P A U L L. T R A C T E N B E R G
A T T O R N E Y-A T - L A W & L E G A L C O N S U L T A N T
1 2 3 W A S H I N G T O N STREET
N E W A R K, N J 07102
9 7 3 - 3 5 3 - 5 4 3 3
P A U L L T R A C T E N B E R G @ G M A I L. C O M

VIA EMAIL

December 21, 2018

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

Re: Leonor Alcantara et. al. v. David Hespe et al.
OAL Docket No: EDU 11069-2014 S
Agency Ref. No. 156-6/14

Dear Judge Scarola:

As a participant in the above-captioned case whose main role is to assist your Honor in the fair, effective and timely disposition of this matter, I am submitting this letter. It is a follow up to this past Wednesday's appearance before your Honor at which petitioners' school funding expert Mel Wyns presented testimony and there was a brief discussion of the State's latest motion to dismiss.

My understanding is that, if your Honor denies that motion, as I believe is fully justified, what follows next apparently is the State's presentation of its case, more than four and a half years after the filing of the petition. For the reasons I state below, I believe that is not an appropriate way to proceed. Instead, I believe that your Honor should recommend to the Commissioner a judgment for the petitioners. If that requires petitioners to file another motion with your Honor, I feel confident that they will accommodate you.

In my opinion, the State has been extremely evasive in spelling out its theory of the case, including in its long-delayed answer, and, therefore, it is unclear exactly what the State would attempt to prove at a hearing. Its bottom-line position seems to be that petitioners have failed to prove a violation of their constitutional right to a thorough and efficient education, and that underlays the State's latest motion to dismiss. However, Mr. Wyns' testimony is strongly to the contrary, and, as the longtime director of the New Jersey Department of Education's Office of

School Finance, his testimony should be given great weight. Indeed, the fact that the State basically did not seek to cross-examine Mr. Wyns adds to his credibility.

Beyond that testimony, though, there is ample evidence in the record, as I pointed out in my October 3, 2018 letter to your Honor, to the effect that the School Funding Reform Act of 2008 has failed to generate sufficient funding for the Lakewood School District (LSD) to provide its students with a thorough and efficient education. The State's own monitors have publicly attested to the fact that Lakewood's problem is a revenue problem not a spending problem—in other words, SFRA has not provided the district with sufficient funding. But, even more dispositively, as Mr. Wyns testified to, we discovered that for four successive years the Commissioner of Education has certified to the State Treasurer that SFRA does not provide adequate funding for the Lakewood school district to be able to provide its students with a T&E education, exactly what petitioners have claimed.

The result of those certifications has been that the State has loaned LSD increasing amounts of money in the form of "advance state aid."[1] The total of those loans is more than $46 million and this school year alone the loan far exceeded $28 million. Mr. Wyns testified that, in his opinion, next year's loan, if provided, would have to be in the neighborhood of $43-45 million, bringing the total outstanding debt to well over $70 million. Given Mr. Wyns' testimony that LSD's state education aid under SFRA, as just amended, will be declining year-to-year, he further testified that, in the near future, LSD's loan repayment obligations would equal or exceed its annual state aid. In other words, with one hand the State will be providing LSD with education aid under SFRA and, presumably, an ever-growing loan, but with the other hand the State will be reclaiming all of its education aid pursuant to 18A: 7A-56 (b)'s explicit requirements.

Since I very much doubt that, in presenting its case, the State will challenge the Commissioner's annual certifications, it seems evident that what it will try to prove should a hearing be necessary is that LSD's SFRA funding **PLUS** the advance state aid it has received this year and may receive in the future are sufficient to enable it to provide its students with a T&E education.

The State has refused to state that unequivocally in its answer or anywhere else. However, its Brief in Support of Motion to Dismiss, dated April 30, 2018, does hint at that theory of the case. At page 53, Mr. Shafter, one of the State monitors in Lakewood, is quoted as stating that "the 2017-2018 budget, **after the state aid advance**, was 'sufficient…to deliver the [T&E] services to the students." (Emphasis added.). At page 55, the State indicated: "However, contrary to Petitioners' apparent presumption, the district's budget deficit does not establish that the students of Lakewood are not receiving T&E. **This is especially so where the Department ensured,**

[1] The statute authorizing these payments, 18A: 7A-56, provides that "b. 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." It also limits these advance State aid payments to districts with a State monitor.

without fail, that the District's deficit was filled through a state aid advance." (Emphasis added.).

If I have correctly surmised the State's theory of the case, then it will try to establish that LSD's SFRA funding, plus its receipt of advance state aid, is enabling it to provide its students with T&E. In my opinion, petitioners do not have to rebut that assertion to prevail. The heart of their case is that, because of Lakewood's unique demographics, SFRA funding for LSD is inadequate to provide Lakewood students with T&E. I suspect that LSD appreciates the Commissioner's efforts over the past four years[2] to supplement SFRA funding with advance state aid, but, in my opinion and I believe the petitioners, that is not a constitutionally sufficient response. There are at least three reasons for that:

1. The New Jersey Supreme Court made very clear and explicit in *Abbott* that state funding to assure students T&E had to be certain, reliable and predictable, not uncertain and discretionary with the executive branch as "advance state aid" is;
2. The Commissioner's statutory authority to certify to the State Treasurer the constitutional necessity of advance state aid to a school district is limited to districts with a state monitor and there is no assurance that LSD will continue to be such a district; and
3. As indicated, "advance state aid" is actually a loan and, as Mr. Wyns testified, LSD's repayment obligations already substantially eat into LSD's state aid and will eventually totally offset it.

Thus, it seems to me quite beside the point whether in the current school year, because of a more than $28 million emergency loan from the State, LSD might be able to provide its students with T&E or not. Rather, the core constitutional problem, which your Honor should address, is whether SFRA is unconstitutional as to LSD because it fails to assure adequate funding for T&E every year on a certain and predictable basis without the need for additional emergency funding, which by definition, is uncertain and unpredictable. On that point, the primary respondent in this matter, the Commissioner of Education, has regularly conceded the petitioners' argument by his annual certifications pursuant to 18A: 7A-56.

My ultimate recommendation is that your Honor not consume more of the valuable time of everyone involved in this matter by presiding over days of hearings in which the State attempts to prove an irrelevant point—that, thanks to large and ever-growing state loans to supplement an inadequate SFRA, LSD may be able to provide its students with T&E. Instead your Honor

[2] Actually, as Mr. Wyns testified, the State has recognized LSD's fiscal plight, resulting from its unique demographics, since at least the 2004-2005 school year and in many of the intervening years, not just the past four, has found ways to direct additional state funding to LSD in the pursuit of T&E for LSD's public school students. It seems long overdue to correct the problem with the statutory formula so that those students are not dependent upon the discretionary, and therefore uncertain and unpredictable, additional state funding necessary for T&E.

should forthrightly address the fatal constitutional flaws in SFRA as it relates to the Lakewood School District and its 6,000 public school students, most of them educationally needy.

As I have been asserting for years, time is of the essence in moving to correct those flaws before the jerry-built funding system of discretionary loans augmenting inadequate SFRA funding caves in on LSD and the State. After all, it is the State that bears ultimate legal and moral responsibility for assuring all New Jersey students, including those in LSD, a thorough and efficient education. It is long past time for the State to meet that responsibility for the public school students of Lakewood and your Honor can play an essential role in bringing that about.

Respectfully submitted,

Paul L. Tractenberg, Participant

cc: Arthur H. Lang, Esq.
Geoffrey N. Stark, Esq.
Jennifer Hoff, Esq.
Michael I. Inzelbuch, Esq.