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March 4, 2019

Honorable Susan M. Scarola, ALJ
Office of Administrative Law
Quakerbridge Plaza, Building 9
Mercerville, NJ 08625-0049

Re: Leonor Alcantara et. al., v. David Hesse et. al.

OAL Docket No: EDU 11069-2014 S

Agency Ref. No. 156-6/14

Dear Judge Scarola:

As you know, I represent the Petitioners in the above referenced case. Petitioners respectfully request leave of the Court to move for summary decision on all the substantive issues in this matter.

N.J.A.C. §1:1-12.5(a) provides "for summary decision upon all or any of the substantive issues in a contested case. Such motion must be filed no later than 30 days prior to the first scheduled hearing date or *by such date as ordered by the judge.*" (Emphasis added).

The basis of Petitioners' request that your Honor permit a motion for summary decision now, pursuant to the discretion afforded you by the applicable regulation, is that the Commissioner's certification of \$28,182,090 in advance state aid pursuant to NJSA 18A:7A-56, and the subsequent additional \$1,566,821 in emergency aid, came months after the petitioners' case in chief had initially

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concluded. The Commissioner's certification that without these huge sums the Lakewood Public School District (LPSD) could not provide its students with a thorough and efficient education (T&E) fundamentally altered the whole School Funding Reform Act of 2008 (SFRA)/T&E argument in this matter and eliminated the need for further evidence from the State on that point.

Actually, it turns out that the Commissioner has recommended advance state aid in greatly escalating amounts for four consecutive years, thereby explicitly acknowledging that the funding generated for LPSD by SFRA is insufficient to provide LPSD students with T&E. According to the statute, "The commissioner's recommendation shall be based on whether the payment is necessary to ensure the provision of a thorough and efficient education." NJSA 18A:7A-56. Consequently, unless the State plans to challenge the validity of the Commissioner's annual recommendations to the State Treasurer, there is no material fact in dispute about the SFRA formula's constitutional inadequacy as applied to LPSD.

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It is possible, of course, that the State will argue instead: (i) that inadequate SFRA funding, when augmented by annual advance state aid, might be sufficient to assure LPSD students with T&E; and (ii) that the State is entitled to present its case to that effect. The problem with that approach is that, as a matter of law, the State should be precluded from advancing that argument. Annual advance state aid simply is not a constitutionally sufficient means of meeting T&E for LPSD students for several reasons.

First, advance state aid, as its name suggests and as the statute makes explicit, is a loan advanced to the district that must be repaid out of future state aid; it is not additional aid at all. "The advance State aid payment shall be repaid by the school district through automatic reductions in the State aid provided to the school district in subsequent years. The term of the repayment shall not exceed 10 years. . . ." NJSA 18A:7A-56(b). For LPSD, given the huge and escalating amounts involved, the advance state aid will operate, in effect, as a Ponzi scheme in which future LPSD students will pay the proverbial piper within a few years. As Petitioners'

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school funding expert witness Melvin Wynn testified, without cross-examination by the State on that point, in the relatively near future LPSD's annual repayment obligations will actually exceed its current state aid. "If nothing happens, then mathematically, yeah, if you stretch it out long enough it's possible all of the state aid would go for paying right back to the state and none of it would go for T&E." (Tr. 12/18/2019 33-23 to 34-1).

Second, the State's authority to extend advance state aid loans to LPSD is conditioned on the State continuing to require that state fiscal monitors are assigned to LPSD. Unless the State were to commit itself to keep fiscal monitors in LPSD, and unless the Commissioner were to commit himself to annually recommend to the State Treasurer the payment of sufficient advance state aid to LPSD to make up for its T&E shortfall, and the State Treasurer were to acquiesce in those payments, even that inappropriate and inadequate source of funding would be in jeopardy.

Third, should the State argue that the constitutional spending mandate is satisfied with the annually exploding amounts of advance state aid loans deemed necessary by the

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Commissioner to enable LPSD to provide its students with T&E, it would run afoul of many rulings by the New Jersey Supreme Court in *Robinson v. Cahill* and *Abbott v. Burke*. To be constitutionally appropriate, funding of T&E must be reliable, certain and predictable, and surely cannot be discretionary with the State as advance state aid is.

One of the reasons that the court refused to consider federal education aid as a means to satisfy the T&E constitutional mandate was because it was discretionary and, therefore, neither certain nor reliable. Of course, pursuant to federal law it also was meant to supplement not supplant state and local education funding. But, at least, unlike advance state aid, federal education funding actually provided school districts with additional funding; it was not just a loan repayable from future aid designed for the education of future students.

In the very first New Jersey Supreme Court decision in the State's long-running school funding litigation, the court stated that "[T]he ultimate responsibility for a thorough and efficient education was imposed upon the State." *Robinson v. Cahill*, 62 N.J. 473, 509 (1973). The State's constitutional obligation to provide sufficient

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funding for T & E is not satisfied with discretionary annual advance state aid because, like federal aid, it is unpredictable and discretionary. "Briefly, we view the State's constitutional obligation to provide a thorough and efficient education as not adequately satisfied if dependent on federal aid, which today is subject to substantial fluctuation. Plaintiffs' witness called it a 'roller coaster.'" *Abbott by Abbott v. Burke (Abbott II)*, 119 N.J. 287, 330 (N.J., 1990). This is all the more so in the case of LPSD where funding has been nothing short of a "roller coaster" because there is no rational relationship between the revenue generated by the SFRA and the actual mandated expenses of the district. The record is replete with testimony of teacher exodus due to low morale and lack of job security because of the uncertainty of funding. Unpredictable advance state aid, as the Court said concerning federal aid, "should not be 'used as a crutch against some structural failing in the funding scheme itself'. . . and was not envisioned as a funding substitute for State aid." *Abbott v. Burke*, *Abbott XXI*, 206 N.J. 332, 410 (2011, citation omitted).

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Funding has to be formulaic, non-discretionary and predictable. The Abbott III Court ruled that the scheme to fund the low-income urban districts pursuant to the Quality Education Act of 1990 was unconstitutional because it “depend[ed] fundamentally on the discretionary action of the executive and legislative branches . . . [and that] the statute fail[ed] to guarantee adequate funding for those districts.” Abbott by Abbott v. Burke (Abbott III), 136 N.J. 444, 451 (1994). LPSD students have multiple deficiencies requiring the kind of well-planned intervention needed in most low-income urban districts. It is impossible for the district to remedy educational deficiencies and to responsibly plan for the future, knowing that its stream of revenue becomes more insufficient with each passing year and that it must rely on even larger loans just to maintain its present levels of curriculum and support. Given all the uncertainties and inadequacies attached to advance state aid, it simply cannot assure that every year LPSD will receive the constitutionally required funding sufficient to guarantee its students with T&E.

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This imposes on your Honor an obligation to take assertive and timely action to cure the constitutional deprivation being suffered by LPSD students, which will only worsen over the years given the large annual increases projected in Lakewood's population of nonpublic school students.

On behalf of the Petitioners, I, therefore, respectfully request that your Honor does the following:

1. Grant Petitioners leave to file this letter brief as a motion for summary decision;
2. Grant that motion and, more specifically: (i) deliver to the Commissioner of Education your findings to the effect that LPSD cannot provide its students with T&E with the revenue available pursuant to the formulas contained in SFRA, and that the Legislature should proceed expeditiously to cure that constitutional defect; and (ii) recommend to the Commissioner that he should find, as a matter of law, that advance state aid pursuant to NJSA 18A:7A-56 is not a constitutionally sufficient means of enabling LPSD to meet T&E requirements for its students.

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Respectfully Submitted,

s/ Arthur H. Lang

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