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VIA EMAIL

September 30, 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, I am submitting this letter in anticipation of the scheduled October 3, 2018 conference call with your Honor in which I expect to participate.

At bottom, this matter raises only two issues:

1. Whether the Lakewood School District's approximately 6,000 public school students are being denied a thorough and efficient education by the manner in which the School Funding Reform Act of 2008 (SFRA) applies to the district's unique demographics; and
2. If they are, what can be done to cure the unconstitutionality as expeditiously as possible.

The hearing your Honor conducted on August 20, 2018, the ensuing order you issued and the four submissions you have already received from the parties and participants shed dispositive light on those issues. The four submissions to which I refer are:

1. Petitioners' Second Amended Petition submitted on September 4, 2018;
2. The State's Answer to the Petitioners' Second Amended Petition submitted on September 18, 2018
3. The extensive September 27, 2018 submission by Michael Inzelbuch, attorney for participant Lakewood School District (LSD), and especially the fruits of his OPRA

request regarding documentation of the State's advance state aid payments to LSD during the past four years (attached to his submission as Exhibits D, E, F and G); and

4. The powerful and authoritative September 28, 2018 report by Melvin Wyns about the School Funding Reform Act of 2008's impact on LSD, submitted by petitioners' attorney Arthur Lang.

To assist your Honor, the parties and the other participant, I will briefly reference each of the four submissions and explain how, taken together, they fully support the Petitioners' case and point the way toward the recommended decision your Honor should issue as soon as possible.

As I have been urging repeatedly for years, time is of the essence here since the fundamental constitutional rights of LSD's almost 6,000 public school students, most of them low-income Hispanic students, have been denied for years (actually, Mr. Wyns' report suggests that, based on his contemporaneous reports, the deprivation may be at least 20 years old and that, starting in the 2004-5 fiscal year, the State began providing supplemental fiscal support to LSD).

Many LSD students have already suffered irreparable harm and we must act to end this unjustifiable situation immediately. (Indeed, I wonder whether there are some astute attorneys out there brainstorming about theories under which the State might be found civilly liable for its likely failure to have met the fundamental constitutional and statutory rights of tens of thousands of LSD students.)

Petitioners' Second Amended Petition

Petitioners have set out an updated, concise and persuasive petition, which alleges why and how LSD public school students have been denied their fundamental constitutional right to a thorough and efficient education, and that, for the past four years, the Commissioner of Education has in effect acknowledged that by certifying, pursuant to statute, that SFRA funding is inadequate to provide them with such an education. As the Petition points out, it is doubtful for many reasons that the advance state aid provided has rendered the funding system constitutional as to LSD and its students.

State's Answer to Second Amended Petition

After more than 50 months, the State has finally submitted an answer to the petition and, tragically, it is a careless, shoddy and unresponsive document that does nothing to move this matter ahead in a productive manner, notwithstanding your Honor's efforts.

Most of the petitioners' allegations and evidentiary support are drawn from the New Jersey Department of Education's own data files and website, and yet the State repeatedly claims not to have "sufficient knowledge or information to admit or deny" most of the petitioners' allegations.

Its answer also mechanically asserts time after time that "Petitioners are left to their proofs," as if the Petitioners had not already put in their case.

Its third ploy is to assert that the New Jersey Constitution, decisions of the New Jersey Supreme Court and legislative enactments "speak for themselves and require no response." The fact that the main Respondents, the Commissioner and State Board of Education, have broad power and duty to oversee and enforce the state constitution and statutes as they relate to education, repeatedly underscored by the State's highest court, seems quite beside the point if we accept the approach taken by the State in its Answer.

I do not believe that it is necessary to provide your Honor with a detailed analysis of the State's Answer; even a cursory reading will demonstrate its shortcomings. I will, however, briefly address several of the State's responses to underscore how unresponsive and shoddy the Answer is.

First, at paragraph 1, responding to the Petitioner's first allegation that Petitioners are entitled to a thorough and efficient education, and quoting the entirety of the state constitution's education clause, the State answers:

The New Jersey Constitution speaks for itself and requires no response. To the extent this paragraph calls for conclusions and/or characterizations of law, it requires no response. Respondents are without sufficient knowledge or information to admit or deny the remaining allegations in this paragraph. Petitioners are left to their proofs.

What are we to make of this? That the State is not even prepared to admit that there is a state constitutional education clause that assures students in New Jersey a thorough and efficient education? If the State is not prepared to admit that, it will come as no surprise that in the rest of the Answer it admits to almost nothing of consequence.

By the way, the reference to "the remaining allegations in this paragraph" is particularly inapt since, as far as I can tell, there are no such allegations. Better than anything, this demonstrates the totally mechanistic and formulaic approach taken by the State in its Answer. It recites multiple reasons why the State should not be expected to respond in a substantive and responsible way to the Petitioners whether or not those reasons actually apply to the particular allegations. (In fact, this is similar to what the State does in its long laundry list of "Affirmative

Defenses,” which are dutifully listed whether or not they have any plausible connection to this matter and the Second Amended Petition.)

Second, in the very next paragraph, Petitioners allege that the State is ultimately responsible for assuring that Petitioners’ educational rights under the state constitution are provided, citing two landmark New Jersey Supreme Court decisions. Instead of admitting this bedrock principle, the State hides behind its litany of excuses.

Third, in paragraphs 13 and 14 of the Second Amended Petition, Petitioners address the Commissioner’s annual certifications to the State Treasurer for the past four years, pursuant to N.J.S.A. 18A: 7A-56, that LSD qualifies for advance state aid because, without it, the district cannot provide its students with a thorough and efficient education. This has become the crux of the Petitioners’ case because the Commissioner is formally acknowledging the correctness of their constitutional claim. Notwithstanding the existence of these formal written certifications (copies provided to your Honor by Mr. Inzelbuch), the State attempts essentially to deny the allegations of both paragraphs, except for allegations in paragraph 13 it deems to be directed to State Treasurer and the allegation in paragraph 14 about the existence of N.J.S.A. 18A: 7A-56. Is the State in effect claiming that the Commissioner acted contrary to the statute by certifying advance state aid for LSD or that he simply didn’t know what he was doing?

Finally, to demonstrate the sloppiness of the State’s Answer, it apparently didn’t provide a response to Petitioners’ allegations at paragraph 21 and instead incorrectly numbered the remainder of its responses (*e.g.*, the State’s paragraph 21 is actually a response to the Petitioners’ paragraph 22 and so forth).

I could bore everyone with much more chapter and verse about the inadequacies of the State’s Answer, but I believe that it would be needless overkill.

Participant LSD’s Submission by its Attorney Michael Inzelbuch

For purposes of this letter, I am addressing only the fruits of the OPRA request, which produced Exhibits E, F, G and H. They demonstrate what we already believed—namely that every year for the past four the Commissioner of Education has written to the State Treasurer, pursuant to N.J.S.A. 18A: 7A-56, recommending the advance of state aid to LSD because “this advance payment is necessary to ensure the provision of a thorough and efficient education.” Additionally, the State Treasurer replied authorizing the Commissioner to provide the advance state aid, but with the understanding that the funds were to be considered a loan and that repayment would be made over a term not to exceed 10 years through automatic deductions from LSD’s state aid for those future years.

As indicated above, the Commissioner's annual action seems to accept Petitioners' core constitutional claim that SFRA does not provide LSD with adequate funding to provide a thorough and efficient education. If the State has a different understanding, it would have been helpful to learn that through its Answer.

Melvin Wyns Report on the School Funding Act of 2008 as Applied to LSD

Mel Wyns is one of New Jersey's leading experts on school funding. He was a long-time head of the NJDOE Division of Finance and has been a school finance consultant and expert witness for years since. He has consulted with LSD during the better part of the past 15 years. Indeed, toward the end of his report, he states that, "I personally am aware that [Lakewood's school funding problems] date back to at least 1998-99, twenty years ago." (Wyns Report at 25).

In my judgment, his September 28, 2018 report just submitted to your Honor by the Petitioners is entitled to great weight as to both issues before this tribunal—whether SFRA is capable of providing LSD with adequate funding for its students to receive a thorough and efficient education and, if it is not, what changes are required to bring the State into conformity with its constitutional obligations.

As to the first matter, the Wyns Report describes, based on the author's personal experience with the district, how the State began providing supplemental aid to LSD outside of the school funding formula as early as 2004-5. That year, the State provided \$1 million—and, in Wyns' opinion as well as that of school district officials, the amount was insufficient to cure LSD's funding problem. Four years later, SFRA replaced the prior state funding law, but, according to Wyns, SFRA failed to adequately address the LSD's already unique demographics, which Wyns had identified in his 2003 reports for LSD. The problem was compounded by the fact that SFRA was fully funded only in its first year of operation and its effectiveness was never fully assessed despite statutory and judicial requirements.(See Wyns Report at 2-5).

As to curing LSD's fiscal problems by annual discretionary state aid advances, the Wyns' Report indicates that such an approach is inadequate, in part because of the statutory requirement that such advances be repaid in annual installments out of LSD funds that are, by definition, insufficient.

The Wyns Report describes in detail how SFRA works both in general and for LSD. His bottom line is that "Lakewood's budget is \$10,706,689 below adequacy under SFRA *before Lakewood's unique circumstances are considered*" (Wyns Report at 7 and 17)(Emphasis in original). Even more to the point, the Wyns Report states that:

The fact that the New Jersey Department of Education did offer the district a loan

of \$28,182,090 [for the 2018-19 school year] which is an amount well in excess of the amount the SFRA defines as the amount the district is below adequacy (\$10,706,689) is a clear indication that due to Lakewood's unique demographics SFRA is severely flawed as applied to Lakewood. (Wyns Report at 17).

As to what to do to remedy this unconstitutional situation, the Wyns Report states:

In my opinion, N.J.S.A. 18A: 7A-56 was never intended to provide advance state aid payments of this magnitude (\$28 million) nor to be used repeatedly to fund budget revenue shortfalls. (Wyns Report at 16).

Wyns also does not believe that the Commissioner's authority extends to adjusting the annual LSD state aid allocation by sufficient amounts to cure the problem (although apparently former Commissioner William Librera had a different view in 2004; see Wyns Report at 2-3). His report states at one point:

Personally, I am baffled by the fact that after the provision of the state aid advance of \$28,182,090 for 2018-19 the state still wants to dismiss this case and maintain the status quo. The state is aware that SFRA has failed in Lakewood. Certainly, the two fiscal monitors are aware of this fact....Providing discretionary annual state advances does not meet the Constitutional imperative to maintain a "thorough and efficient" educational system and is simply not viable in the long run. If I were a fiscal monitor in Lakewood or still in the Division of Finance I would be seeking out or searching for ways to permanently resolve Lakewood's school funding problem and I would welcome any direction from the court. Perhaps, current Department of Education officials are simply unable to be proactive at this time or since Lakewood is involved the politics are not right and the state feels it has no other option at this moment except to resist. (Wyns Report at 22).

What Wyns is left with is a solution based either on: (1) budget footnote language; or (2) an explicit statutory change. (Wyns Report at 3). As to an explicit statutory change, his preferred approach, the Wyns Report provides a detailed analysis and set of recommendations (see Wyns Report at 25-30). I urge your Honor to carefully consider Mr. Wyns' detailed, thoughtful and expert discussion. Perhaps a recommended decision by you in this matter that reflects the Wyns analysis can provide a vehicle for the Commissioner to weigh in seriously and substantively on this urgent matter. Clearly, the educational and life prospects of about 6,000 LSD students turn on your ability to move us toward a real solution to this constitutional conundrum.

Respectfully submitted,

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