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| LEONOR ALCANTARA, individually and as |) |
| Guardian ad Litem for E.A.; |) |
| LESLIE JOHNSON, individually and as Guardian ad |) |
| Litem for D.J.; |) |
| JUANA PEREZ, individually and as Guardian ad Litem |) |
| for Y.P.; |) |
| TATIANA ESCOBAR individually; |) |
| and IRA SCHULMAN, individually and as Guardian ad Litem |) |
| for A.S. |) |
| Petitioners, |) |
| v. |) |
| |) |
| DAVID HESPE, COMMISSIONER OF THE NEW |) |
| JERSEY DEPARTMENT OF EDUCATION; |) |
| the NEW JERSEY STATE BOARD OF EDUCATION; |) |
| and the NEW JERSEY DEPARTMENT OF EDUCATION |) |
| Respondents. |) |
| ----- |) |
| |) |
| |) |

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PETITIONERS' SUMMATION BRIEF

Arthur H. Lang
918 East Kennedy Blvd. Lakewood, NJ 08701
(732) 609-5530
lakewoodlaw@gmail.com
Attorney for Petitioners
NJ Att. No. 014102010

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PRELIMINARY STATEMENT

The School Finance Reform Act of 2008 (SFRA) is unconstitutional as applied to Lakewood (LPSD). The revenue it generates from state and local sources has no rational relation to LPSD's ordinary operating expenses. LPSD serves a K-12 residential population of 37,000 but only 6,000 students are enrolled in the public schools. Only the public school students are counted for funding in the SFRA formula. The district is required to provide transportation for nonpublic students living remote from their schools and a Free and Appropriate Public Education (FAPE) for the disabled. The cost of providing these services to a population of 37,000 under the SFRA funding formula that was designed for only the 6,000 public school students results in LPSD having insufficient revenue to provide its public school students with their constitutionally required thorough and efficient education for which the SFRA funding statute was designed.

State fiscal monitors have been in Lakewood since 2014. Due to the shortfall in funding under SFRA, the state has been providing increasing amounts of discretionary advance state school aid to LPSD, in the form of loans that are required to be repaid, to balance its budget pursuant to a

statute designed for districts having a fiscal monitor in place and having a deficit so that Lakewood might have the revenue necessary to provide its public school students with their constitutionally required thorough and efficient education. Such loans can only be provided when the commissioner has certified that the loans are necessary to provide a thorough and efficient education. Since the SFRA funding statute continues to remain inadequate for Lakewood it appears that at present the state school aid advance process and the resultant loans is the only means the State has to provide the LPSD with adequate funding. At present there appears to be no end in sight regarding the usage of the state school aid advance process and such loans, which are placing an increasing fiscal burden on Lakewood.

The excessive debt being placed upon Lakewood by these loans is inconsistent with the T & E standard as it is an inappropriate means of financing Lakewood's continuing ordinary operating expenses. The Supreme Court of a sister state, the first with a "thorough and efficient clause" in its constitution, ruled on the issue presented here, holding that advancing state aid to underfunded districts to meet their ordinary operating expenses is unconstitutional.

Our State constitution mandates continued and regular annual funding that is sufficient to provide the revenue required for each school district to meet the expenses necessary to provide a thorough and efficient education. Such funding has to be pursuant to a discernable plan based upon a study of actual expenses, it must be guaranteed and not discretionary, it must be continued and predictable in order for a school district to plan ahead and for the school district to know how much to spend to meet the Core Curriculum Content Standards (CCCS), and it must be transparent so that the public and legislature understand the needs of the school district.

The state is not providing T & E in Lakewood despite the loans. The "revenue" is still inadequate to prepare students for their roles as citizens and competitors in the labor market, as indicated by the very few graduates going to college and the dismally low-test scores. The funding is inadequate to serve the educational needs of Lakewood public school students due to their poverty and lack of ability to speak English. The SFRA formula simply does not take into account all of the required expenses for LPSD's 31,000 nonpublic resident K-12 students.

LEGAL ARGUMENT¹

I. The SFRA is Unconstitutional as Applied to LPSD Because It Does Not Assure Sufficient Funds for the District's Public School Students to Achieve a Constitutionally Required T & E Education.

"The constitutional guarantee of a thorough and efficient education attaches to every school district, and indeed, to every individual school in the State." Abbott v. Burke, 149 N.J. 145, 198 (1997).

A) LPSD's Unique Demographics Make the SFRA Formula an Inapt and Insufficient Mechanism for Assuring that LPSD Has Adequate Funding for Its Public School Students.

Lakewood's proportions of public and nonpublic school students are virtually a mirror image of the statewide proportions. Approximately 16% of Lakewood's K-12 age population attends the LPSD and approximately 84% attend nonpublic schools;² Statewide in New Jersey, approximately 88.5% attend public schools and approximately 11.5% attend nonpublic schools.³

¹ The following references will be made to witnesses: RH, Dr. Ross Haber, demographer; LW, Laura Winters, superintendent; RF, Robert Finger, Business Administrator; MSS, Malka Sptiz-Stein, STEM supervisor; MM, Marcy Marshall, principal; DF, Dr. Danielle Farrie, funding expert; DS, David Shafter, state fiscal monitor; MA, Michael Azzara, state fiscal monitor; MW, Melvin Wyns, retired DOE Director of Finance; KD, Kevin Dehmer, Assistant Commissioner of Finance; GF, Glenn Forney, DOE Deputy Assistant Commissioner of Finance. Transcripts will be so referenced: T1 Feb 5, 201; T2 Feb. 7, 2018; T3 Feb. 12, 2018; T4 Feb. 13, 2018; T5 Feb. 22, 2018; T6 Dec. 18, 2018; T7, July 7, 2018; T10, July 23, 2019. Data from tables submitted Sept. 4, 2019 will be identified by table heading.

² 2016-17 nonpublic 31,023 and public 5,854, T1 RH 53-21 to 25. The State's witness testified that there are 32,000 nonpublic students in Lakewood. T10 GF 17-10 to 12.

³ 2017-18 1,370,236 NJ students were enrolled in public schools, NJDOE, <https://www.state.nj.us/education/data/enr/enr18/>; 2017-18 178,864 NJ

B) Neither the SFRA Funding Formula nor the Adequacy Budget Related to the SFRA Formula Contemplate a Demographic Situation Such as Lakewood's and Make Adequate Provision for LPSD's Unique Demographics.

SFRA's Adequacy Budget is the primary metric for *most districts* that defines the costs necessary for T&E. The SFRA adequacy budget is based upon "the per-pupil amount [which] is intended to represent the cost of educating an elementary school student, that is, of providing that student with the CCCS and extracurricular and co-curricular activities necessary for a thorough and efficient education." Abbott v. Burke, 199 N.J. 140, 153 (2009, emphasis added).⁴ But the calculation of LPSD's adequacy budget pursuant to SFRA fails to account for the district's unique demographics since such calculation is based only on enrolled public school students and is therefore too low to assure that LPSD can provide them with a T&E education. Even if, arguendo, SFRA's adequacy budget was the correct metric for LPSD, the district's actual available annual revenue is below the adequacy budget as calculated pursuant to SFRA. Approximately 54.4%

students attend nonpublic schools. National Center for Education Statistics <https://nces.ed.gov/surveys/pss/tables/TABLE15f11718.asp>.

⁴ "The necessary resources include 'teachers, librarians, technology specialists, counselors, nurses, clerical staff, principals, assistant principals, an athletic director, lunchroom aides, professional development, supplies and materials, equipment, technology, assessment, student activities, and safety.' *App.* at 42 (*op.* at 213, 971 A.2d at 1032)." 199 N.J. at 153 n.7 (N.J. 2009)

of LPSD's annual budget including the advanced state aid is required to pay for the transportation and special education costs of a resident k-12 population of 37,000.⁵ Other districts range from 8% to 14%. (T2 RF 159-12 to 160-16). The state must either revise the SFRA formula as it applies to LSPD or assume directly the extraordinary costs of required services for Lakewood's nonpublic school population to assure that LPSD has constitutionally adequate funding.

II. The Addition of Periodic Uncertain, Unpredictable and Discretionary Funding, Whether in the Form of So-called Advance State Aid, Which is Effectively a State Loan to LPSD, or of a Year-End Addition to the State Budget by a Legislative Footnote, Cannot Cure SFRA's Constitutional Defect

The SFRA alone does not provide sufficient funding. It was necessary for the State to provide advanced state aid that has increased from \$4.5 million to \$5.6 million to \$8.5 million to \$28.2 (plus \$1.6 million emergency aid) million to most recently \$36 million.⁶ The provision of advanced state

⁵ The 2017-18 current special education and transportation expense at the time of testimony was \$78 million (T2 RF 183-16 to 19) out of a operating budget of \$143.5 million. (Id. 184-20 to 186-3). If LPSD relied upon the SFRA (without loans), special education and transportation would consume 67% of the \$ 117 million adequacy as defined budget. (T4 DF 45-5).

⁶ The Court may take notice , "On July 2, 2019, the DOE advised that on July 1, 2019, the Commissioner had written a letter to the State Treasurer requesting that \$36,033,862 be provided to the district in the form of advance aid for the school year 2019-2020, and that the State treasurer had approved the request." Bd. of Educ. of Twp. of Lakewood, Ocean Cty. v. NJ Dep't of Ed., EDU 8386-19, final decision, (Aug. 6, 2019). <https://www.nj.gov/education/legal/commissioner/2019decisions.shtml>. See N.J.R.E. 201(b) "Facts which may be judicially noticed include. . .(4)

aid or even possible year-end budgetary footnote language cannot cure the constitutional defect of the SFRA.

A) To Meet Constitutional T&E Requirements, Funding Must Be Formulaic, Certain and Not Discretionary, Predictable, and Transparent to Adequately Enable a School District to Provide Its Public School Students with a Thorough and Efficient Education.

i) Funding Must Be Pursuant To A Discernable Plan that Correlates Funding to T&E.

If "the state chooses to assign its obligation under the 1875 amendment to local government, the State must do so by a plan which will fulfill the State's continuing obligation." Robinson v. Cahill, 62 N.J. 473, 519 (1973, emphasis added). The plan has to correlate funding to the expenses necessary for T & E.⁷ When the State failed to "devise a funding formula that measured the cost of delivering educational content standards in districts having concentrated populations of disadvantaged pupils with multiple learning challenges [it] forced the Court to devise a judicial remedy to fill the void." 199 N.J. at 149. The State must conduct a study into the expenses necessary for T & E in order to correlate funding to T&E expenses. Indeed, in the case of the special need districts, we find that the State was not

records of the court in which the action is pending and of any other court of this state or federal court sitting for this state."

⁷ "Unlike the QEA, which ascribed an arbitrary per-pupil cost for a 'quality education' that was not defined, CEIFA correlates educational funding with educational achievement through the T E amount." Abbott v. Burke, 149 N.J. 145, 162 (N.J. 1997).

allowed to create a formula "without relying on any study of the level of funding actually needed for the SNDs to achieve parity." 149 N.J. at 157.

Kevin Dehmer, Assistant Commissioner of Finance, thought there was a plan for Lakewood but did not know it. "So there's a plan laid out by the State monitor, which I believe my deputy could speak in more detail about. . . . [T]he monitor has a -- has a plan that's required in order to plan to move the District ahead." (T7 120-23 to 121-18). But the only "plan laid out by the State monitor[s]," is legislative action. David Shafter's suggested the creation of "a formula so that some portion of those [nonpublic] students could be counted as a percentage, in order to -- in planning the adequacy budget. And the local fair share would be deducted from that. And that would be an -- That would be what the State aid would be." (DS T5 93-9 to 14). Michael Azzara testified, "They need more revenue. We're -- If it comes from the taxpayers or it comes from the State, that's really a question for the legislature and the courts, not me. I mean, I would assume that it would come from the State because the District is tapped for its property tax." (T5 129-21 to 130-3). As for the Department's plan that Mr. Dehmer thought his "deputy could speak in more detail about," it simply does not exist. The Court asked Glenn Forney, Deputy Assistant

Commissioner of Finance, "if there's any end game here, without continually raising the amount that Lakewood gets. Assuming everything stayed the same." Mr. Forney answered, "We're just going by year by year at this point." (T10 GF 146-3 to 6). There is no plan.

ii) Funding Must Be Guaranteed and Not Discretionary.

"Funding must be certain, every year." Abbott v. Burke, 119 N.J. 287, 385 (N.J. 1990). Funding must not be discretionary. In Abbott, the constitutional funding standard for T&E in low-income urban districts was parity or substantial equivalence with the wealthier suburban districts. The constitution required for them "a law that will by its own terms automatically achieve substantial equivalence in per pupil regular education expenditures *without depending on the discretionary actions of officials*. . . ." Abbott v. Burke 136 N.J. 444, 448 (1994, emphasis added). Whether the level of funding is parity for an urban low-income district or adequacy for a suburban district, "[i]t should be formulaic, it should not be subjective and discretionary action. T&E should not be premised on discretionary subjective action." (T6 MW 40-10 to 13). The retention of teachers, the sports program, library and guidance personnel, all of which have been cut in part or in

whole in LPSD, and the delivery of T & E in LPSD, should not be dependent upon the subjective discretion of DOE officials of how much they will loan the district, if at all.⁸

One of the reasons that federal funding is not considered in school funding litigation as it relates to the constitutional T&E standard is that annual federal funding is uncertain similar to discretionary funding. "Briefly, we view the State's constitutional obligation to provide a thorough and efficient education as not adequately satisfied if dependent on federal aid, which today is subject to substantial fluctuation. Plaintiffs' witness called it a 'roller coaster.'" 119 N.J. at 330. (To wit: LPSD's \$10,471,991 Title I share in 2016-17 dropped to \$3,950,983 in 2017-18. See Table: Lakewood School District Other State and Federal Funding Revenue Sources. Also see T2 LW109-20 to 110-5. LHS funding of \$1.5 million was reduced to 183,00 T3 MM 205-25 to 206-3).⁹ Teacher tenure law also recognizes the discretionary and uncertain nature of federal funding and excludes teachers funded by it from tenure. As long as teachers "were not employed in programs contingent on

⁸ Teachers, T2 LW 73-1 to 16, 67-1 to 69-18; Athletic Director, Trainer and Sports Program, T2 LW 25-13 to 26-2, 118-1 to 122-8; Librarian T2 LW 108-6 to 10; Guidance 85-8 to 12.

⁹ Respondents suggested T&E in LPSD pointing to many federal funded programs. But the Abbott XX Court said, "State funding must be such that "federal funds are not being used as a crutch against some structural failing in the funding scheme itself." 199 N.J.at 174.

uncertain federal funding, they were therefore entitled to tenure under [N.J.S.A. 18A:28-5](#). The court suggested that Title I teachers could not receive tenure under [N.J.S.A. 18A:28-5](#) because of the tenuous nature of their federal funding." Spiewak v. Board of Education, 90 N.J. 63, 71 (N.J. 1982). Contrary to tenuous federal funding, T&E funding must be formulaic, certain and nondiscretionary.

iii)Funding Must Be Predictable In Order For A District To Plan Ahead and For The District To Know How Much It Should Spend On T&E.

Planning is essential to the delivery of T & E. The SFRA was conceived as the "development of a predictable, transparent school funding formula [that] is essential for school districts to plan effectively and deliver the quality education that our citizens expect and our constitution requires." NJSA 18A: 7F-44 (2)(q) (2013). The importance of planning is also found in N.J.S.A. 18A:22-38. The "Commissioner has the authority to restore any reductions which . . . affect 'the stability of the district *given the need for long term planning and budgeting.*'" Abbott v. Burke, 206 N.J. 332, 420 (2011, emphasis added). "[P]redictability enables districts to predict the available funding, allowing districts to plan and implement programs more effectively. This works best over long time periods, providing for

effective long term planning.” 199 N.J. at 211 (citations omitted).

Normally school districts do not know their total T&E (SFRA) revenue amounts until after the Governor's budget address in February or March leaving them only two or three months to adopt the school budget. Increased expenses due to a growing population or increasing student needs typically correlate to an increased SFRA adequacy budget. A district may choose to bypass the tax cap proportionate to the increased enrollment pursuant to N.J.S.A. 18A:7F-37.(T5 DS 38-7 to 39-10) ¹⁰ Their T&E spending and local share is a function of SFRA's adequacy calculation and their budget is developed based upon this revenue information.

By contrast LPSD does not know its total T&E revenue until *after* adopting its budget since Lakewood must await the subjective discretionary decision by state officials of what amount is necessary for LPSD to provide T&E, which ultimately

¹⁰ Voter approval is not necessary. N.J.S.A. 18A:7F-37(b)(1) The allowable adjustment for increases in enrollment authorized pursuant to subsection a. of this section shall equal the per pupil prebudget year adjusted tax levy multiplied by EP, where EP equals the sum of: (a)0.50 for each unit of weighted resident enrollment that constitutes an increase from the prebudget year over 1%, but not more than 2.5%;(b)0.75 for each unit of weighted resident enrollment that constitutes an increase from the prebudget year over 2.5%, but not more than 4%; and(c)1.00 for each unit of weighted resident enrollment that constitutes an increase from the prebudget year over 4%.(2)A school district may request approval from the commissioner to calculate EP equal to 1.00 for any increase in weighted resident enrollment if it can demonstrate that the calculation pursuant to paragraph (1) of this subsection would result in an average class size that exceeds 10% above the facilities efficiency standards established pursuant to P.L.2000, c.72 (C.18A:7G-1 et al.).

is an exercise in balancing the budget after making every possible cut.(T5 DS 19-3 to 8). Significantly, the law makes no provision for the actual increases in Lakewood's costs related to the transportation and special education services it must provide for its nonpublic school student population which increases about 2,500 each year.¹¹ Apparently the only option for the State presently under existing statutes is planning on advancing Lakewood more school aid and increasing Lakewood's loan balance causing Lakewood to accumulate more debt.¹²

iv)Funding Must Be Transparent So That The Public And Legislature Understand The Needs Of The District.

Transparency is necessary for districts to know what they are expected to spend. "[T]ransparency is an important funding goal as it enables stakeholders to determine readily the basis for funding outcomes. . . [Transparency] allows districts to know why they are receiving a particular amount of funding. This knowledge enables districts to make

¹¹ T2 RF 190-23 to 25.

¹² A public question is not an option. "We did make the District go out to vote for an 18A-22-40. It went down 17,413 no votes to 1,807 yes votes." T10 GF 99-8 to 10. When Mr. Stark asked the state monitor if a referendum would be a solution, Mr. Azzara replied, "the Department and local leaders and State leaders, and everybody was saying -- you know, everybody was saying that any separate questions are not going to be passed, so don't even bother holding the referendum and spending the money." T5 MA 113-8 to 13. It should be noted that the majority of citizens voting in a referendum in Lakewood pay tuition for 31,000 children consuming one-third or half the income of many families.

decisions that are more informed.” 199 N.J. at 210-11 (citations omitted). The transparency of the “particular amount of funding” that is necessary for T&E in LPSD could help legislators understand why LPSD has needed continuous loans. If the DOE would have known why a “particular amount of funding” was necessary for T&E in LPSD or developed a predictable plan for the necessary funding rather than “just going by year by year at this point,” a legislative solution might have been forthcoming by now.

B) To Meet Constitutional T&E Requirements, Funding Must Be Adequate to Enable LPSD to Provide Its Public School Students, Many of Them Requiring Additional Funding to Address Their At-risk Status, with a Meaningful Opportunity to Meet the New Jersey Student Learning Standards (NJSLs)

“To ensure all students receive the education guaranteed to them by the New Jersey Constitution, the rules promulgated pursuant to SFRA direct all districts to . . . measure student progress in meeting the CCCS, statewide assessments, or standardized tests, are administered at grade 3-8 and 11-12. . . .” Abbott v. Burke, 206 N.J. 332, 422 (N.J. 2011). The CCCS are “adequate as a reasonable legislative definition of a constitutional thorough and efficient education.” 199 N.J. at 184-85 (citation omitted).¹³

¹³ The CCCS have been replaced by the New Jersey Student Learning Standards.

i) The Uncertain Discretionary Funding of LPSD is Inadequate To Serve the Educational Needs of Lakewood's Disadvantaged Students.

"Funding must be guaranteed and mandated by the State; and that the level of funding must also be adequate to provide for the special educational of these poorer urban districts in order to redress their extreme disadvantages." 119 N.J. at 295. Typically 91% of LPSD students are at-risk (low-income).¹⁴ Moreover, 25% are English Language Learners (ELL).¹⁵ Some ELL students in Lakewood High School have not gone to school since fifth or sixth grade.¹⁶ In districts like LPSD, the "totality of the districts' educational offering must contain elements over and above those found in the affluent suburban district. If the educational fare of the seriously disadvantaged student is the same as the 'regular education' given to the advantaged student, those serious disadvantages will not be addressed. . . ." Id. at 374. Rather than having "elements over and above those found in the affluent suburban district," LPSD is among the least spending districts on per-pupil classroom instruction.

¹⁴ T2 LW 43-20 to 44-21.

¹⁵ Sometimes call ESL (English as Second Language). T2 LW 40-18 to 41-8.

¹⁶ "[A] lot of them are 17, 18 years old. And the last time they attended school in their country, their native country, was 5th, 6th Grade. So it's nearly impossible with a short amount of time to catch them up to State requirements." T3 MM 213-8 to 12.

Petitioners' expert, Dr. Danielle Farrie, testified that in 2000 Lakewood per pupil classroom spending was the same as other districts in its category of K-12 districts of 3,500+. Then the gap widened until "now Lakewood is spending about 50 percent less than those other districts. So they're spending about \$9,000 per student, and Lakewood is only spending \$6,600 per student on classroom instruction costs." T4 DF 78-18 to 22. The 2016 Taxpayer Guide to Educational Spending shows that on the low end Lakewood budgeted \$6,600 per pupil and Keansburg on the high end budgeted \$13,135, a ratio of about half.¹⁷ In Robinson, finding the funding act unconstitutional, the ratio of per pupil spending between the highest and lowest spending districts was also close to half, "[r]anging by district from below \$700 per pupil annually to over \$1500." Robinson v. Cahill, 69 N.J. 449, 481 n.4 (1976).

ii) LPSD Student Outcomes Fall Far Short of NJSL Standards

During the same years that per-pupil spending decreased due inadequate funding formulas, the end of year assessment scores of LPSD students also decreased.¹⁸ Dr. Farrie

¹⁷ Lakewood Per Pupil Amount-Classroom Instruction (followed by rank out of 101 3500+ K-12 districts) has declined significantly over the years discussed by Dr. Farrie: 2003-04 \$6,046 (54) 2004-05 \$7,365 (82) 2005-06 \$6,528 (42) 2006-07 \$6,357 (23) 2007-08 \$7,112 (43) 2008-09 \$7,132 (32) 2009-10 \$7,309 (21) 2010-11 \$7,439 (31) 2011-12 \$7,506 (27) 2012-13 \$7,486 (19) 2013-14 \$7,260 (10) 2014-15 \$6,585 (3) 2015-16 \$6,600 (1). Taxpayer Guide to Educational Spending.

¹⁸ Petitioners' exhibit 6-3 shows that the High School Proficiency Assessment Language Arts scores for Lakewood from 2008-2014 were lower

testified to the "strong correlation between that [per-pupil] decline in instructional spending with academic performance. . . ." (T4 DF 81-18 to 20).

During the four years of PARCC, with the exception of ELA 11, LPSD scores were typically just a fraction of the state average despite some relative improvements in the elementary grades. (Table PARCC results). As for Advanced Placement (AP), only two students passed the test¹⁹ The NJ School Performance Reports Statewide 34.9% of all students took an AP course and 20.5% of those students passed the exam. In Lakewood 17.0% of all students took an AP course and 2.6% of those students passed the exam.²⁰

C) The Statute Under Which Advance State Aid is Provided Was Not Intended to Apply to a Situation Such as LPSD's Annually Recurring Fiscal Shortfall

The State has no plan to increase the district's ordinary revenue or to make the district continually solvent and eliminate the need for the advance state school and loans.

than the average and median scores of the Abbott districts. The HSPA Mathematics scores for Lakewood were about half the state average and more than ten points lower than the average and median of the Abbott districts every year since 2009. The Grade 8 GEPA and NJ ASK Language Arts score for Lakewood was below the average and median of the Abbott districts every year since 2004. The Grade 8 GEPA and NJ ASK Mathematics score for Lakewood was below the average and median of the Abbott districts every year since 2006. Spreadsheets with each district's scores are still available on the DOE website at <https://www.nj.gov/education/schools/achievement/prior.htm>.

¹⁹ T3 MM 265-22 to 266-15. One of the passing grade was for AP Spanish.

²⁰ 2017 NJ School Performance Report, Lakewood Twp., p.32, submitted to the Court Sept. 4, 2019.

The State has not studied or determined how much revenue is necessary for Lakewood or its particular circumstances. Rather, it determines revenue for LPSD (in the form of loans) at the end of the initial budgetary process *after* expenditures are *subjectively* determined by the monitors, not beforehand by an objective formula that is used by every other district to guide the budgetary process. By finalizing Lakewood's revenue after the budget is created via a subjective and discretionary process rather than beforehand via an objective T&E cost formula that considers all of the district's unique circumstances, the state has shifted the constitutional obligation to the local district. But a "system . . . which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, *the obligation is the State's to rectify it.*" 62 N.J. at 513 (emphasis added). This obligation of the state is to "establish a **funding structure** to ensure adequate financial resources to enable a system of free public schools to operate throughout the State." N.J.S.A. 18A:7A-2(b)(4)." D.S. v. Board of Education, 188 N.J. Super. 592, 606 (N.J. Super. App. Div. 1983). Instead, conveniently with a monitor in place, the State has been providing LPSD discretionary, ad hoc advance state school aid under the provisions of the state monitor statute, N.J.S.A. 18A:7A-56.

i) The Statutory Advanced State Aid Provision and Its Substance Suggest that Advance State Aid was an Adjunct to the State Monitors' Role and a Means to Deal with Short-term Emergent Circumstances Brought on by Fiscal Mismanagement, Not a Mechanism for Curing Long-term Structural Problems with the SFRA Funding Formula.

The State has been loaning LPSD advanced state aid under the provisions of N.J.S.A. 18A:7A-56 to balance the district's budget by providing ordinary revenue for ordinary expenditures. The statute was designed to aid districts with existing spending deficits and "to address the increasing problem of school districts failing to correct serious deficiencies identified in their annual audits."²¹ The purpose of advance state aid is apparent by the legislature's placement of it in the state monitor statute (advanced state

²¹ A2684, Assembly Statement, Mar. 13, 2006. Found at: <https://www.njleg.state.nj.us/Default.asp> The bill was introduced on February 27, 2006 by Assemblymen Herb Conaway and Jack Connors to bail out the Willingboro School District a month after they introduced A2053 on January 17, 2006. The language of the earlier bill appropriated \$8 million "contingent upon the submission of a corrective action plan by the Willingboro School District." Immediately after passage of A2684, the DOE took action on Willingboro. "'Under the 'School District Accountability Act' signed by Governor Corzine earlier this week, the Commissioner may appoint a state monitor in districts where serious fiscal deficiencies have been identified in the district's annual audit. Acting Commissioner Appoints Interim State Monitor for Willingboro, NJDOE News, Apr. 21, 2006. <https://www.nj.gov/education/news/2006/0421wil.pdf> The March 13, 2017 A2684 Appropriation Committee hearing is about Willingboro (Online recording beginning at 1:37 found at: <https://www.njleg.state.nj.us/media/mp.asp?M=A/2006/AAP/0313-0200PM-2.M4A&S=2006>). Willingboro repaid the loan early. Its 2016 CAFR reports, "Under provisions of the Act the District received an advanced state aid payment of \$10,000,000 enabling the district to satisfy financial obligations and create a revised balanced budget for the fiscal year. Although the proposal was for the District's future annual state aid payments to be adjusted downward by \$1,000,000 over a ten-year period to account for the advance but the district accelerated the payment of the \$10,000,000 loan and was fully discharged in fiscal year 2011."

aid is available only if a state monitor is present in a district). N.J.S.A. 18A:7A-56 was not designed to correct deficiencies in a regular T&E funding formula or to address the failures in a formula. Lawmakers did not intend or envision the statute would be the continual source of revenue for a district's operating budget for its ordinary expenses, and in particular, not for ordinary purposes under the watchful eyes of state fiscal monitors year after year.

ii) The Commissioner's Annual Certification Pursuant to the Statute Does Prove, However, that LPSD's Regular SFRA Funding is Insufficient to Enable It to Provide Its Students with a T&E Education.

Advanced aid state may be provided to a district only if it is "necessary to ensure the provision of a thorough and efficient education."

The Commissioner of Education shall recommend to the State Treasurer whether an advance State aid payment should be made to a school district for which a State monitor has been appointed. The commissioner's recommendation shall be based on whether the payment is necessary to ensure the provision of a thorough and efficient education. N.J.S.A. 18A:7A-56.

The Commissioner's recommendations of advance state aid to provide annual revenue to LPSD for ordinary expenses "to ensure the provision of a thorough and efficient education," clearly acknowledge the fact that the SFRA amounts are insufficient to provide LPSD students with a thorough and

efficient education and as such indicate the SFRA is unconstitutional as applied to LPSD.

D) Because Advance State Aid is a Loan that Must be Repaid Out of Future State Aid, It Exacerbates LPSD's Fiscal Situation and Burdens It with Increasingly Great Obligations.

Excessive debt is inconsistent with a Thorough and Efficient education. Although there is no New Jersey case law dealing with a situation like LPSD, which is *sui generis*, however excessive debt is a violation of T & E in the New Jersey dissolution statute. The dissolution of a consolidated district will be denied if "1)[a]n excessive debt burden will be imposed upon the remaining districts, or the withdrawing district, or upon any of the constituent districts in the event of a dissolution." N.J.S.A. 18A:13-56. This is because an "[e]xcessive debt burden. . . would result in a condition inconsistent with the 'thorough and efficient system of free public schools . . .' which the State is obligated to maintain and support." In re Pet. for Auth. to Conduct, 298 N.J. Super. 1, 7 (App. Div. 1997).

There is case law and apropos dicta in a sister state, *infra*, in which school districts were forced to borrow for ordinary operating expenses, like LPSD, because of an inadequate funding statute. "The debt which stems from mandated borrowing programs is in many instances staggering,

and the cyclical effect of continued borrowing has made it more difficult to maintain even minimal school operations.” Derolph v. Ohio, 78 Ohio St. 3d 193, 202 (Ohio 1997).

i) The Supreme Court of A Sister State Found that the State’s Use of Loans to Meet a District’s Ordinary Operating Expenses Violated the Thorough and Efficient Clause of Its Constitution.

We find persuasive authority in a sister state with the same “thorough and efficient” provision in its constitution. (Section 2, Article VI of the Ohio Constitution).²² Unlike N.J.S.A. 18A:7A-56 that authorizes loans for a district with a *spending* problem, Ohio law apparently authorized loans for *revenue* purposes.

Another inherent weakness in the system stems from forced borrowing. Districts unable to meet their budgets are forced to borrow funds. The first type of state-mandated loan is the “spending reserve” loan. R.C. 133.301. Under the spending reserve loan program, school districts are permitted to borrow against a subsequent year’s revenue with approval of the Superintendent of Public Instruction. *Id.* Although there is a statutory maximum amount that can be borrowed by a school district, the superintendent may (and does) permit borrowing beyond that limit. R.C. 133.301(C). If a school district cannot meet its current operating needs through a spending reserve loan, it is then required to seek approval of a loan under R.C.

²² “The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State.” “The 1851 Ohio Constitution was the first to use the words ‘thorough and efficient’ to describe the education system mandated to be established by its legislature.” Pauley v. Kelly, 255 S.E.2d 859, 865-66 (W. Va. 1979)

3313.483. These loans are obtained from commercial lenders. R.C. 3313.483(D). . . .These loan programs, discussed above, are nothing less than a clever disguise for the state's failure to raise revenue sufficient to discharge its constitutional obligations. Id. at 201-02.

The Ohio Court recognized that a statute like N.J.S.A. 18A:7A-56 might be required but not for ordinary expenses as in the case of LPSD.

We recognize that some type of borrowing provision may be necessary to provide funds in the case of extreme emergencies or unexpected calamities; however, any system that entails borrowing from future funds to meet ordinary expenses is not a thorough and efficient system. Except in extreme cases, reliance on loans must be eradicated, and loans certainly must not be employed as a method to meet school districts' daily operational expenses. Derolph v. Ohio, 89 Ohio St. 3d 1, 26 (Ohio 2000)

Primarily because of the reliance on loans to meet a district's operating budget the Derolph Court said, "Ohio's elementary and secondary public school financing system violate[d] Section 2, Article VI of the Ohio Constitution, which mandates a thorough and efficient system of common schools throughout the state." 78 Ohio St. 3d at 212.

The court noted that a "school district can get into a spiral where it is continually borrowing and paying back the following year. A school district, therefore, is always taking away from the future. Any time a school district does such borrowing into the future, it robs future generations of

children." Id. at 222 (quoting the trial court). However, although R.C. 133.301(C) and R.C. 3313.483(D) were afterwards repealed,²³ the Ohio Court retreated from enforcing its rulings.²⁴

ii) This Problem is Compounded by the Fact that, after 2018-19, LPSD will Receive as State Aid Only Transportation and Categorical Aids and Not Equalization Aid, Thus Resulting in Total State Aid At Best Holding Constant in Future Years, If Not Decreasing, and Making Repayment of LPSD's Burgeoning Debt to the State Increasingly difficult.

The accumulation of debt may soon reach a point in which paying back the loans will consume all of LPSD's state aid and none of it will be for T & E.²⁵ Melvin Wyns, the DOE's Director of Finance for 13 years, testified:

[T]his is an advance of future state aid and the requirement in the statute is that they be repaid over a ten year period out of future state aid, so, in effect, what is occurring, you're robbing Peter to pay Paul, and so Lakewood's present students can have a thorough and efficient education, they're taking money away from future students. I think, in my opinion, on the faulty premise that future students won't have those same T&E needs, frankly,

²³ R.C. 133.301(C) was repealed outright and R.C. 3313.483(D) was supplanted by R.C. 3313.484. "No loan shall be approved under sections 3313.483 to 3313.4810 of the Revised Code after March 1, 1998."

²⁴ "The General Assembly seems to believe that if it does not have some type of forced borrowing provision, it will have to give undeserved money to poorly administered districts, and the threat of forced borrowing is one of the motivations it uses to compel districts to be fiscally prudent. This is an example of the distrust of local school districts the state has repeatedly exhibited in enacting legislation to try to remedy school-funding problems." *DeRolph v. Ohio*, 93 Ohio St. 3d 309, 362(2001).

²⁵ T6 MW 33-23 to 34-1, 36-11 to 25.

because you're taking future state aid, which is an unknown amount of money, which may not be there, or likely not -- will not be there in this instance, will be -- you know, will be used to repay these loans.²⁶

Indeed state aid to LSPD in future "may not be there, or likely not." Rather than amending the SFRA to provide LPSD with adequate revenue, recent amendments to the law have decreased revenue. The Appropriations Act reduced state aid by \$1.5 million for the 2018-19 school year.²⁷ Secondly, Lakewood's equalization aid, the state's share of the adequacy budget, is set to decrease to zero under the recent amendments to the SFRA.²⁸

iii) Advance State Aid for Ordinary Expenses
Violates the Efficiency Standard of T & E.

The role of the funding statute is "to implement the efficiency component of the constitutional thorough and efficient education." 149 N.J. at 162.

The word "efficient" implicates funding. . . . [It] focuses on the effectiveness with which educational resources are applied to achieve a certain result. The concept of efficiency requires that educational resources be applied in a way that maximizes the potential for achieving a thorough education. More simplistically, the Constitution requires that educational resources not be wasted. Waste is inefficient and therefore unconstitutional. Id. at 209-10 (Garibaldi, J., dissenting)

²⁶ Id. 22-12 to 24

²⁷ Id. 34-19 to 35-7. Lakewood applied for and was granted emergency aid of \$1.6 million (supra).

²⁸ Id. 28-13 to 29-5.

It is wasteful for LPSD to be constantly training new teachers because teachers quit due to lack of job security²⁹ and lowest median salary in the state.³⁰ The command of "efficiency means 'the effectiveness with which educational resources are applied to achieve a certain result. . . ." Id. at 214. It is inefficient to lose experienced and trained teachers that have the skills to deliver differentiated instruction to students with multiple deficiencies.³¹ It is inefficient that the budget determines funding rather than funding determining the budget. The greatest inefficiency is the encumbrance of the future children with excessive debt. The district is simply "just going by year by year at this point" colloquially reinventing the wheel each year.

iv) Advance State Aid is Available Only to Districts with State Monitors in Place

There is no statutory authority for advance state aid if no monitor is present. The state will need to keep monitors in Lakewood perpetually, or until the SFRA is adjusted to provide sufficient revenue to LPSD. The district is

²⁹ LW T2 69-6 to 15. MS T3 151-8 to 16 and T3 152-11 to 16. "I've actually had superintendents stand up and thank me in a public meeting to say whatever you're doing in Lakewood keep doing, keep training the teachers, because they're actually taking our teachers." LW T2 68-12 to 18.

³⁰ Ratio of Students to Classroom Teachers and Median Teacher Salary Table, Lakewood had the lowest median teacher salary each year 2014-19; Taxpayers' Guide to Education Spending <https://www.nj.gov/education/guide>

³¹ MSS T3 138-3 to 22.

responsible to pay the monitors thereby diverting funds from T % E, almost \$300,000 in 2018.³²

III. The Presence in LPSD of as Many as Three State Monitors Continuously Since 2014 Assures that the District is Spending Available Funds Appropriately

State fiscal monitors, as many as three at a time have overseen LPSD's finances since 2014. Since then the need for state aid advances has increased. Such advances are the State's only means to balance LPSD's budgets so that funding for LPSD's ordinary operating budgets is available to enable the district to ostensibly provide a T&E education for its students. The monitors have publicly attested to the fact that LPSD's problem is a revenue problem not a spending problem (see videotaped statement of Michael Azzara provided to the Court tribunal by letter of Participant Paul L. Tractenberg dated March 29, 2015).

The disparity between Lakewood's available SFRA revenue and the required T&E spending has continuously increased while the state monitors have been in place even though there has been a "definite improvement" in the audits.³³ Rather than the advance state aid ceasing or decreasing each year, since there has been a "definite improvement" after the

³² The 2017-18 User Friendly Budget shows LPSD paid David Shafter \$85,236 p. 12; Micahel Azzara \$115,344, p. 24 Theresa Polliforne-Sinatra, \$89,712, p.30

³³ T5 DS 89-25 to 91-6, also see 75-7 to 76-10 and.

monitors were appointed, the state aid advances have increased from \$4.5 million to \$5.6 million to \$8.5 million to \$28.2 to \$36 million due to the increasing deficiency of SFRA. The fiscal monitors supervising LPSD have characterized the budgets under their tenure as "barebones" (T5 MA 108-7 to 8) and "extremely responsible" (T5 DS 28-10). Yet larger and larger loans were still necessary to provide sufficient revenue to keep up with mandated spending. It is clear that "[n]o amount of administrative skill will redress this deficiency and disparity - and its cause is not mismanagement." 119 N.J. at 381.

IV. Even if, Arguendo, Advance State Aid and Other Forms of Uncertain Discretionary State Funding Could be Deemed to Satisfy Part of the State's Obligation to Assure that T&E is Adequately Funded, the Facts in Evidence Demonstrate that LPSD Still Lacks Adequate Funding

LPSD is underfunded by \$35 to \$40 million because the SFRA does not acknowledge the mandated costs of serving a nonpublic population of 31,000.

1) LPSD's Business Administrator testified that \$78 million of LPSD's \$143.5 million current 2017-18 budget *supplied with advance state aid* is required to pay for transportation and special education costs for a resident k-12 population of 37,000 (T2 RF 183-16 to 19, 184-20 to 186-3). It follows that only \$65.5 million remains for regular education in LPSD. SFRA defines \$100 million as the LPSD

cost of regular education.³⁴ Accordingly, the cost of serving non-public population of 31,000 is \$34.5 million.

2) Arguably, the nonpublic cost to LPSD is \$37.7 million. The 2017-18 cost to the district for nonpublic students entering the district for FAPE is \$23,156,854.³⁵ The 2017-18 non-public transportation cost to the district after deducting regular transportation aid and nonpublic aid is \$14.6 million. (T2 RF 178-8 to 179-15).

3) Petitioners' expert, Dr. Danielle Farrie testified:

[T]hey are spending somewhere around \$40 million in excess of what the formula provides for both special education and transportation, and because as I said those are mandates that can't be changed, that \$40 million has to come from elsewhere, and the only elsewhere is the funding for the regular education program and for the supplemental services for average students, English language learners. So that's \$40 million off of the, you know, 120 around say adequacy budget. So that is a very significant shortfall in terms of the amount of funding that is left for the regular education program after those mandated special ed and transportation costs are accounted for. (T4 DF 86-4 to 18).

LPSD funding, even with the loans, is constitutionally insufficient. The lack of revenue is consistent with Dr.

³⁴ 2017 Notice to Districts, Regular Education is the Adequacy Budget \$109,857,390 minus \$10,020,127 allocated for special education.

³⁵ This assumes that the 296 students sent to private schools for the handicapped are from nonpublic families perhaps accounting for the \$3.2 million difference between the two methodologies. Out-of-district special education tuition is \$32,653,379 (2018 CAFR). Offset this amount with Extraordinary Aid, \$5,546,891 and the SFRA amount already included in the adequacy formula generated by the 296 students, \$3,949,634 (296 x \$11,209 x 0.96780 + 296 x 0.1492 x \$17,343 x 0.96780. At-risk figures are not available). This assumes

Farrie's testimony that LPSD, a district in which 90% of its students are at-risk, spends substantially less *per pupil* than other districts. (T4 DF 78-18 to 22). In Robinson, the "trial court found the constitutional demand had not been met and did so on the basis of discrepancies in dollar input per pupil. We agree." 62 N.J.at 515.

A) Funding is Inadequate to Prepare Students for their roles as Citizen and Competitors in the Labor Market.

"The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." Id. at 515. It is hard for Lakewood students to compete if, according to the latest figures, only 35.5% of graduates enroll in a postsecondary institution compared to 72.8% statewide. Just as dismal, just 19.7% of those who go to college are going to a four-year institution. That means that just 6.6% of LPSD graduates (19.7% x 35.5%) go to a college that offers a bachelor's degree. Statewide *more than half* of all graduates go to four-year institution (72.4% of the 72.8% go to a four-year institution).

Even 16 months after graduation only 40.9% graduates are in any kind of college compared to 77.9% statewide. Of those in college just 21.1% are in a four-year college compared to

68.1 statewide. That means that 16 months after graduation, just 8.6% (40.9% x 21.1%) of LPSD students are in a four-year college compared to 53% (77.9% x 68.1%) statewide.³⁶

B) Funding is Inadequate to Serve the Special Educational Needs of Lakewood Students.

As mentioned, typically 91% of Lakewood students are at-risk due to poverty.³⁷ LPSD schools are failing schools.³⁸ They are peers with former Abbott district schools for DOE comparisons.³⁹ Programs, curriculum and staff have been cut from LPSD despite its extreme need.

LPSD has inadequate and a relatively low number of teacher supervisors.⁴⁰ (MSS T3 187-5 to 14, MM T3 233-18 to 234-22, MM T3 252-23 to 254-18); no assistant superintendent

³⁶ Table Enrolled in Post-Secondary Institution, New Jersey School Performance Report <https://rc.doe.state.nj.us/SearchForSchool.aspx>

³⁷ T2 LW 43-20 to 44-21.

³⁸ State Monitor Azzara: "Lakewood has at least three priority schools and a focus school, which means they're failing schools. And they have the State Department of Education's Regional Achievement Center is assigned to work with those schools because of the failing. Q Are there any other schools in Ocean County that are priority or focus schools? A Not that I can recall. Q The majority of the priority and four focus schools, how would you characterize those districts? A Inner city poverty districts. Asbury Park is one. Neptune, Kingsburg, Newark, Jersey City, Camden. They're all -- They were all in the Abbott Districts. Q And Lakewood's considered -- A Not --Q -- grouped together with them. A Lakewood is not an Abbott District. Q Lakewood's not an Abbott. But it has the same characteristics as -- as those districts. Does it? A I -- I would say so. Yeah. MR. STARK: Objection. THE COURT: Well, does it? MR. LANG: Does it? THE COURT: Does it share some of -- THE WITNESS: Yes. Yes. In terms of the number of kids that are qualified for free and reduced lunch. As far as the number of children that the regulation considers to be in poverty to make it an at-risk district. It's the same criteria for everybody now." (T5 MA 114-19 to 115-24).

³⁹ 2014-15 NJ School Performance Reports, the last year peer districts were reported for comparisons. Submitted to the Court Sept. 4, 2019.

⁴⁰ Other districts have two math supervisors rather than one for the whole district covering both science and math, T3 MSS 179-24 to 180-7.

(T3 MM 236-1 to 19); inexperienced teachers (LW T2 69-6 to 15, MSS T3 151-8 to 16 and T3 152-11 to 16); teacher instability (MM T3 232-18 to 233-1); inadequate and relatively low number of instructional interventionists (MM T3 239-10 to 240-6, MSS T3 171-9 to 23); above capacity classroom sizes (LW T2 16-7 to 16-25, MS T3 157-20 to 22); cuts in athletic program (LW T2 121-17 to 122-2); Spanish is the only Foreign Language (MM T3 217 10 to 14, T3 219-10); loss of in-house industrial arts and vocational Education (MM T3 203-20 to 204-13); and inadequate and relatively less in-class support and resource pullout services than other districts (MM T36 242-6 to 243-20, MM T3 238-18 to 21).⁴¹ The high number of at-risk children is compounded by the fact that 25% of LPSD students are English Language Learners. Chronic absenteeism is "significantly higher" than other districts.⁴²

"A thorough and efficient education requires such level of education as will enable all students to function as citizens and workers in the same society, and that necessarily means that in poorer urban districts something more must be added to the regular education in order to

⁴¹ Neighboring districts have in-class support for science and social studies rather than just math and Language Arts. T3 MM 257-16 to 258-9. LHS has in-class support for ninth grade in all four subjects.

⁴² T3 MM 208-16 to 22. The 2017-18 LHS School Performance Report (submitted Sept. 4, 2019) lists chronic absenteeism as 25.8% while statewide is 14.9%.

achieve the command of the Constitution.” Lakewood has the characteristics of the urban low-income districts and the DOE considers it a peer for comparison purposes. Its program should be “something more” than its neighboring districts, not less.

Conclusion

The well known facts that Respondents have not answered, the data, the public statements of the state monitors of Lakewood having a revenue rather than spending problem, the sheer impossibility of balancing the Lakewood budget despite the presence of up the three state fiscal monitors, the necessity of loans just to maintain a bare-bones program, all prove that the formula must be fixed.

Respondents brought testimony of accounting deficiencies prior to the appointment of the state monitors, but since their appointment in 2014, Respondents have loaned LPSD increasing in amounts, necessary for T&E, from \$4.5 million to \$5.6 million to \$8.5 million to \$28.2 million to most recently \$36 million. They failed to present testimony that the SFRA was adequate as applied to LPSD, or of a plan or “end game” to the necessity of the ever-increasing loans.

Petitioners respectfully request the Court to determine:

- 1) That the SFRA as applied to the LPSD does not provide sufficient funding to enable the school district to deliver

the New Jersey Student Learning Standards and extracurricular and cocurricular activities necessary for a thorough and efficient education.

2) That the consequential reliance upon discretionary advance state aid payments pursuant to 18A:7A-56 to provide funding for a thorough and efficient education does not provide T&E funding in any given school year that is certain and predictable.

3) That the constitutional imperative regarding a thorough and efficient education requires sufficient funding that is not discretionary.

4) That the Commissioner recommends that this matter be remedied by the Legislature.

Respectfully submitted,

s/ Arthur H. Lang

Arthur H. Lang
Attorney for Petitioners
Dated: October 4, 2019