

Pre-hearing Statement in Alcantara et al. v. Hespe (OAL Docket No.: EDU 11069-2014 S)

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As I have maintained throughout the proceeding, most recently during the December 21, 2017 conference call, the failure of the School Funding Reform Act of 2008 (SFRA) to adequately provide for the needs of the Lakewood School District's public school students is obvious and dramatic. The fact that Lakewood's public school students are overwhelmingly low-income Hispanics makes the State's default even more damaging and inexplicable. Every day that disposition of this case, and vindication of the students' constitutional rights, is delayed causes the students irreparable harm. Yet, after more than three years, this case has not yet reached even an administrative hearing. As ALJ Scarola suggested during the December 21 conference call, the main issue in this case is likely to be remedial, but the hearing is largely focused on liability, in my judgment a foregone conclusion.

From my long experience in *Abbott v. Burke*, I know that in some cases an elaborate hearing and an extraordinarily detailed recommended decision by an ALJ to the commissioner can wind up playing a very important and positive role in a complex case that breaks new ground or that turns on a closely balanced factual issue. With all respect, though, this is not the same kind of case. The ground has been well ploughed and the issue for determination is clear—does Lakewood's unique status render SFRA clearly inadequate to assure that Lakewood's students receive what is their constitutional due?

As I said during the conference call, the Haber and Associates report (the Haber Report) underscores how unique the Lakewood school district is in the state of New Jersey and how unsuited SFRA is to deal adequately with Lakewood's extreme outlier status. As the Haber Report indicates, 89% of New Jersey's school age children attend public schools; in Lakewood, a mere 15.47% do currently and the Haber Report projects that percentage will decline to 14.90% within four years (see Table 2). I daresay that, in New Jersey school districts with a socioeconomic status comparable to Lakewood, the percentage of students attending nonpublic schools is well below the state average of 11% and the percentage of students attending public school is well above the state average of 89%. Their situations, therefore, would be even more sharply at variance with Lakewood's.

The Haber Report also documents very carefully the budgetary impact of Lakewood's extraordinary level of nonpublic school attendance. In Table 9, the report indicates that, based on the NJDOE numbers for 2016-17, \$62,949,437 of the district's \$137,836,194 budget, or 45.7%, is allocated to mandated services for nonpublic school students. That leaves \$74,886,757 for the district's 5,854 public school students. That is an average of \$12,792 per pupil for some of the state's most educationally disadvantaged students. By comparison, the state's average per pupil spending in 2015-16 was \$20,385 (for some reason, a 2016-17 state average for this category

was not provided on the NJDOE website, but it would undoubtedly be significantly higher) and the average spending for the former Abbott districts, which have comparably disadvantaged student populations to Lakewood, was significantly higher.

Another way to look at the Lakewood data is best reflected by the following table I prepared for 2016-17:

<u>Total</u> <u>budget</u>	<u>Adequacy</u> <u>budget</u>	<u>Nonpublic</u> <u>costs</u>	<u>Remaining</u> <u>\$\$ for public</u> <u>schools</u>	<u>Shortfall</u> <u>from</u> <u>adequacy</u>
\$137.84 m. (per pupil= \$23,534)	\$126.87 m. (per pupil= \$21,672)	\$62.95 m. (45.7% total budget)	\$74.89 m. (per pupil= \$12,792)	\$ 51.98 m. (per pupil= \$8,879)

If Lakewood public school students had the total district budget to apply to their educational costs, per pupil expenditures would be somewhat above the average per pupil spending in the state and about at the level of many of the Abbott districts. However, when the 45.7% of the budget that is required to meet mandated costs for Lakewood’s extraordinarily high number of nonpublic school students is deducted, what is left for public school students is far below not only the state average and Abbott levels of spending, but it is more than 40% lower than Lakewood’s adequacy budget level (\$12,792 vs. \$21,672). The adequacy budget is a construct of SFRA and indicates the spending level necessary for a district’s students to be able to meet the state constitution’s “thorough and efficient” standard of education. If spending more than 40% below this statutory and constitutional standard doesn’t present a prima facie case of unconstitutionality, it is hard to imagine what would. As a practical matter, the only recourse is a substantial increase in state funding since Lakewood is one of the poorest communities in New Jersey by many benchmarks and also is precluded from substantially increasing its local property tax revenues because of SFRA’s 2% cap on such increases.

As Judge Scarola indicated during the December 21 conference call, the legislature, rather than the commissioner, may be the means of solving this unconstitutional situation, but that should be the focus of attention rather than whether there is unconstitutionality, which from the state’s own data and from the mouth of the state’s lead fiscal monitor in Lakewood is self-evident.

I have no doubt, however, that, if the State has its way, we can spend many more months arguing about fiscal and other details, which can’t even begin to rebut the petitioners’ overwhelming prima facie case. And then we wind up eventually with ALJ Scarola’s recommended decision, which is submitted to the commissioner of education, who after all is the named defendant in this matter. The commissioner’s determination could add months of further delay before petitioners even reach the state courts where, for the first time, a definitive

constitutional ruling is possible. In my opinion, that is a peculiar and grossly time-consuming way to handle such a compelling claim of a constitutional violation by the State.

As to the state's obligation to rectify the situation, *Abbott v. Burke*, its predecessor case *Robinson v. Cahill*, and dozens of other decisions of the New Jersey courts, including many by our state's highest court, make explicit that education is ultimately a state function and, if local school districts cannot cure an unconstitutional situation, the state must step in. Because this is such strong and longstanding state constitutional doctrine it makes the long delay in responding to the unmet needs of Lakewood public school students all the more inexplicable.

The duration of this administrative proceeding is symptomatic of the state's unwillingness to deal with the issue. Instead, the state defendants have made a series of motions that have had the effect, if not the purpose, of delaying the hearing and the adjudication of the petitioners' claims that they are being deprived of their fundamental constitutional rights to a thorough and efficient system of fee public schools. Virtually all of these motions have been denied. They brought delay rather than expeditiousness and clarity to this proceeding. Without prejudging the motion I just received seeking to bar the report of Danielle Farrie, one of the petitioners' proposed expert witnesses, I am concerned that it, too, may do more to add delay and technical complexity to this proceeding than to facilitate its prompt resolution. The time is long overdue for the State to step up and meet its obligations without further delay, and I beseech ALJ Scarola to do what she can to expedite the process.