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April 27, 2023

Dr. Angelica Allen-McMillan
Acting Commissioner of Education
New Jersey Department of Education
Judge Robert L. Carter Building
100 River View Plaza
Trenton, NJ 08625-0500

RE: Alcantara, et al., v. Hespe, et al., Dkt. No. A-003693-20T2

Dear Acting Commissioner Allen-McMillan:

This letter is submitted in lieu of a formal brief in support of petitioners-appellants' Motion for Emergency Relief in the above-captioned case.

The emergency relief sought is an expedited schedule for your issuance of a final decision on the March 6, 2023, remand to you from the Appellate Division. Pursuant to that remand order, you are "to consider the substantive arguments pertaining to the SFRA in light of our Supreme Court's directive in Abbott ex rel Abbott v. Burke (Abbott XX), 199 N.J. 140, 146 (2009): the State has a continuing obligation to 'keep SFRA operating at its optimal level…',and '[t]here should be no doubt that we would require remediation of any deficiencies of a constitutional dimension, if such problems emerge.'" (Slip op. at 15)

Emergency relief applications in matters before the Commissioner are provided for by N.J.A.C. 6A:4-3.5. According to that section, such applications are to be made by motions

"conforming to the requirements of N.J.A.C. 6A:4-3.1," and "shall be considered on an expedited basis and shall be reviewed in accordance with N.J.A.C. 6A:4-4.1 (b)."

N.J.A.C. 6A:4-3.1 contains several requirements of clear relevance to this motion for emergency relief: (1) a letter brief, pursuant to N.J.A.C. 6A:4-2.8 (g), may accompany the motion; (2) the "motion shall be accompanied by an affidavit setting forth fully the factual basis upon which the motion is based;" (3) "[t]he moving party shall serve one copy of the moving papers on all other parties and shall file the original with the Commissioner;" and (4) "[e]xcept as provided in N.J.A.C. 6A:4-3.5, an opposing party shall have 10 days after service of the moving party's papers to serve and file papers in opposition" (N.J.A.C. 6A:4-3.5 requires that "[a]pplications for emergency relief shall be considered on an expedited basis.") Presumably, this last provision authorizes the Commissioner to shorten the time for the opposing party to serve and file its papers, as well as admonishing the Commissioner to render her decision on the motion expeditiously.

N.J.A.C. 6A:4-4.4 entitled "Relaxation of rules," further underscores the intent of this chapter of the rules to mandate "elimination of unnecessary delay" (N.J.A.C. 6A:4-4.4 (a)), and to authorize the Commissioner to "modify time schedules…at his or her discretion or by leave upon motion of a party." (N.J.A.C.6A:4-4.4 (b))

Finally, as indicated, the rules specify that applications for emergency relief, such as the one being supported by this letter brief, "shall be reviewed in accordance with N.J.A.C. 6A:4-4.1 (b). That regulatory provision adopts the four standards articulated by the New Jersey Supreme Court in *Crowe v. DeGioia*, 90 N.J. 126 (1982):

1. The moving party will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying the moving party's claim is settled;

3. The moving party has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the moving party will suffer greater harm than the respondent will suffer if the requested relief is not granted.

This letter brief will now address each of the four *Crowe v. DeGioia* standards:

1. Irreparable harm. The petition filed with the Commissioner on behalf of Lakewood public school students in mid-June 2014, almost nine years ago, has been considered by several administrative law judges in the Office of Administrative Law, by the Acting Commissioner and by the Appellate Division ever since despite the admonition that the administrative process should be efficient and expeditious. For much of that time, my co-counsel, Arthur Lang, and I have emphasized repeatedly that "time is of the essence" because those students are being denied their fundamental constitutional right to a "thorough and efficient" education ("T&E") largely because of inadequate funding. Every day that that right is denied, we asserted, was a day of education lost to them forever. If ever there was a graphic example of irreparable harm being done to young New Jerseyans, 100 % of them low-income and 95% of them Latino and black, that was it.

Now, thanks to a unanimous decision of the Appellate Division reversing your decision on T&E, we know that our legal assertion was in fact a statement of New Jersey's constitutional law. As of the court's March 6, 2023, decision, and the State's subsequent determination not to seek review by the New Jersey Supreme Court, the students' right to have their constitutional harm remedied, and the consequent burden on the State to act speedily, has ripened. The initial onus is on you to issue a prompt final decision relating to your remand instructions from the Appellate Division. The irreparable harm inflicted on Lakewood's public school students will not be erased

no matter how fast you act, but, at least, it will be limited.

2. Settled legal rights. As indicated above, both the movants' legal rights to a T&E education and the denial of those rights have been definitively resolved. The relevant NJAC provisions also make clear that they have the right to obtain remedies for that denial in an efficient and expedited manner. That is the whole point of making explicit provision for emergency relief.

3. Likelihood of prevailing on the merits. The merits of this case involve both the determination that Lakewood public school students are being denied their right to T&E, and the claim that the cause of such a denial is, at least in significant part, the way in which SFRA has been applied to Lakewood.

As indicated above, the first of those issues has been finally resolved as a matter of law. As to the second matter relating to the cause of that proven denial, there is a strong likelihood that the application of SFRA will be deeply implicated. After all, Administrative Law Judge Scarola's elaborately detailed decision recommending that you find a T&E violation made clear, as did the State monitors assigned to Lakewood for the past seven years, that the school district's problem is a revenue problem not a spending problem. In other words, it simply has not had enough money to provide its students with T&E. How such a fiscal problem can exist independent of the state's school funding law defies understanding and logic.

Moreover, you and your predecessor commissioners have acknowledged that there has been a SFRA shortfall every year for at least the past six by certifying to the State Treasurer that Lakewood needs ever-increasing advance state aid loans. Otherwise, according to your certification, the district will not have sufficient funds from SFRA to provide its students with T&E. By the way, even with the hundreds of millions of dollars in repayable loans advanced to

Lakewood already, neither the Appellate Division nor ALJ Scarola was persuaded the district was able to provide T&E. According to ALJ Scarola, what it did provide to Lakewood was an "unsustainable" fiscal burden and even a "Ponzi scheme." Additionally, under the advance state aid loan statute, the State monitors must remain in Lakewood until the loans are fully repaid, which can be another 10 years.

The combination of these annual commissioner of education certifications and the continuous presence in the Lakewood school district of multiple state monitors with extensive authority to control the district's financial operations and expenditures argue strongly for SFRA being the substantial, if not sole, cause of Lakewood's "unsustainable" fiscal situation. Indeed, unless the acting commissioner is willing to accept responsibility for failures over the years by her State monitors or by herself and her predecessor commissioners, one would think she would join the student petitioners in arguing that the Legislature must amend SFRA, as well as fully fund it, or adopt separate legislation to overcome Lakewood's ongoing fiscal crisis.

4. Moving party's greater harm. The State's funding failures with respect to the Lakewood school district over many years have caused the public school students grievous harm that will likely burden them throughout their lives. This, in turn, will harm the State of New Jersey, which desperately needs the good citizens and productive competitors in the labor market that T&E is designed to produce. That is at the heart of the New Jersey Supreme Court rulings in *Abbott v. Burke*. Any further needless delay in providing those students with their constitutional rights can only exacerbate the severe harm they and our state have already suffered.

By contrast, it is hard to imagine that the State respondents will suffer any cognizable harm by being required to provide an expeditious remedy to those students as the New Jersey Constitution requires.

In conclusion, since the four *Crowe v. DeGioia* standards definitely have been met, you should immediately grant the student petitioners' motion for emergency relief in the form of an expedited schedule for issuing your final decision in this matter.

Respectfully submitted,

s/ *Paul L. Tractenberg*

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