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VIA EMAIL

April 20, 2021

Dr. Angelica Allen-McMillan
Acting Commissioner of the Department of Education
Attn: Bureau of Controversies and Disputes
100 Riverview Plaza, 4th Floor, PO Box 500
Trenton, NJ 08625-0500

Re: Reply to Exceptions to Initial Decision of Susan M. Scarola, ALJ (Ret., on recall)
Leonor Alcantara, et al. v. David Hespe, et al.
OAL Docket No: EDU 11069-14
Agency Ref. No. 156-6/14

Dear Commissioner Allen-McMillan:

As a participant in this matter, I am submitting this reply to exceptions to Administrative Law Judge (ALJ) Scarola's initial decision filed with the Commissioner pursuant to N.J.A.C. 1:1-18.4.

In my capacity as a participant, I have sought to "add constructively to the case without causing undue delay or confusion" (N.J.A.C. 1:1-16.6 (b)). That has been true throughout the overly lengthy period in which this matter has been in the Office of Administrative Law (OAL). But I believe my assistance in adding "constructively to the case" has, at no point, been more important than it is now.

The ALJ's initial decision and the exceptions to it confront the Commissioner with a welter of confusing and even contradictory conceptions of this case and of the best resolution of it. As I have set out in my own exceptions, I believe that this is a relatively simple and straightforward case whose resolution, consistent with the Commissioner's constitutional and statutory powers and duties, is clear.

My main effort in this reply, therefore, will be to describe, and distinguish among, the options before the Commissioner, and to recommend what I consider to be the soundest resolution.

Options presented to the Commissioner

1. *ALJ's Initial Decision*. The ALJ recommended that you decide Lakewood's public-school students were being denied their fundamental constitutional right to a through and efficient (T&E) education, largely for fiscal reasons related to Lakewood's unique status as a district with 25% of all the nonpublic school students in the entire State and resulting costs for those students, mainly for transportation and special education services, that annually consume more than 50% of the school district budget. However, when it came to the cause of that unconstitutional denial, the ALJ inexplicably blamed it on local mismanagement, community choices and "other legislation," rather than on the State's school funding law, the School Funding Reform Act (SFRA). Her recommended "remedy" for the unconstitutional denial was another needs assessment of the Lakewood district.

2. *Petitioners' Recommendations*. The petitioners' exceptions focused almost exclusively on the ALJ's recommendation regarding petitioners' alleged failure to meet the "heavy burden" of proving that SFRA had caused the unconstitutional denial of T&E to Lakewood public-school students. Petitioners took exception to every step of the ALJ's treatment of this issue starting with the "heavy burden" imposed on the petitioners, the insufficiency of the three alternative explanations the ALJ presented for the denial of T&E—local fiscal mismanagement, "community (not school board) choices," and "Other legislation" including the annual appropriations act, the district's alleged failure to reign in transportation and special education costs, and the inappropriateness of considering advance state aid as a constitutionally acceptable means of funding T&E. Based on this analysis, the petitioners recommended that the Commissioner reject the ALJ's Initial Decision regarding the cause of the denial of T&E and instead rule that SFRA's failure to reflect Lakewood's unique demographics was the principal cause.

3. *State Respondents' Recommendations.* The State respondents submitted "partial exceptions" to the ALJ's Initial Decision, urging that the recommendation about Lakewood public school students being denied T&E should be rejected. At the heart of the State respondents' position on this issue was the repeated assertion that, although the various relevant metrics for Lakewood students (e.g., standardized test scores, graduation rates, and AP enrollment rates) were still low, T&E was being provided because: (i) the "less than stellar" metrics had "slightly improved" over time, if "at a slower pace than Petitioners would like to see" (Respondents' exceptions at 12); and (ii) based on a selective, cherry-picked list of educational opportunities available to some Lakewood public-school students, "the record does not support a finding that students are not receiving T&E ." (State respondents' exceptions at 16). The State respondents' bottom line seemed to be that, despite low metrics, "Lakewood has shown that they have the ability to improve these issues one step at a time." (Id.)

   In my judgment, even if a modest and slow improvement curve may be better than stagnation or deterioration, standing alone without evidence that it reflects adequate achievement hardly demonstrates that Lakewood students are now receiving T&E, or that the ALJ's findings and holding are wrong and should be rejected by the Commissioner.

4. *Participant Lakewood Board of Education's (BOE) Recommendations*. The BOE's exceptions are difficult to evaluate because they seem to reflect both a fundamental misunderstanding of the meaning of a constitutionally compliant T&E education and an extraordinary casualness about procedural requirements.

   First, about the procedural requirements as they relate to the BOE's status in this case: over the course of this matter's pendency in OAL, the BOE has regularly changed its position about what role, if any, it wanted to play.[1] Initially, on September 2, 2014, early in this proceeding, the State respondents filed an unsuccessful motion to have the Lakewood district joined as a necessary party, but the BOE objected.[2] Then, more than two years later, the BOE petitioned for leave to appear as a participant, which ALJ Metzger granted by a letter order dated November 21, 2016.[3] Then, as the dates for the petitioners to present their case approached in February 2018, the BOE sought to intervene as a party, an effort which ALJ Scarola denied not once but three times. The first time was orally at the hearing on February 7, 2018;[4] the second time was by letter order dated August 20, 2018; and the third time was by letter order dated October 9, 2018.[5] All three letter orders concluded with a sentence indicating that the order could be reviewed by the Commissioner "upon interlocutory review," but the BOE never sought an interlocutory review. Now, on the very brink of the conclusion of the excessively long administrative processing of this matter, and nearly three years after its prior efforts to intervene were rebuffed, the BOE is trying again. Worse still, the BOE is seeking to re-open the record, which was closed on November 28, 2019, almost a year and a half ago, so that BOE can "present the new evidence." (BOE exceptions at 7).

   If one were a real stickler about procedural requirements, it is not even clear that the BOE's status as Participant permits it to file exceptions since, pursuant to N.J.A.C. 1:1-16-6, the ALJ has to specify the nature and extent of participation, and ALJ Metzger's order permitting the BOE to participate is silent about that.[6]

[1] Of course, the composition of such public bodies changes over the years, as does its counsel and other senior employees, but that cannot be the sole determinant of whether procedural requirements designed to provide certainty and consistency can simply be ignored.

[2] See ALJ Scarola's October 9, 2018 order recounting the procedural history at par. 2.

[3] ALJ Metzger's letter order does not specify what the BOE can do in the case as a participant. Compare ALJ Kennedy's order permitting me to participate in which he specified that I could participate in all the ways contemplated by the regulation, including "The right to file exceptions to the initial decision with the agency head."

[4] Alcantara Tr.1 22-14 to 20 (Feb. 7, 2018).

[5] In the letter order dated October 9, 2018, ALJ Scarola indicated that, notwithstanding the prior orders denying its efforts to intervene as a party, the BOE renewed its motion and the ALJ yet again denied it because "the addition of another party would cause undue delay in concluding these proceedings which have been protracted" and because "the petitioner is capable of presenting this matter on behalf of the parents and children who attend Lakewood's schools."

[6] ALJ Metzger's order states only that "This letter order will serve in lieu of a formal order granting participation status to the Lakewood Board of Education pursuant to N.J.A.C. 1:1-16.6."

Even assuming that BOE can submit exceptions, there seems to be no basis for a participant to file motions with the ALJ. And, in any event, this latest effort to intervene should be denied because it comes far too late and is likely to significantly disrupt and delay even further the conclusion of the administrative phase of this case.

As to the BOE's fundamental misunderstanding of the meaning of a constitutionally compliant T&E education, the BOE repeatedly takes the position in its exceptions that, at least if the BOE were able to introduce more recent evidence into the record, it would demonstrate that Lakewood's public-school students were being provided with T&E. Yet, in the next breath, the BOE argues that the ALJ's holding about SFRA being constitutional as applied to Lakewood should be set aside by the Commissioner because SFRA is a "broken funding formula as it specifically applies to Lakewood." (BOE exceptions at 3) (Emphasis in original.)

From those back-to-back statements by the BOE, it is difficult to understand how SFRA can be unconstitutional as applied to Lakewood if Lakewood students are not being denied a T&E education. Such a position is even more difficult to understand given the federal lawsuit BOE filed on July 3, 2019 against the New Jersey Legislature, NJDOE and various state officials in their official capacities. In that case, BOE asserted that the Legislature's failure to appropriate $30 M of extra funding, recommended by the Governor in his budget message for FY 2020, "deprived Lakewood's students of a 'thorough and efficient' public education that is guaranteed to children in the New Jersey Constitution."[7] The BOE claimed that Lakewood public-school students were being denied T&E because of inadequate funding even though the Commissioner certified and the Treasurer provided more than $36 M in advance state aid to Lakewood for that fiscal year.[8]

The argument BOE made in its recent federal court action suggests a reading of the BOE exceptions in this case that might harmonize its seemingly contradictory assertions—the BOE is using its argument that it is providing its public- school students with a "T&E education" in a non-legal or non-constitutional sense. What it may be arguing, in effect, is that it may have enough funding, only because of the millions of dollars of advance state aid, and those dollars are designed to make up for SFRA's constitutional deficiencies, but they create an "unsustainable burden" for Lakewood. We know from *Abbott v. Burke* that funding streams such as advance state aid do not satisfy the constitution's requirement that funding to satisfy T&E must be regular, predictable, certain, and non-discretionary—and the BOE recognized that in its complaint to the federal court. Advance state aid is none of those; indeed, it is not even a grant of state aid, but rather a repayable loan.

[7] Letter Order of Hon. Frieda L. Wolfson, U.S. Chief District Judge, Lakewood Board of Education v. New Jersey Legislature, et al., Civ. Action No. 19-14690 (FLW) (July 8, 2020), at 1.

[8] In its complaint, the BOE claimed that the advance state aid was "insufficient in both form—in that it is a loan requiring repayment—and substance—as Lakewood now purportedly requires a further $16,900,000 in order to provide a 'thorough and efficient' education to its students." (Id. at 3).

So, the bottom line of the BOE's exceptions should be not only that SFRA is unconstitutional as applied to Lakewood, but also that its insufficiencies deny Lakewood's public-school students a constitutionally required T&E education even in the years when the aggregate funding may appear to be educationally adequate or when there have been some improvements in standardized test scores or other T&E benchmarks. The problem of arguably adequate funding today, as with all Ponzi schemes, is that eventually some students will get victimized by an extreme shortage of funds. For Lakewood that day is fast approaching since repayment obligations for advance state aid will soon equal Lakewood's total state aid funding under SFRA. At that point, it will effectively get no net state aid at all.

5. *Participant Paul L. Tractenberg's Recommendations*. Participant Tractenberg recommended that the Commissioner adopt the ALJ's Initial Decision as to the denial of T&E but reject the ALJ's recommendations as to the cause of that denial and the proffered remedy of a needs assessment. Instead, Participant Tractenberg urged the Commissioner to rule that the denial of T&E was substantially caused by SFRA's unconstitutionality as applied to Lakewood and to take all appropriate steps to recommend to the Legislature and Governor both modifications of SFRA necessary to adapt it to Lakewood's unique demographic circumstances and other legislative action regarding the funding of transportation and special education services for nonpublic school students and regarding the ability of the BOE to reflect and serve the public school community.

Soundest Resolution

1. *Core T&E Issue*. The ALJ's Initial Decision and the exceptions to the Commissioner present two main options as to the core T&E issue: (i) the ALJ's Initial Decision, and the exceptions of the petitioners and Participant Tractenberg urge you to find that Lakewood's public-school students are being denied T&E, primarily for fiscal reasons; and (ii) the State respondents urge you to reject the ALJ's Initial Decision in this regard and find that T&E is being provided. As indicated above, although the BOE exceptions seem to agree with the State respondents, a more careful reading indicates that the BOE is not really taking the position that the education it is providing its public-school students complies with the T&E clause of the state constitution. Rather, the BOE seems to be suggesting that with advance state aid, not a constitutionally appropriate form of funding, added to other available funds, the BOE may be able to provide an acceptable level of education.

   Ironically, since the State has ultimate constitutional responsibility for assuring all New Jersey students with T&E, and since the Lakewood BOE has been delegated initial responsibility for carrying out that charge, to the extent they seem to share the view that the ALJ's recommendation about a denial of T&E should be rejected, there would seem to be a self-serving or self-justifying quality to that position.

   The soundest resolution of this issue is for the Commissioner to adopt the ALJ's extensive findings of fact and her consequent holding that Lakewood public school

students are being denied T&E based on both input and outcome measures. After all, the whole point of using OAL and an ALJ in these sorts of cases is to have the ALJ develop an extensive record on the basis of which an educationally sound and fact-based decision can be made. Therefore, the Commissioner should not reject the ALJ's recommendation in this regard without substantial reason to believe that her findings and holding were unsupported by the record or otherwise seriously flawed.

2. *Cause of a T&E Denial*. Here is where some significant confusion arises regarding the options. There are essentially four different configurations reflected in the ALJ's Initial Decision and the exceptions filed with the Commissioner: (i) the ALJ has found that T&E was denied, but that the cause was circumstances, listed above, other than SFRA; (ii) the petitioners representing Lakewood's public-school students and Participant Tractenberg believe T&E has been denied to Lakewood public school students and the cause is that SFRA, as applied to Lakewood, is unconstitutional; (iii) the State respondents argue against a T&E denial and, therefore do not address a cause in their exceptions (but, based on their earlier submissions to the ALJ, presumably would take the position that, if there were a denial, SFRA was not a significant or substantial cause); and (iv) Participant BOE, like the State respondents, also seems to argue against a denial of T&E, but, unlike the State respondents, faults SFRA for not providing Lakewood with adequate funding.

   As to the soundest choice among these four configurations, the Commissioner should reject the ALJ's Initial Decision insofar as it held that SFRA was not even a significant cause of Lakewood's inability to provide its students with T&E. Because this recommendation by the ALJ is primarily a matter of policy and law, rather than fact, it is not entitled to the same level of respect as her factual findings and holding regarding the denial of T&E. Indeed, it seems to largely ignore the legal impact of the Commissioner's annual certifications of Lakewood's need for advance state aid, which are based on the Commissioner's judgment that without advance state aid the district will be unable to provide its students with T&E. In other words, the Commissioner has annually concluded, indeed certified to the State Treasurer, that SFRA alone is simply not assuring Lakewood sufficient funding. Of course, as indicated above, advance state aid cannot cure the constitutional funding shortfall resulting from SFRA's failures to respond adequately to Lakewood's unique demographic circumstances.

3. *Remedy for a T&E Denial*. As to this final issue, the exceptions present the Commissioner, broadly speaking, with two options: (i) the ALJ's Initial Decision recommends that another needs assessment of the Lakewood district be conducted; and (ii) the petitioners, Participant Tractenberg, and Participant BOE recommend that the Commissioner seek legislative intervention to modify SFRA or take other action that would assure that Lakewood has enough funding, which meets the Abbott constitutional standards, to address its unique demographic circumstances. In their exceptions, the State respondents have not addressed this issue.

   As to the soundest choice between these two alternatives, the needs assessment has little to commend it. As my exceptions dealt with in detail, Lakewood has already been over-studied and another needs assessment would do little more than consume valuable time

that should be used to implement meaningful changes in the statutory and regulatory structure by which Lakewood receives funding so that it becomes adequate to enable the district to provide, at long last, a T&E education for its universally low-income and overwhelmingly Black and brown public-school students.

Conclusion

It is long past time for the Commissioner to use her acknowledged powers to discharge her constitutional duty to assure that Lakewood's public-school students receive their fundamental constitutional entitlement to T&E.

Respectfully submitted,

Paul L. Tractenberg, Participant

cc: Susan M. Scarola, ALJ
Arthur H. Lang, Esq.
Sydney Finkelstein, Esq.
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