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Joseph H. Orlando
Appellate Division Clerk's Office
P.O. Box 006
Trenton, NJ 08625

Re: Alcantara, et al. v. Allen-McMillan, et al., Appellate Dkt. No. A-002493-23; Agency Dkt. No. 156-6/14; OAL Dkt. No. EDU 11069-2014S

Dear Mr. Orlando:

My co-counsel Arthur Lang and I represent petitioners/appellants in the above-referenced matter. Please accept this letter brief in lieu of a more formal brief in opposition to the Motion by the Lakewood Board of Education to intervene in this case.

INTRODUCTION AND ABBREVIATED PROCEDURAL HISTORY

We oppose the motion because this over-long case is already more than a decade old and the Lakewood Board of Education's much-belated effort to intervene before the Appellate Division might further delay the resolution of this case without providing any offsetting benefits.

After all, this case was originally filed in June 2014, as a petition with the commissioner of education and was in the administrative process, before OAL and the commissioner, for more than seven years before it was first appealed to the Appellate Division from the acting commissioner's first Final Agency Decision issued on July 16, 2021.

On March 6, 2023, almost nine years after the petition was filed, a unanimous three-judge panel of this court reversed the acting commissioner's final agency decision, ruling that Lakewood public-school students were being denied their fundamental constitutional rights to a "thorough and efficient" education (T&E). This effectively reinstated the Administrative Law Judge (ALJ)'s initial decision regarding T&E issued two years earlier on March 1, 2021. The State did not appeal this court's ruling.

In its unanimous decision, this court remanded the case to the acting commissioner to consider the substantive arguments raised repeatedly by petitioners/appellants regarding the constitutionality of the state's school funding law, the School Funding Reform Act of 2008 (SFRA), as applied to Lakewood.

It took until April 1, 2024, more than a year later, for the acting commissioner to respond to the remand order, and even that required an order of this court granting petitioners/appellants' motion in aid of litigants' rights. Disappointingly, the acting commissioner issued a conclusory final agency decision exculpating both SFRA and the department itself from any responsibility for the denial of T&E to Lakewood's public-school students. In doing so, as we have argued in our appeals briefs, the acting commissioner failed to grapple in any meaningful way with the arguments about SFRA's unconstitutionality as applied to Lakewood we had raised or with New Jersey's longstanding constitutional jurisprudence.

Petitioners/appellants appealed as of right from that final agency decision on April 24, 2024, and the parties' briefing was completed on August 22, 2024. Since then, we have been awaiting a date for oral argument.

At no point during this more than 10 year-long adjudicatory process has the Lakewood Board of Education ever participated as a party. It was not for lack of trying before several ALJ's, however. Initially, early in the case on September 2, 2014, the State moved to dismiss the petition for its failure to name the Lakewood Board of Education as a party, the Board resisted joining as a party, and the ALJ denied the State's motion. Several years later, on the brink of the OAL hearing, the Board, represented by a different attorney, sought to intervene as a party.

ALJ Scarola's October 9, 2018, letter order, supplementing her August 20, 2018, order, provides important insights regarding this issue. First, as to the Board's 2014 resistance to being joined as a party, the letter order contains a relevant footnote explaining why the Board had contested its inclusion as a party. The footnote read as follows: "Lakewood was then represented by other counsel. The reason[s] Lakewood chose to contest its participation as a party are not known, but do form the law of the case."

Second, the ALJ's letter order states that "Lakewood was permitted to participate, but was not designated as a party." The Board's status as a "participant" resulted from the Board's October 16, 2016, motion and a prior ALJ's order granting that request on November 21, 2016. Its participant status continued through the administrative process despite several efforts by the Board's new attorney to have the Board intervene as a party.

Third, one of those unsuccessful efforts was a focus of the ALJ's letter order, which provided insights relevant to the Board's current motion before this court. In explaining why she

was denying the Board's motion, the ALJ had this to say:

> At this state of the proceedings—the petitioner's case is nearly concluded and a motion to dismiss has been filed by the State—the addition of another party would cause further delay in concluding these proceedings which have been protracted. Further, the petitioner is capable of presenting this matter on behalf of the parents and children who attend Lakewood's schools. Lakewood's motion to intervene as a party is again denied.

It is instructive that the Lakewood Board has not renewed its unsuccessful efforts during the administrative process to intervene during the almost nine months since the current appeal was filed with this court, or the five months since the parties' briefing was complete, until its 11th hour effort to intervene as we await a date for oral argument.

Argument

I. MOVANT LAKEWOOD BOARD OF EDUCATION HAS FAILED TO DEMONSTRATE THAT INTERVENTION IS AVAILABLE IN THE APPELLATE DIVISION

In its argument, Movant acknowledges that "the Rules of Court do not specifically address motions to intervene before the Appellate Division" (Brief at 5) and it presents no argument, let alone precedent, for why intervention should, nonetheless, be available when a case has been properly appealed as of right by a party.

Instead, the Movant just asserts that the court should grant intervention as a party by using the Court rules applicable to the trial courts as "an appropriate guide" (Id.). Again, the Movant presents no argument or precedent for why the court should adopt that approach. Moreover, New Jersey Rule of Court 4:1 circumscribes the scope of the rules in Part IV, the part Movant asserts should be applied to its motion, as governing "the practice and procedure of civil actions in the Superior Court, Law and Chancery Divisions [but not Appellate Division], and the surrogate's courts and the Tax Court except as otherwise provided in Part VI and Part VIII [Rules Governing Practice in the Law Division, Special Civil Part, and in the Tax Court]."

The court should, therefore, reject this motion out of hand.

II. EVEN IF THE COURT WERE WILLING TO USE THE TRIAL COURT RULES AS A GUIDE FOR DECIDING MOVANT'S MOTION TO INTERVENE, IT SHOULD DENY THE MOTION BECAUSE MOVANT HAS FAILED TO SATISFY THE RELEVANT CRITERIA OF THOSE RULES

New Jersey Court Rule 4:33-1 provides for intervention as of right and Rule 4:33-2 provides for permissive intervention, both in the State's trial courts. Even if this court were willing to use those rules as an "appropriate guide" for considering Movant's motion for intervention, it should not result in an order for intervention.

Both rules require that the application for intervention be "timely." As the Introduction and Abbreviated Procedural History make clear, this case is more than 10 years old and the current appeal was filed more than eight months ago, all the briefing was completed five months ago, and we are awaiting a date for oral argument. The timing of this motion gives a whole new meaning to the word "dilatory."

It is true that earlier in this litigation the Movant both rejected participation as a party and unsuccessfully sought intervention, but the last such effort was rejected by the acting commissioner in July 2021, three and a half years ago. And even in October 2018, when the ALJ denied the Movant's intervention motion, she described it as too late.

Related to this point, a second criterion (or "guide") applicable to a permissive intervention decision is "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." (N.J.C.R. 4:33-2).

Finally, the intervention as of right Rule (N.J.R.C. 4:33-1) denies such intervention if "the applicant's interest is adequately represented by existing parties." Not only we, but also ALJ Scarola in her October 9, 2018, letter order, believe that we have demonstrated our capability to represent Lakewood's public-school students, the ultimate constitutional claimants in this case. Their interests must be the focus of Movant's motion, too, for, if they are not, it is hard to imagine what cognizable interest the Board wants to represent as a party to this appeal.

As indicated, the Lakewood board did serve as a "participant" in OAL, and that may be a model for the Board's participation should the court find that it might provide any significant benefit at this very belated point. Frankly, my co-counsel and I are dubious about that and believe the better course is for the court to deny this motion and move forward as expeditiously as possible to oral argument and a decision.

Sincerely,

Paul L. Tractenberg
Co-counsel for petitioners-appellants

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