credible evidence that Lakewood’s students are not receiving a thorough and efficient education as required by the New Jersey Constitution. The statistics sadly indicate that Lakewood’s students are not prepared for college, career or life due to a constitutionally inadequate education.” (p. 95).

Since I believe that ALJ Scarola accurately reflected the facts she found and correctly applied New Jersey law to those facts, I have no exceptions to that portion of her initial decision.

2. If Lakewood public school students are being denied T&E, what is the cause of that constitutional deprivation?

If one read only the ALJ's findings of fact, the answer would be very clear—the cause or causes of the constitutional deprivation are:

- Lakewood's unique demographics result in as much as 54% of its school budget being allocated to the transportation and special education costs of its huge, and constantly increasing, nonpublic school population (p. 65); and
- The remaining funds are insufficient for the education of Lakewood's regular education public-school students, who more than most New Jersey students desperately need an excellent education because they are 100% low-income and 94% Black and Latinx (p. 66).

Implicit in these findings is that SFRA simply does not provide enough funding to meet the educational needs of Lakewood's students when you combine the 6,000 in public school and the 32,000 or more in nonpublic schools and that alternate sources of funds that the Commissioner has tapped are neither sufficient nor consistent with *Abbott's* constitutional requirements that funding be regular, certain, predictable, and non-discretionary. As will be discussed below in a major Exception, however, that is, inexplicably, not the conclusion ALJ Scarola reaches in her Legal Discussion and Order.

Lakewood's unique demographics and their financial consequences

ALJ Scalero's very first findings of fact speak to Lakewood's unique demographics (see pp. 64-65). Most pointedly, she states that, as a result of "the burgeoning Orthodox community" and the large percentage of school-age children in Lakewood, "currently, only sixteen percent of Lakewood Township's students attend public schools while eighty-four percent attend private or sectarian schools. **This statistic is so deviant from the average in New Jersey as to be an outlier.**" (p. 65) (Emphasis added.)

In a contemporaneous and related initial decision, ALJ Scalero makes the point even more directly:

Lakewood is a unique school district within New Jersey; it is comprised of approximately 6,000 enrolled public-school students, as well as approximately 31,000 non-public-school students. **State aid to the district is based on the number of public-school students. This calculation impacts the amount of funds that remain available for the district to provide its enrolled students with a constitutionally-mandated through and efficient education, because Lakewood also has a statutory mandate to pay for the transportation and special education costs for the non-public-school students.**" (Board of Education of Lakewood Township v. New Jersey Department of Education, 2019 WL 3453810 (N.J. Adm), p. 1) (Emphasis added.)

The insufficiency of State aid

This quotation also makes clear and explicit that the causes of the constitutional deprivation are related to insufficient state aid. That linkage between unique demographics and inadequate state aid also is stressed in ALJ Scarola's initial decision in *Alcantara*. Immediately after the "deviant from the average in New Jersey" language quoted above, her findings of fact shift to "the effect the rapid growth in private school attendance has had on the district's finances" (p. 65) and to the testimony of state monitor Azzara about "Lakewood's ongoing budgetary issues arising from the costs borne by the district in accordance with State law for the transportation and special education of students attending private schools." (Id.) Even more pointedly, ALJ Scarola refers to the testimony of Robert Finger, the district's interim assistant business administrator (and previously its business administrator and Board secretary), which she characterizes as "credible" and accepted as fact, to the effect that:

Since his return [to the Lakewood school district] in 2017, the district has needed significant financial help from both the State and the Township to balance its budget. The district's financial issues can be attributed in large part to the extraordinary cost the district bears for its legal mandate to pay for transportation for private school students and for tuition for special education students the district places in out-of-district private schools. For instance, for the 2017-2018 school year, these transportation and special education costs consumed more than half of the district's budget, or \$78M out of a total budget of \$144M.⁴ However, in neighboring districts such as Toms River, Brick, Jackson, and Freehold, the average transportation and special education tuition costs make up only 4-7% of their budgets. (p. 65).

According to ALJ Scarola:

Shafter and Azzara, the State monitors, echoed Finger's sentiments about the correlation between Lakewood's private school expenses and its budget problems. Since their placement in Lakewood in 2014, these monitors have rectified several issues with recordkeeping and financial waste in the district. To avoid teacher layoffs, increased class sizes, and program cuts, and to balance the annual budget, the district has borrowed millions of dollars from the State in the form of advance SFRA aid.

Lakewood received \$4.5M in advance aid in 2015; \$5.6M in 2016; \$8.5M in 2017; and, \$28M in 2018, for a total of nearly \$50M. **As noted by several of the witnesses for both parties, advance aid is essentially a loan from the State with money from future SFRA aid. Lakewood must repay these loans out of future aid, creating an unsustainable cycle of borrowing and repayment that will be difficult for Lakewood to break.** Only districts with state monitors are eligible for advance aid, and State monitors cannot be removed unless and until a district repays the advance aid it receives. (p. 66) (Emphasis added.).

⁴ It actually totals 54.2%, but may include the special education costs of some regular Lakewood public school students.

As indicated, Azzara, characterized by ALJ Scarola as “the leading New Jersey state monitor,” (p.42), has been assigned to Lakewood since 2014. “He oversees finances in the district and reports to the Commissioner through Glenn Forney [deputy assistant commissioner of education of finance].” (Id.) Azzara’s opinion about Lakewood’s fiscal and management situation is that:

Lakewood has a revenue problem, not a spending problem. They have made every reduction possible to maintain education. The budget is what is needed to get the county to sign off on it, and it really cannot be cut any more. Special-education expenses cannot be cut. Security cannot be reduced. A deficit is anticipated this year. (Id.) (Emphasis added.)

ALJ Scarola then describes Azzara’s testimony on the reason for Lakewood’s “revenue problem.” He clearly attributes it to SFRA’s school-funding formula:

Thirty thousand non-public school students put a burden on the district, as **that kind of population creates expenses not addressed by the SFRA school-funding formula** Lakewood needs more revenue, whether it comes from the Legislature or Lakewood Township residents, but Lakewood is capped at what it can raise, although it has a large tax base. The amount of aid appropriated is controlled by the Legislature. The levy cap is also controlled by the Legislature. (p. 44) (Emphasis added.)

As recapitulated by ALJ Scarola, Azzara’s testimony succinctly describes the constitutional dilemma created by the Legislature for Lakewood:

- its statutory school funding formula, SFRA, does not contemplate or deal with Lakewood’s unique circumstances;
- it has not appropriated additional funding to respond to Lakewood’s unique needs (and, in fact, the Legislature has only fully funded SFRA once during its 13-year life); and
- it has capped what Lakewood can raise locally and can spend on the public schools.

The inescapable conclusion from this testimony, and from the related findings of fact by ALJ Scarola, is that SFRA is unconstitutional as applied to Lakewood. The most relevant of those findings of fact appear at the end of that section of her initial decision and include that:

- Lakewood’s “population boom” over the past 20 years and the proportional growth in private school enrollment has resulted in “significant transportation costs associated with private school students” and “tens of millions of dollars in tuition each year to send a few hundred special education students to private schools. **SFRA aid covers only a portion of those costs.**” (pp. 76-77) (Emphasis added.)
- **“The school district’s transportation and special education costs have strained its annual budget and have led the district down an unsustainable path of borrowing millions upon millions of dollars in the form of advance SFRA aid. The school district’s financial difficulties have negatively affected its public school students, teachers, and programs. This is evident from a narrowed breadth of course offerings, relatively low per pupil classroom instruction spending and classroom teachers’ salaries, and marked teacher turnover.”** (p. 77) (Emphasis added.)

- “The continuation of State aid advances as an **unreliable source of funding**, and the obligation to reimburse the State over time, have contributed to the situation, as **the school district’s financial problems persist** and unrestrained growth continues in the township.” (Id.) (Emphasis added.)

The highlighted portions of the above bullet points clearly suggest that ALJ Scarola understands the causal linkage among the denial of T&E to Lakewood public school students, the district’s persisting—indeed, worsening and unsustainable—financial problems caused by Lakewood’s unique demographics, and SFRA’s failure to provide the funding necessary to enable Lakewood to right its financial ship.

Yet, nonetheless, that is not the conclusion she reaches. She maintains that the real causes of Lakewood’s failure to provide its students with T&E are the three alternative explanations offered by the State respondents: (i) “Fiscal mismanagement by Lakewood;” (ii) “Community choices;” and (iii) “Other legislation.”

In adopting, wholesale, the State’s three alternative explanations for the denial of T&E to Lakewood public school students ALJ Scarola is contradicting many of her own findings described above and, frankly, departing from logic and commonsense. These lapses have led to some serious exceptions to her initial decision. Before I reach them, however, I have a prior exception about the burden of proof.

Exception #1:

As to the first major issue raised by this petition—whether Lakewood public school students are being denied their fundamental constitutional right to T&E, ALJ Scarola applied the traditional and correct burden of proof—a preponderance of credible evidence--and concluded, on that basis, that the petitioners had made their case and should prevail on that issue.

Once having made that determination, however, she applied a different, and I believe demonstrably incorrect, standard to the second major issue—whether SFRA is unconstitutional as applied to Lakewood. She imposed a “heavy burden” on petitioners because, in her words, they were challenging “the constitutionality of a statute” and “there is a strong presumption that the statute is constitutional.” (p. 95).

There is no basis in New Jersey law for a standard that imposes a “heavy burden.” The language ALJ Scarola quoted in her initial decision to support her view came not from the New Jersey Supreme Court, but from Judge Peter Doyne who served as a special master in *Abbott*, and from his Opinion/Recommendations to the Supreme Court. (see 199 N.J. 140, 180 (2009)). Moreover, in *Abbott XX*, from which ALJ Scarola quoted Judge Doyne’s language, the issue of the burden of proof applied not to a party challenging a statute, but rather to the State, which was seeking judicial approval to replace a judicially created school funding remedy, the “parity remedy,” with SFRA. In fact, the section of Judge Doyne’s Opinion/Recommendations from which ALJ Scarola quoted was entitled “B. The Burden on the **State**.” (199 N.J. at 236) (Emphasis added). Thus, the quoted language is technically dictum, not part of a direct and binding court ruling.

Clearly, however, in most cases there is a presumption that a statute is constitutional, and the party challenging the statute has a burden of proof or persuasion. In *Abbott XX*'s different context, where the issue was how much of a burden to place on the State in justifying a statute, Judge Doyne engaged in a helpful and substantial discussion of three potential standards for the burden of persuasion under the New Jersey Rules of Evidence (see 199 N.J. at 236-238).

They are: (i) by a preponderance of the evidence; (ii) by clear and convincing evidence; or (iii) beyond a reasonable doubt. Notice that a "heavy burden" is absent from the alternatives. Of the three recognized standards, Judge Doyne quickly dismisses the third because it "is usually reserved for criminal cases." (199 N.J. at 236).

As between the other two, Judge Doyne indicated that "[i]n civil actions, generally, the preponderance standard applies." (Id.) Although the clear and convincing standard is sometimes applied in civil cases, that is usually only "when the threatened loss resulting from civil proceedings is comparable to the consequences of a criminal proceeding in the sense that it takes away liberty or permanently deprives individuals of interests that are clearly fundamental or significant to personal welfare. [interior citation omitted]" (199 N.J. at 237).

Surely, the "loss" State respondents might suffer if the student petitioners' challenge to SFRA as applied to their school district were successful does not rise to that level. Later in his Opinion/Recommendations Judge Dyne puts an even finer point on it when he states: "...the presumptive standard is by a preponderance. A higher standard is employed only in limited circumstances; therefore, in determining the burden, the preponderance standard is the starting point." (199 N.J. at 238).

Therefore, at most the "preponderance of evidence" standard, which ALJ Scarola applied to whether student petitioners were being denied T&E, should be the standard also applied to their challenge to SFRA.⁵ That is consistent with my personal knowledge of the burden imposed on students challenging prior school funding laws in *Robinson v. Cahill* and *Abbott v. Burke*. *Abbott* is the more instructive because, as is true in this matter, an ALJ was charged with rendering an initial decision on the constitutionality of a school funding law. In addressing the issue of the student petitioners' burden of proof, ALJ Lefelt stated:

My most important function, as recognized by the Supreme Court, is, therefore, to resolve the factual disputes focused upon by the parties. Based on the record developed, I must determine how Chapter 212 [the school funding law] has actually been implemented and whether plaintiffs proved their contentions **to be more likely true than not by a preponderance of the believable evidence.** (*Abbott v. Burke*, EDU5581-85 (initial decision), August 24, 1988) (Emphasis added.).

Finally, under the particular circumstances before you, where ALJ Scarola has found that student petitioners are being denied their fundamental constitutional right to T&E, and the main basis of her ruling was the inadequate, even unsustainable, status of Lakewood's fiscal situation, you

⁵ In *Abbott XX*, where the burden of justifying SFRA was placed on the State, not surprisingly the State argued the preponderance standard was the correct one and the student plaintiffs argued for clear and convincing evidence.

should seriously consider imposing a burden of justifying SFRA on the State respondents, as the New Jersey Supreme Court did in *Abbott XX*.

Exception #2

In less than half a page, ALJ Scarola accepts that “Respondents persuasively argue that a significant reason for additional unavailable funds for the provision of T&E is choices Lakewood made with respect to tax levy authorized under the SFRA” (p. 96), and that this presumably constitutes “Fiscal mismanagement by Lakewood.” The peculiar syntax aside, there seems little to no substance supporting this conclusion. The State has acknowledged, and the ALJ has described, that the Lakewood school district annually is falling tens of millions of dollars short of meeting its fiscal needs and the problem is worsening. It is simply implausible that had the district corrected some alleged, but unquantified, shortfalls in the local tax levy between at least 10 and seven years ago could have led to a measurable improvement in Lakewood’s current financial situation, let alone enabled the district to provide its students with T&E. Moreover, the presence in the district since 2014 of multiple State monitors, their statutory obligation to report weekly to the Commissioner or her designee, and the ultimate state responsibility for T&E makes it extremely difficult to credit **local** mismanagement as a cause of the denial of T&E.

Exception #3

The ALJ’s discussion of “Community choices” occupies twice as much of her initial decision—one page—but it is no more credible than her discussion of “Fiscal Mismanagement by Lakewood.” The ALJ starts with a paragraph about local choices allegedly made that are basically beyond the control of a school district. So, is the point to blame the municipality and the public for the school district’s fiscal inability to provide its students with T&E? Or is it to blame everyone but the State education authorities, who have ultimate responsibility for assuring T&E?

To make matters even worse, in the next paragraph the ALJ abandons the community-choice explanation just offered by acknowledging that “respondents did not provide expansive evidence on these subjects, and thus no findings of fact were made regarding these issues.” (p. 97) So, this point is an unsupported non-starter.

The only other “evidence” proffered of community choice being a significant or substantial cause of the denial of T&E to Lakewood students has to do with the school district’s failure to successfully avail itself of two statutory provisions that permit a district to raise additional funds either by “special district tax” (N.J.S.A. 18A:22-40) or by a voter-approved proposal to increase the adjusted tax levy by more than the statutory allowable amount (N.J.S.A. 18A:7F-39), which explicitly cannot be used to finance T&E programs or services. As the ALJ goes on to describe, in 2016 Lakewood sought “to increase the school tax levy to raise more than \$6M to help pay for transportation services,” but the “measure was defeated by Lakewood Township voters by a margin of **99% to 1%**.” (p. 98) (Emphasis added.). To emphasize the importance of this alternative explanation of why Lakewood students were denied T&E, the ALJ ends this brief section of her initial decision with a sentence immediately following the report of the 99-1 defeat

of the proposed measure: “N.J.S.A. 18A:22-40 and N.J.S.A. 18A:7F-39 at least present opportunities for Lakewood to ameliorate its financial difficulties.” (Id.)

Exception #4

The ALJ’s last alternative explanation for why Lakewood students were denied T&E, under the rubric “Other legislation,” is an odd amalgam of assertions that essentially seem to be blaming the Legislature for doing, or not doing, things that have worked in contravention of SFRA to cause the unconstitutional deprivation. In other words, the Legislature did its job by enacting SFRA, but somehow undermined SFRA’s effectiveness by other actions.

Exactly what are these other legislative actions that are to blame? The ALJ briefly lists just two and then goes on to a smorgasbord of extended discussions of possible cost containment measures regarding transportation and special education costs and of the T&E benefits of a comprehensive preschool program for at-risk children. The two legislative actions highlighted are:

- N.J.S.A. 18A:7F-38, which places a tax levy cap on school districts
 - So, is the ALJ’s recommendation that Lakewood, which has been fiscally unable to fund a T&E education, should simply raise more money from its local property tax? Wasn’t heavy reliance on disparate local property wealth the constitutional flaw in a succession of earlier school funding laws? Hasn’t the Murphy administration sought credit for its effort to hold down local property tax rates?
- The annual Appropriations Act, which “affects the amount of money Lakewood receives through the SFRA” (p. 98)
 - So, is the ALJ suggesting that the Legislature’s failure to fully fund SFRA is a defense to SFRA’s being unconstitutional as applied to Lakewood? Or is that an element of the petitioners’ claim of SFRA’s unconstitutionality as applied?

As to the cost containment discussion, the ALJ seems to largely ignore the presence of State monitors in Lakewood for the past seven years, their extensive statutory powers and duties to assure proper spending by the district, the Commissioner’s back-up role, and the monitors’ statements on the record, earlier credited by the ALJ, to the effect that Lakewood has a revenue problem, not a spending problem.

On the matter of escalating transportation costs, everyone acknowledges them, but no one has the secret as to how to substantially reduce or even contain them. These escalating costs seem primarily related to the exploding growth in the nonpublic school population. The ALJ acknowledges that various cost-saving efforts have been made in Lakewood (p. 100), but seems to attempt to impose the impossible on the district—and the State monitors and their superiors in the NJDOE, including the Commissioner, when she states:

Despite these [cost-saving] measures, Lakewood’s transportation costs have continued to increase annually, from \$23M in 2014-2015 to \$31M in 2018-2019. Yet there is an absence of evidence in the record to indicate that these rising costs are **totally** attributable to the rising number of nonpublic school students, and that Lakewood has done

everything it can to rein in its transportation costs in order to free up more funds for T&E for its public school students. (Id.) (Emphasis added.)

Talk about a burden of proof—how do you prove that rising transportation costs are “totally attributable” to the rising number of nonpublic school students? Or that the district has done “everything it can” to rein in transportation costs?

On the matter of large and growing special education costs, the ALJ again seems to place an unsustainable burden on Lakewood to prove that, in response to a 2009 needs assessment, it has taken adequate steps to reduce costs, and she seems to give the State monitors and their NJDOE superiors a free pass. Since the State has ultimate responsibility for T&E and extensive statutory powers and duties to assure that districts operate in a cost-effective and efficient manner, this seems an oddly inappropriate location of responsibility.

Finally, the ALJ interjects at the end of this discussion, which started with “Other legislation,” the desirability of Lakewood creating a comprehensive preschool program for at-risk students because it might improve their educational prospects. It turns out, according to the ALJ, that Lakewood does have a preschool program for three- and four-year old special education students and for four-year old general education students, but not a preschool program for general education three-year-old students and perhaps not a preschool program focused on at-risk students. (p. 102). This may be a worthy idea, but it is hard to understand its relevance or feasibility for a district without adequate funding for its existing programs.

3. What should be done to remedy the constitutional denial of T&E as quickly and as completely as possible?

Exception #5

In the last two pages of her 105-page initial decision, ALJ Scarola addresses the remedy which she recommends to the Commissioner for the Lakewood students’ longstanding denial of T&E. Unfortunately, her recommended “remedy” is neither quick nor complete. In short, she recommends that Lakewood should be subjected to another time-consuming “needs assessment.” It is hard to imagine what more can be learned about the day-to-day educational issues regarding the delivery of T&E to Lakewood public school students. After all, the district had a needs assessment in 2009, an audit in 2014, at least two State monitors in place since 2014, ongoing oversight by the executive county superintendent, oversight by the deputy assistant commissioner for finance and the commissioner via the monitors’ weekly reports and otherwise, and the seven-year process in the OAL, which included nine hearing days before the ALJ, testimony from 15 witnesses presented by petitioners and respondents, and voluminous documentation (81 exhibits submitted by petitioners, nine of them with multiple parts; and 29 exhibits submitted by respondents).

The State monitors described Lakewood’s problem as a revenue problem, not a spending problem yet a needs assessment is likely to be focused more on spending than revenue. Let me coin a phrase inspired by the State monitor’s phrase—Lakewood’s problem is not a knowledge problem, it is a courage and determination problem. The State must acknowledge and act on its

responsibility for remedying the longstanding denial of Lakewood students' fundamental constitutional right to T&E. That means going well beyond what the Commissioner has done previously to try to prop up the Lakewood district by means such as advance state aid, which is helpful but insufficient. Although the Lakewood students may lack a ready avenue for being compensated by the State for the damages they already have suffered, the State should feel itself to be honor-bound and constitutionally obliged to move forward with maximum speed and effectiveness.

What remedies do I recommend to the Commissioner as a participant in this matter and as a long-time advocate for the State's poor and educationally needy students?

- An immediate step would be to obtain the necessary authorization to forgive Lakewood's advance state aid repayment obligations. As the ALJ recognized in her initial decision, that enormous burden⁶ on Lakewood is unsustainable and renders impossible significant improvement in the quality of education provided to its public-school students. Clearly, the advance state aid provision was intended to apply to a situation quite different from Lakewood's where a short-term infusion of funding would enable the district, with the assistance of a State monitor, to correct its fiscal difficulties.
- On a longer-term basis, the cure must be systemic and start with legislative action to adjust SFRA's formula so that it recognizes and responds to Lakewood's unique demographic realities as well as to enact other statutes that directly fund the unique costs that Lakewood and, to a lesser degree, other districts are forced to incur for nonpublic school students who reside in those districts, especially relating to transportation and special education services. One model the Legislature might consider is the direct state funding of TPAF costs for all districts, which has been in place for many years.⁷
- Lakewood's unique demographics also pose another challenge. For years, its school board has been dominated by nonpublic school interests. Of course, board members who do not have children in the public schools can still have the best interests of the public schools and their students at heart. However, when year after year seven or eight of the board's nine members not only do not have children in the public schools, but also would never consider sending their children to the public schools, the board is likely to have difficulty relating to public school parents and the broader community. A statutory adjustment may be required to assure that the Lakewood board has adequate independent representation of the public-school community.⁸

⁶ Although I understand that the official record in this matter closed on November 28, 2019, in fashioning the Commissioner's response to Lakewood's desperate financial situation it is hard to imagine that you can simply ignore the advance state aid to that district certified by you just a few weeks ago and by your predecessor in 2020 as necessary for Lakewood to be able to provide T&E to its students. With those additional repayable loans, the total amount Lakewood owes the State is \$136.9M (of which the ALJ's initial decision reflected \$46.4M at page 66).

⁷ See N.J.S.A. 18A:66-33. See also KPMG, State of New Jersey Teacher Pension and Annuity Fund, Schedule of Employer and Nonemployer Allocations and Schedule of Pension Amounts by Employer and Nonemployer (June 15, 2015) at page 6: "The State of New Jersey, Teacher Pension and Annuity Fund (TPAF) is a cost-sharing multiple-employer defined benefit pension plan with a special-funding situation, by which the State of New Jersey (the State) is responsible to fund 100% of the employer contributions....The TPAF is administered by the State of New Jersey, Division of Pensions and Benefits...."

⁸ It is well within the Commissioner's authority to recommend legislative changes. Indeed, in many instances, including adjustments to SFRA, the Commissioner is invited or required to weigh in periodically. See, e.g., N.J.S.A.

- If steps to achieve adequate independent representation of the public-school community on the Lakewood board were to prove infeasible or insufficient to assure T&E for Lakewood students, the Commissioner and State Board of Education may have no alternative but to consider state takeover of the Lakewood school district pursuant to N.J.S.A. 18A:7A-15 and 15.1. Although New Jersey's record of success with state takeover is mixed, it is the remedy both most clearly within the Commissioner's and State Board's existing power and duty and most consistent with the New Jersey Supreme Court's clarion constitutional call in *Robinson v. Cahill* quoted earlier in this letter. The court stressed that, in connection with assuring T&E, "if the local government cannot carry the burden, the State must meet its continuing obligation." (62 N.J. at 509).

Exception #6

My final exception is a summative one. In my judgment, ALJ Scarola courageously and correctly concluded that the student petitioners had borne their burden of proving by a preponderance of credible evidence that Lakewood students are being denied their fundamental constitutional right to T&E. Then, however, her initial decision seemed to go badly off the rails when it addressed both the cause of this constitutional deprivation and the remedies for it. To develop the recommendations to the Commissioner on those matters reflected in the ALJ's initial decision, ALJ Scarola had to reject out of hand the student petitioners' evidence and legal arguments, and to accept uncritically the state respondents' evidence and legal arguments.

Conclusion

To sum up, I urge the Commissioner, based on the exceptions I have provided, to take the following actions in response to ALJ Scarola's initial decision:

1. To adopt the ALJ's recommended holding that the "petitioners' application to declare that Lakewood cannot provide a [thorough] and efficient education to its public school students is **GRANTED**;"
2. To reject the ALJ's recommended holding that "the [petitioners'] application to declare SFRA unconstitutional as applied to Lakewood is **DENIED**," and to hold that petitioners' application in this regard is also granted; and
3. To reject the ALJ's remedial recommendation "that a current Needs Assessment regarding the ability of Lakewood to deliver a thorough and efficient education to its public school students be undertaken with appropriate recommendations to the district," and to order that legislative and other remedies outlined above be sought by the Commissioner.

Respectfully submitted,

Paul L. Tractenberg, Participant

18A:7F-46 (Commissioner of Education, State Board of Education and Governor are given power and duty to advise the Legislature about updating of SFRA).

Attachment

cc: Susan M. Scarola, ALJ
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