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July 6, 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. Allen-McMillan, et al., 475 N.J. Super. 58 (App.Div. 2023)

Dear Acting Commissioner Allen-McMillan:

This letter is submitted in lieu of a formal brief in support of petitioners-appellants' Motion for Clarification or Reconsideration in the above-captioned case pursuant to N.J.A.C. 6A:3-1.15 (b).

The motion relates to your May 12, 2023, Order (and related letter of the same date to my co-counsel Arthur Lang and me) denying our motion for emergent relief. The emergent relief we sought was regarding the Appellate Division's March 6, 2023, unanimous decision ruling that Lakewood public school students were being denied their fundamental constitutional right to a "thorough and efficient" education, and the court's remand to you with specific instructions to consider the constitutionality of the School Funding Reform Act (SFRA) as applied to Lakewood.

We have been especially concerned about the status of that remand since your April 18, 2023, sworn and videotaped testimony to the Senate Budget and Appropriations Committee. In

response to pointed questions from Senator Paul Sarlo, the Committee Chair, and from Senator Teresa Ruiz, the Senate Majority Leader, about the *Alcantara* case, you essentially said you didn't know anything about the case or even which lawyers were representing you. Since you are effectively the primary respondent-appellee in that case, as well as the agency head charged with responsibility to respond to the Appellate Division's remand with a final decision, your testimony raised serious questions for us, which we have been attempting to pursue since April 18, 2023, with you, your putative lawyers in the Office of the Attorney General, and even with the Appellate Division. The chronology of those efforts is delineated in my co-counsel's certification in support of this motion, and the documents themselves are in the appendix being filed with this motion.

In this letter brief, I will highlight some of our efforts. One purpose of doing that is to explain why the 10-day time limit for filing a motion for clarification or reconsideration of your May 12, 2023, order denying our request for emergent relief regarding the remand should not be strictly applied here. In effect, we have been pursuing clarification of your intentions regarding the remand process and its timetable starting on April 20, 2023, and ending on June 27, 2023, less than 10 days ago. We have sought to do this through a variety of means, including:

- Our April 20, 2023, letter to you requesting an expedited (within 45 days) final decision on the remand;
- Our May 1, 2023, motion to you for emergency relief;
- Our May 1-3, 2023, email exchange with Donna Arons, Assistant Attorney General, seeking to determine which deputy attorney generals were representing you in this matter;
- Our May 18, 2023, motions to the Appellate Division seeking: (i) leave to file an interlocutory appeal of your May 12, 2023, order denying our motion for

emergency relief before you; and (ii) emergency consideration of the motion for leave to file an interlocutory appeal;

- Our May 24, 2023, letter to you (after the Appellate Division's May 19, 2023, denial of our request for emergency consideration) seeking a short and specific timeline for the remand process and your final decision;
- Our June 13, 2023, email and letter to you renewing our request for a speedy remand process and final decision (after the Appellate Division's June 9, 2023, denial of our Motion for Leave to File an Interlocutory Appeal of your May 12, 2023, order);
- Our June 13 and 14, 2023, emails with DAG Christopher Weber, who seemed to be your attorney regarding the remand process, to set up a conference call on June 14, which occurred at 3 pm on that date among my co-counsel and me, and DAGs Weber and Matthew Lynch (who had argued the case before the Appellate Division);
- Our June 15, 2023, memorandum seeking to memorialize the June 14, 2023, conference call and referencing a June 28, 2023, 11 am follow-up conference call agreed to during the June 14 conference call;
- DAG Weber's June 27, 2023, email and letter: (i) rejecting our June 15, 2023, account of the June 14, 223, conference call; (ii) indicating, for the first time, that DAGs Weber and Lynch were your lawyers only before the Appellate Division and not in connection with the remand; and (iii) cancelling the next day's follow-up conference call; and
- Our June 29, 2023, email and letter to DAG Weber setting forth the problems with

his June 27, 2023, email and letter.

Several things should be clear from that chronology of recent events. First, my co-counsel and I have left no stone unturned in our effort to vindicate our clients' fundamental constitutional rights to T&E as expeditiously as possible. Indeed, throughout this nine-year litigation, we have repeatedly stressed how and why time is of the absolute essence for them.

Second, our continuing efforts have been met with a surprising and deeply disappointing lack of urgency by those constitutionally and statutorily charged with the power and duty to assure T&E for all New Jersey students, and especially for those, such as our clients, who are educationally disadvantaged. Indeed, you are chief among the State's officers with that profoundly important responsibility, and yet, frankly, and surprisingly given your own educational and professional background, your conduct has not yet measured up. With this motion, we give you yet another opportunity to rise to the occasion by clarifying or reconsidering your May 12, 2023, order. You have only to do what the Appellate Division's remand clearly asked of you—to consider and address the students' argument that SFRA is unconstitutional as applied to the unique Lakewood school district, and to do so "expeditiously" as you and your lawyers have repeatedly indicated you would do, this time in accordance with a specific timeline including dates.

I hope that, considering this background, your response will not be the hyper-technical one of refusing to consider our Motion for Clarification or Reconsideration because it was not filed within 10 days of your May 12, 2023, order denying our motion for emergency relief. You clearly have the ability and flexibility to construe our filing as timely because, continuously since May 12, 2023, and, actually, for weeks before that date, we have been seeking, through every available means, to persuade you to fully honor the Appellate Division's March 6, 2023, remand to you.

Indeed, the rule governing motions for clarification itself provides that such a motion "shall be considered based upon necessity as specifically demonstrated in the papers submitted with the motion." (N.J.A.C. 6A:3-1.15 (b)(3)). Even more germane to relaxation of the 10-day filing requirement, you are expressly granted the authority to relax rules governing such matters when, in your discretion, "a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." N.J.A.C. 6A:3-1.16. I believe that the necessity for you to consider our motion for clarification has been clearly and specifically demonstrated, and that we also have demonstrated the injustice of strict adherence to the 10-day filing requirement.

As a practical matter, we have been seeking to clarify your May 12, 2023, order, and, more broadly your response to the Appellate Division's March 6, 2023, remand to you, virtually since the remand, now exactly four months ago. Those efforts were brought to an effective halt, however, **less than 10 days ago** by DAG Weber's June 27, 2023, email and letter, which made clear that all our efforts to clarify your order, and response to the court's remand, would be of no avail for two reasons: (1) DAG Weber advised me that he and DAG Lynch were your lawyers before the Appellate Division, but apparently not in connection with the Appellate Division's remand to you,[1] that our conference call, therefore, had been "informal" and only a "professional courtesy," and, presumably, that the conference call was not to be relied on for any clarification regarding the meaning of your May 12, 2023, order and letter[2]; and (2) paradoxically, your treatment of the remand process had already been adequately explained in your order and letter.[3]

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[1] DAG Weber failed to advise me in that letter or otherwise who, if anyone, is serving as your lawyer in connection with the Appellate Division's remand to you. Given N.J.A.C. 6A:3-1.3(j), your lawyer for this matter must be someone from the Office of the Attorney General, but that lawyer has not yet been identified.

[2] Indeed, in his letter, DAG Weber sought to admonish us by stating that "We do not agree with your characterization of the conversation as set forth in your memorandum and would object to the inclusion of that memorandum in any further proceedings." However, DAG Weber's letter provided neither any indication of inaccuracies in my memorandum nor any basis for an objection to our including that memorandum "in any further proceedings."

[3] Your lack of response to my letters of May 24, 2023, and June 23, 2023, also nullified those efforts to clarify your May 12, 2023, order.

Thus, we were left with no alternative but to file this Motion for Clarification or Reconsideration to address both your unwillingness to set out a timetable, with specific dates, for the remand process, and your description of the remand process as one centered on a "comprehensive review" of the Lakewood school district by the NJDOE, which you originally ordered in your July 16, 2021, final decision in this case. Apparently, the Department had done nothing on that comprehensive review between July 16, 2021, and May 12, 2023, almost 22 months.

In any event, it is not at all clear that the kind of comprehensive review of the Lakewood school district you ordered in 2021, as part of a final decision that ruled the district was providing its students with a "thorough and efficient education" (T&E), but could still benefit from some educational improvements, has any relevance after the Appellate Division overruled your final decision and unanimously ruled that Lakewood's public school students were being denied T&E. Curiously, your May 12, 2023, order simply refers to the fact that you had issued a letter "directing the Department to expedite" the almost two year old comprehensive review on which, apparently, it had done nothing. We have received no copy of a letter to the Department containing such a direction. If your intention was to have your May 12, 2023, letter to Mr. Lang and me serve that purpose, it is surprising that no copy to the Department was shown.

Your order does provide some insights about how you conceive of the comprehensive review as the centerpiece of your remand process, however. Your premise is that "the information that comprised the record before the OAL, the Commissioner, and the Appellate Division is now outdated," and "that an updated record is required in order to make an appropriately informed decision about the SFRA and its application to Lakewood."

This could be read to suggest that you intend to use the comprehensive review to

effectively re-litigate the issue of whether Lakewood's public school students are still being denied T&E based on more current data, and this needs to be clarified. You then conclude that the petitioners' motion for emergent relief was rendered moot because you had determined a "schedule for the proceedings in this matter, as outlined in the May 12, 2023, letter," but apparently not in the May 12, 2023, order itself.

The letter is addressed to my co-counsel Arthur Lang and to me and shows no copies to anyone—not to a lawyer representing you or any other State respondent, or to the Department. It makes explicit that the comprehensive review you now want the Department to "expedite" is the very same one you ordered in your July 16, 2021, final decision. You also elaborate on what the comprehensive review should consider. Among other things, it "will require the engagement of experts to examine Lakewood's operations and performance in several key areas, including educational policy, special education, administration and governance, and accounting."[4]

Then, your letter continues, "Upon completion of this **expedited** comprehensive review, Lakewood and the petitioners will have an opportunity to respond to the resulting report and recommendations prior to the issuance of a final agency decision on the as-applied constitutionality of the SFRA." (Emphasis added.). Since no dates are provided for when this seemingly elaborate "comprehensive review" will begin, let alone be concluded—and how it will actually bear upon a determination of SFRA's constitutionality as applied to Lakewood—the import of the word "expedited"[5] and how this letter provides a "schedule,"[6] as your order claims,

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[4] Your letter fails to explain why outside experts are required to review Lakewood's administration, governance, and accounting despite the continuous presence in the district of multiple state monitors for more than nine years with broad powers and duties over these very areas, and a statutory responsibility to submit weekly reports to you or your designee. Incidentally, I have been trying to obtain copies of those reports, as well as the monthly public reports the state monitors are required to submit to the Lakewood Board of Education and its community, from the NJDOE Records Custodian since May 13, 2023, almost eight weeks ago, via the Open Public Records Act. After repeated, and unexplained, delays in production, on June 24, 2023, I filed a Denial of Access Complaint with the NJ Government Records Council, and I am awaiting resolution of that complaint.

[5] A common dictionary definition of "expedited" is accelerated, sped up or executed promptly, as contrasted with

are, to say the least, unclear.

All the above desperately need clarification, especially since they must be construed in the context of the Appellate Division's explicit remand instruction to you and the requirement that that instruction must be carried out "precisely as it is written."[7]

Unlike your response to the remand, the court's remand instruction could not have been clearer. The last paragraph of its opinion stated, in relevant part:

> For these reasons, we reverse and remand, with instructions for the agency to consider the substantive arguments pertaining to the SFRA in light of our Supreme Court's directive in *Abbott* .., [that] the State has a continuing obligation to "keep SFRA operating at its optimal level…" and "there should be no doubt that we would require remediation of any deficiencies if a constitutional dimension, if such problems do emerge." (Alcantara, et al., v. Allen-McMillan, et al., 475 N.J. Super. 58, 71 (App.Div. 2023)).

Lest there be any uncertainty about that instruction to you, earlier in in its opinion, the court had this to say: "**<u>The Commissioner owed appellants a thorough review of their substantive argument: the funding structure of the SFRA was unconstitutional as applied to Lakewood's unique demographic situation</u>**." (Alcantara at 67) (Emphasis added.).

The core clarification required of you is whether the "comprehensive review" you describe in your May 12, 2023, order and letter is compatible with the "through review" remand instruction of the Appellate Division. If it is not, as I believe is obvious, then your "peremptory duty" is "to obey in the particular case the mandate of the appellate court precisely as it is written." (Flanigan v. McFeely, 20 N.J. 414, 420 (1956)). That is, to focus your remand process on the petitioner-

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delayed, hindered, restrained, or impeded.

[6] A common dictionary definition of "schedule" is "a list of times at which possible tasks, events or actions are intended to take place."

[7] In a recent Appellate Division decision by a three-judge panel, two of whom also served on the panel that issued the May 6, 2023, decision in our case, the court said this about a remand: "Where a remand has been ordered, a trial court or agency 'is under a peremptory duty to obey in the particular case the mandate of the appellate court precisely as it is written.'" (citing to the New Jersey Supreme Court decision in *Flanigan v. McFeely*, 20 N.J. 414, 420 (1956)). (In the Matter of the Cannabis Regulatory Commission, ___N.J. Super. (App.Div. May 4, 2023) (unpublished opinion)).

appellants' argument that SFRA is unconstitutional as applied to Lakewood, not on whether, based on new data, Lakewood students are still being denied T&E.

Immediately after quoting from *Flanigan*'s venerable New Jersey Supreme Court precedent, the Appellate Division panel buttressed its position by quoting from two other long-established New Jersey Supreme Court precedents to the effect that:

- "'[T]he appellate judgment becomes the law of the case,' and the agency must not depart from it." (Lowenstein v. Newark Bd. of Educ., 35 N.J. 94, 116-17 (1961)); and
- "[W]hile an agency may be 'privileged to disagree with [the Appellate Division's] decisions, 'the privilege does not extend to non-compliance.'" (Tomaino v. Burman, 364 N.J. Super. 224, 233 (App. Div. 2003) (quoting Reinauer Realty Corp. v. Borough of Paramus, 34 N.J. 406, 415 (1961)).

For these reasons, you should grant our Motion for Clarification or Reconsideration, and make it clear and explicit that:

- The remand process will proceed on an expedited basis, in accordance with a specific timetable providing dates for all the elements of that process, including the date for your final decision; and
- The remand process will be focused on the Appellate Division's specific remand instructions—namely the petitioner-appellants' argument that the SFRA funding structure is unconstitutional as applied to the Lakewood school district.

Respectfully submitted,

Paul L. Tractenberg

cc (by electronic mail):

Arthur H. Lang, Esq.
Matthew J. Platkin, Attorney General
Donna Arons, Assistant Attorney General
Melissa H. Raksa, Assistant Attorney General
Christopher Weber, Deputy Attorney General
Matthew J. Lynch, Deputy Attorney General
Ryan J. Silver, Deputy Attorney General
Carolyn G. Labin, Deputy Attorney General
Jennifer Simons, Director, NJDOE Office of Controversies and Disputes
Senator Paul Sarlo
Senator Teresa Ruiz