MICHAEL I. INZELBUCH
Attorney-at-Law
1340 West County Line Road
Lakewood, New Jersey 08701
Member NJ and NY Bars
***Phone*: 732-905-0325**
***Fax:* 732-905-5872**
E-Mail: Michael@inzelbuchlaw.com
Staff E-Mail: Sandra@inzelbuchlaw.com / Taylor@inzelbuchlaw.com
Bookkeeping: Bookkeeping@inzelbuchlaw.com

VIA E-MAIL ONLY: ControversiesDisputesFilings@doe.nj.gov

April 13, 2021

Office of Controversies and Disputes
New Jersey State – Department of Education
100 Riverview Plaza – 4th Floor
P.O. Box 500
Trenton, New Jersey 08625

Attn: Dr. Angelica Allen-McMillan
Acting Commissioner of the Department of Education

Re: Alcantara, Leonor, Individually and as G/A/L for E.A. et. als.
v.
Hespie, David, Comm. of Ed., NJ State Bd. of Ed. & NJ Dept. of Ed.
OAL Dkt. No.: EDU-11069-2014 S / Agency Ref.: 156-6/14

EXCEPTIONS TO THE INITIAL FILING – REQUEST TO SUBMIT ADDITIONAL EVIDENCE AND REVERSE THE ALJ'S DECISION

Dear Commissioner Allen-McMillan:

PRELIMINARY STATEMENT

F-A-C-T-S speak louder than words!!!;

F-A-C-T-S speak louder than "INITIAL DECISIONS" that are issued in March 20**21**, ***almost seven (7) years*** since Petitioners' filed a Petition, and, an

"INITIAL DECISION" based on **outdated, stale**, and "**disjointed** testimony", and, further diminished when "parties could not stipulate to facts";[1]

F-A-C-T-S are needed in *this* FACT sensitive matter involving a school district that is 97% minority, 100% free and reduced lunch, and where in addition to 6,000 plus public school students, there are 40,000 plus non-public students, who, **by law**, must be served, albeit, **not** fully accounted for in the "funding formula";

F-A-C-T-S *need* to be presented by the party who has the most to lose, and, is responsible to provide a "Thorough and Efficient" ("T&E") education, to wit, the Lakewood School District, and, not regulated to "*spectator*" (a/k/a "*participant*") status;

F-A-C-T-S that *exist*, albeit, were permitted to be presented **must** be considered when they directly demonstrate that the Administrative Law Judge's "concerns" *have been* and *continue* to be addressed, with, the **F-A-C-T-S**, in part, are:

1. The on-going "Ponzi Scheme" (**as described by the Administrative Law Judge herself**) cannot be allowed to continue;[2]

[1] See, Page 64, footnote 29 of the "INITIAL DECISION" which is attached hereto as **EXHIBIT "A"**.

2. The on-going "Ponzi Scheme" in the form of millions of dollars of "Loans" is the *only* reason the District is able to offer a "T&E" education as the State acknowledges;

3. The New Jersey Department of Education ("NJDOE") and the Lakewood Board of Education have worked *collaboratively* together since 2017 to maximize results for our public school students, and, effectuate economies for the District, especially with the continuous presence of **State** Monitor(s); and

4. ***Both* the New Jersey Department of Education ("NJDOE"), and, the Lakewood Board of Education ("LBOE") *agree* that a Legislative solution is required**.

Thus, respectfully, before reading this submission (and numerous others) as the Department has acknowledged the above let *us* go **together** to the Legislative branch to "fix" a "broken" funding formula **as it *specifically* applies to Lakewood.**

"Enough is Enough" – The Funding Formula Must be Adjusted/Modified" to address the *unique* and *individualized* needs of Lakewood.

If not, well . . . thousands of *additional* hours and dollars will, **un**necessarily, continue to be expended to prove what we all know.

If not . . . the within Motion is brought pursuant to N.J.A.C. 1:1-18.5(b) to, ***firstly***, "**reopen" the record** to allow the Lakewood Board of Education to ***directly*** submit *additional* evidence that was, *at best*, ignored and that is wholly relevant to whether the Lakewood School District is providing a "*T&E*" education especially in light of the *"draconian", "old",* and *outdated* documentation that the Administrative Law Judge ***appears*** to have relied upon.

The Lakewood Board of Education ("Board"), respectfully, submits that the proceedings must be ***reopened*** so that the Administrative Law Judge ("ALJ") may consider new, additional and/or critical evidence that is relevant to the "INITIAL DECISION" and was ignored and/or not permitted. The Board asserts that the ALJ, *for example,* did **not** consider **improved** test scores, the implementation of **new** programs, and other **significant improvements** to the operation of the District such as stellar and vastly improved QSAC scores, as found by the New Jersey Department of Education ("NJDOE"), etc., during the vast amount of time this case laid in the "hands" of the Office of Administrative Law ("OAL") with same all being *significant* relevant to the analysis as to whether the LBOE is providing a "T&E" education. These improvements are

counter to ALJ Scarola's finding that the District is *somehow* not providing a "T&E" education.

In addition, the INITIAL DECISION must be ***reversed*** as to the *naked* and **in**consistent conclusion that the SFRA is (*somehow*) constitutional as specifically applied to Lakewood, New Jersey, especially as the ALJ herself stated on the record that due to the significant much needed funding and the yearly "Loans" of *ever-growing* millions of dollars that the State was operating a "**Ponzi Scheme**" that required financial fixing/remediation.[3] Lastly, the novel *sua sponte* "idea" of yet *another* "Needs Assessment" being conducted is **un**warranted, in part, as the New Jersey Department of Education ("NJDOE") has essentially "controlled" the District since the appointment in 2015 of State Monitors, the New Jersey Department of Education ("NJDOE"), is well aware of the "on-goings" in Lakewood, and as available and reported documentation/statistics clearly demonstrate the needs of Lakewood Schools that serves as the *very basis* for year "loans" by the New Jersey Department of Education ("NJDOE") in the amount of millions of dollars annually.

The information considered by the ALJ is based primarily on *outdated* and "*stale"* data from the period of 2014-2018 with some overlap into the 2019 school

[3] *See*, the Transcript dated July 9, 2019, Page **108**, Line 25, Page 109, Lines 1-5 (**EXHIBIT "B"**).

year. The information considered by the ALJ is based on information presented by a well-meaning educator in the District,[4] who while being an attorney, was most unfamiliar with the Office of Administrative Law ("OAL") process (*as the record aptly demonstrates*), despite his vast efforts and good intentions.

However, the information and DECISION *summarily ignores* the ***significant*** progress made during this period and the progress made while the INITIAL DEICSION was pending for several years despite numerous submissions by the undersigned. Meanwhile, ALJ Scarola herself recognized (and so stated) the very funding issue herein (i.e., the "Ponzi Scheme") that negatively affects district. However, a funding issue does not mean that there is a failure to provide a "T&E" ("T&E") education especially in light of documentation "uncovered" by the undersigned only via an OPRA request served on the New Jersey Department of Education ("NJDOE") that established that the New Jersey Department of Education ("NJDOE") acknowledged that without millions of dollars of cash (a.k.a. "Loans") a "T&E" education could not be provided that the Court relied upon in its earlier DECISION to DENY the Respondent's Motion to Dismiss.

[4] Petitioner's counsel, Arthur Lang, Esquire, is a District employee/math teacher.

The findings of ALJ Scarola summarily **ignored** evidence that the Lakewood School District *met or exceeded* State approved criteria, etc., and, is well on its way to *further* rectifying the concerns raised by ALJ Scarola, albeit, known and reflecting prior. This evidence, in part, was submitted *prior post* Hearing, some of which was *not* available at the time the Hearing commenced and was on-going. The Respondents in the matter objected to much of said documents being considered and ALJ Scarola ultimately ***failed*** to consider the same. As such the ALJ has not considered the full scope of ***significant*** *improvements* that has been made since this matter was initially filed in 20**14** and the record closed in November 20**19**. This matter has continued on for all too many years due solely to the **in**effectiveness of the Office of Administrative Law, and, *only* recently due to the current Pandemic. The Board submits that delays in this matter have led to an INITIAL DECISION that is inconsistent with "reality" and negates recent *significant* progress and developments of the District as the New Jersey Department of Education ("NJDOE") is well aware of. As such the record must be "reopened" and the Board directly should be permitted to present this new evidence.[5]

[5] *See*, "CERTIFICATION OF LAURA WINTERS, SUPERINTENDENT" accompanying this submission.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

1. The original Petition of Appeal was filed with the Commissioner on June 24, 20**14**. The Petition sought a "Declaratory Ruling" from Commissioner that all of Lakewood's students are entitled to the same services to which students similarly situated elsewhere in New Jersey are entitled, and to foreclose the possibility of a remedy that disparately impacts the children of Lakewood or that forces them to forego their rights and privileges under the current law. (Exhibit A, Page 3).

2. The Respondents filed a Motion to Dismiss in lieu of an answer on September 2, 20**14**. (Id.)

3. The matter was then transferred to the Office of Administrative Law ("OAL") and filed as a contested case on Sept. 4, 20**14**. (Exhibit A, Page 3).

4. The Respondents' Motion was opposed on October 22, 20**14**. (Exhibit A, Page 4).

5. On January 14, 20**15**, Paul L. Tractenberg, Esq., filed a Motion on his own behalf for leave to participate in the proceedings pursuant to N.J.A.C. 1:1-16.6 and in opposition to the Motion to Dismiss. Tractenberg's Motion to participate was Granted on March 11, 20**15**. (Id.)

6. The Hon. John Kennedy, ALJ held a Hearing on the Respondent's Motion to Dismiss on June 9, 20**15**. He subsequently *denied* the Motion on July 24, 20**15**. (Id.)

7. On February 19, 20**16**, the Petitioners filed a Motion for Summary Decision asserting that a Hearing was not necessary as all data necessary was in the public record.

8. The Respondents opposed the Motion for Summary Decision on April 14, 20**16**. (Id.)

9. On July 19, 20**16**, Hon. Solomon A. Metzger, ALJ, issued an Order denying the Motion for Summary Decision. (Id.)

10. On October 14, 20**16** the Board filed a Motion to Participate, which was subsequently granted on November 21, 20**16**. (Id.)[6]

11. In May 20**17**, the Petitioners filed a Motion for Emergent Relief related to the district's **2017–2018** budget deficit. Respondents filed Opposition on May 23, 20**17**.That Motion was ultimately withdrawn. (Id.)

12. **On October 9, 2018, the BOE'S "Motion to Intervene" as a party was *wrongly denied*. (Id. at Page 5.)**

[6] It should be noted that the undersigned was *not* counsel for the Lakewood School District in 2016 and the composition of the Board was *dissimilar* to the current Board. Moreover, since 2018 additional millions of "Loans" have become necessary to provide a "T&E" education.

13. The Hearing commenced on February 5, 20**18**, and continued on February 7, 12, 13, and 22, 20**18**. Petitioners rested their case on February 22, 20**18** and Respondents indicated they wished to file a Motion to Dismiss. The Motion was filed on April 30, 20**18**. (Id.)

14. Petitioners moved to "re-open" the case to present additional testimony before the Motion to Dismiss was decided. Respondents opposed and the Petitioners were directed to file an amended Petition to clarify the relief sought. Thereafter Petitioners were permitted to "re-open the record and allow the witness to testify." (Id.)

15. Petitioners filed their *second* Amended Petition on September 4, 20**18**. (Id.)

16. Respondents filed their Answer on September 18, 20**18**. (Id.)

17. Petitioners rested their case on December 18, 20**18**. (Id.)

19. The Respondents' Motion to dismiss was *Denied* on January 8, 20**19**. The matter continued with *additional* Hearing dates on July 9, 10, 21, and 22, 20**19**. (Id. at 6.)

20. **On July 29, 2019, the *parties* (READ- NOT "participants") were asked, as part of their post-Hearing briefs, to jointly stipulate, to the maximum extent possible, certain information relating to the district for each**

school year at issue in this matter (2014–2015 through 2018–2019), which should have been available to them as a matter of public record. Respondents declined and would only stipulate to the documents already admitted into evidence, but would *not* stipulate to any additional data without context for its consideration. (Id. at 6-7)

21. The record closed on November 28, 20**19**. (Id. at 7).

22. ALJ Scarola ***most belatedly*** issued her "INITIAL DECISION" on March 1, 20**21**, many, many, many months after the record was "closed".

23. ALJ Scarola ***wrongly*** concluded Petitioners have shown by a preponderance of the credible evidence that Lakewood's students are ***not*** receiving a "T&E" education as required by the New Jersey Constitution.(Id. at 95).

The ALJ's sole remedy, **un**solicited by either party nor the "participants" herein was to *ORDER* a "Needs Assessment" much akin to what was previously accomplished without any tangible results in 20**10** (*See*, **EXHIBIT "C"**).

24. ALJ Scarola also ***wrongly*** concluded that the Petitioners failed to carry their burden that the School Funding Reform Act is unconstitutional as applied to Lakewood. (Id. at 95).

25. The instant Motion to "reopen" the record follows, **and**, allow the school district/Board of Education to directly present evidence that a "T&E" education was provided ***but only*** because of numerous and on-going cash "infusions" (a.k.a. "loans") by the New Jersey Department of Education ("NJDOE"), that are not sustainable, ***and are a direct result of a funding formula that clearly as applied to the Lakewood School District is unconstitutional, inadequate, and inapplicable – a/k/a a "Ponzi Scheme"***.

LEGAL ARGUMENT

POINT I

"REOPENING" THE PROCEEDINGS IS REQUIRED BECAUSE RELEVANT NEW EVIDENCE CONFLICTS WITH THE FINDINGS OF THE ALJ, AND THAT EVIDENCE HAS THE CAPACITY TO EFFECT A CHANGE IN THE COURT'S DETERMINATION.

As a general matter "**reopening**" proceedings is *within the Agency's Discretion*. See In re Public Service Elec. and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65, 128-129 (App. Div. 2000).

In order to "re-open" the record, a party must establish, on a prima facie basis, that (1) the proffered evidence is relevant to the factual or legal issues involved in the case; (2) that the evidence would have been admissible at the Hearing; (3) that there is some reasonable explanation for the failure to have

presented the evidence at the Hearing; (4) and that the evidence has the capacity to effect a change in the determination of a material fact or a conclusion of law reached in the initial Decision. State of New Jersey v. Boardwalk Regency Corp., 94 N.J.A.R. 2d 73 (1993) (on Motion to reopen the record pursuant to N.J.A.C. 1:1-18.5, the new evidence must have the capacity to effect a change in the determination of a material fact or a conclusion of law reached in the initial Decision).

The Board submits that the evidence not considered by the ALJ satisfies, and, in fact, *exceeds* the above criteria.

1. The Proffered evidence is relevant to the factual or legal issues involved in the case.

In the instant matter the Lakewood Board of Education has made **significant** progress toward remedying past issues that would affect the Constitutional guarantee of a "T&E" education. The Board wishes to present such evidence to the ALJ to provide a more complete explanation of the facts. Again this matter was instituted in *2014* and was litigated through the ensuing years. The ALJ relied on ***stale*** information that did not give consideration to the significant advancements that Lakewood has made in the interim. Thus, Lakewood requests the opportunity to directly present such evidence to the ALJ for further

consideration. The evidence relied on by ALJ Scarola did not provide an accurate representation of the facts, especially in light of new and/or relevant information that demonstrates the *continued* efforts currently being made by the District are actually working. The District, *for example*, has received its highest Quality Single Accountability Continuum Scores (QSAC) scores since 2007 with regard all five categories measured by the New Jersey Department of Education ("NJDOE"), something previously provided to the ALJ but **refused** consideration in the last ten (10) or so years, again, with the ALJ **refusing** consideration of same. Moreover, the District has received high marks for its efforts relative to student transportation issues with its highest efficiency rating. As such this evidence should have been admissible at the Hearing. This evidence is based on publicly available documentation which is current up to the most recent school year and are only two (2) *mere* examples that disconnect and whip the underpinnings of a fatally flawed, delayed, state determination by the ALJ. After 7 years of litigation, it is inconceivable that this new information would not be relevant to a Decision as to whether the district is providing a "Thorough and Efficient" education.

2. The evidence would have been admissible at the Hearing

The evidence that this Participant seeks to introduce should have been admissible at the Hearing. *In addition*, providing evidence of improved test scores and the implementation of new programs are all relevant to the analysis as to whether the Lakewood Board of Education is providing a "T&E" education. Unfortunately, the information considered by the ALJ is based, at best, on status statistics and most selective projections from 2014-2018. As such the ALJ has not considered the full scope of improvements that have been made since this matter was initially filed in 2014. Years of delays in this matter have led to an INITIAL DECISION that is inconsistent with the consistent progress and developments which can be demonstrated in the records the Board intends to directly present. The proffered evidence would show that the Lakewood Board of Education has been making efforts to ensure a "T&E" education for its students and the millions of dollars of "infusions" by the New Jersey Department of Education ("NJDOE") have greatly assisted this to occur, albeit, in an **un**sustainable manner (a.k.a. "loans"). The publicly available records are critical to demonstrate that such efforts were not only made, but have been successful and continue to be successful.

3. There exists a reasonable explanation for the failure to have presented the evidence at the Hearing.

The evidence the Board wishes to present was not made available until after the Hearing occurred. In a good faith effort to supplement its arguments at the Hearing, the Board promptly submitted this new information to the Court. Despite these efforts the Department of Education objected to the consideration of the same. (INITIAL DECISION, Page 7). The record in this matter closed on November 28, 2019. There were significant developments during the 2019-2020 school year which were not considered by the Court **despite the Court knowing of same as same were a matter of public record, and, as the Administrative Law Judge herself presided over numerous litigated cases involving Lakewood School District when the undersigned represented children (and their parents) *then* suing the Lakewood School District, and, since 2017 on behalf of the Lakewood School District**. Specifically, *in part*, this Court, while in the INITIAL DECISION cited the high cost of special education, for example, *neglected* to mention that the ALJ herself has often commented that the District, in fact, has made extraordinary efforts to *reduce* the cost of same, etc.

The Board notes that the relevant information as it regards *significant* **positive** improvement by the District was received by the District on June 18,

2020. This notification received from the Department of Education demonstrated a continued *positive* growth since the initiation of this litigation.

Moreover, in August 2020, the Board received further information which was provided to Judge Scarola indicating a marked improvement for the District. The Board filed letter briefs with the court on June 24, 2020 and on August 3, 2020 indicating that the District's **QSAC** scores, *for example*, demonstrated the District is providing a "T&E" education even with the significant funding concerns and instability it faces as well as improving its *overall* operations. This information was not previously available to the parties until the Hearing had already closed. This new information is highly relevant to the determination by ALJ Scarola and it would be in the interests of justice that this information be weighed and considered the Board made reasonable efforts to make the Court aware of these **significant** developments, but same was ignored and/or cast as duplicative of previously supplied evidence, of course, *wrong* on all accounts.

4. The evidence has the capacity to effect a change in the determination of a material fact or a conclusion of law reached in the INITIAL DECISION

The Board submits that such evidence would have the capacity the capacity to effect a change in the determination of a material fact or a conclusion of law reached in the initial Decision. Indeed, documented improvement showing

that the District significantly continues to remedy past issues as acknowledged by the New Jersey Department of Education ("NJDOE") has the capacity to effect a change in the ALJ's INITIAL DECISION. The refusal to consider such evidence would ignore that the District has maintained an effort to ensure a "T&E" education to its students. In fact, the very improvements by the district address the concerns of ALJ Scarola as stated in the initial Decision:

> As discussed above, there are many steps Lakewood could potentially take to help itself in its quest to provide T&E: develop a comprehensive preschool program for at-risk children; find ways to cut transportation costs so more money may be devoted to educating public school students; improve and expand the in-district special education program to reduce expensive private school placements. Unfortunately, Lakewood has either been unwilling or unable, on its own, to take all necessary steps to deliver T&E to the public school populace. Lakewood needs more help.

(INITIAL DECISION, Page 103).

The Lakewood Board of Education will directly supply information that will demonstrate the *on-going and corrective* efforts taken to remedy the concerns of the Court as well as its *continued* commitment to those efforts. As such through the presentation of publicly available information and testimony clearly demonstrate that Lakewood has and *continues* to actively work to "to take all necessary steps to deliver T&E to the public school populace." The Board of Education has made **significant** progress and has succeeded in showing that it can

and currently provides a "T&E" education for its students, albeit, via loans. As such the Hearing must be "reopened" so that the Lakewood Board of Education may present this relevant new information. This new information has the capacity to clearly change the incorrect finding of fact that a "T&E" education was not provided.

Finally, is it worth noting that this matter was *previously* re-opened in 2018 to present additional evidence and testimony. The same was ultimately granted by the Court. In light of that, this request to "re-open" should be granted in the interest of justice. Moreover, same is not made for the purpose of delay.

POINT II
IF THE COMMISSIONER ORDERS THE "REOPENING" OF THE RECORD BELOW, PARTICIPANT MUST BE ALLOWED TO PROCEED AS AN INTERVENOR, NOT A MERE PARTICIPANT (A.K.A. SPECTATOR)

Participant submits that it should have been granted **intervenor** status and the ALJ erred in denying the Lakewood Board of Education's Motion to intervene as a party.

In the instant matter ALJ Scarola noted that:

> The Lakewood BOE had originally taken the position that it did not want to be included as a necessary party; however, the BOE's

> counsel had changed since the commencement of these proceedings. No appeal was taken from the denial of the Motion to intervene as a party.

(See INITIAL DECISION, Page 5 fn. 11).

The Board should have been allowed to participate **as an intervenor** as the court had no issue allowing entry as a participant. Under N.J.A.C. 1:1-16.1, the Board should have been allowed to proceed as an intervenor because the Board will be substantially, specifically and directly affected by the outcome of this case. There can be no mistake that a finding that the Lakewood School District does not provide a "T&E" education substantially, specifically and directly affects the Board. As such the Board should be permitted to proceed as an **intervenor** rather than a participant. Status as a participant does not grant the Board all of the rights that would ordinarily be granted a party to the litigation as an intervenor would. Participants are granted the following: 1. The right to argue orally; or 2. The right to file a statement or brief; or 3. The right to file exceptions to the initial Decision with the agency head; or 4. All of the above. See N.J.A.C. 1:1-16.6.

The Board requests the Decision *denying* the application to intervene be reviewed by the transmitting agency now, in conjunction with the request to reopen the record below. The denial of the Board's Motion to Intervene has ultimately prejudiced the Board from effectively advocating for its students. The Board recognizes that this review is *discretionary*. As such, while review of this order is being sought for the first time, the Board believes that it would be in the interest of justice for the Commissioner to review the request and allow the Board to proceed as an intervenor.

CONCLUSION

Based upon the foregoing the Board respectfully requests that the Commissioner find that a "T&E" education was provided, and, that only a Legislative "fix" can solve the unique funding issue herein. *Should the Commissioner not so* find, then, the Commissioner is, respectfully, requested to grant the District's Motion to "reopen", and allow it to proceed as an "Intervenor", not a mere "spectator" (a.k.a. "participant"). As demonstrated above, and, in the attached CERTIFICATION of Laura A. Winters, Superintendent of Lakewood Public School District, the ALJ's "INITIAL DECISION" *ignores* prior and current ***realities*** as to

many of the issues/basis the ALJ *somehow* relied upon in her ***mistaken*** finding that a "T&E" education was not provided. For, in fact, a "T&E" education was provided, albeit, in a "Ponzi scheme" method as the ALJ herself described, to wit, the **un**sustainable "Loans" given to the District by the New Jersey Department of Education ("NJDOE") that "scream out" for a finding that SFRA as applied to Lakewood is **un**constitutional and a Legislative solution is immediately required.

Respectfully submitted,

Michael I. Inzelbuch, Esquire
MICHAEL I. INZELBUCH, ESQ.

MII/sn
EXHIBIT ATTACHMENTS
cc: The Honorable Susan Scarola, ALJ
Arthur Lang, Esquire (for Petitioners)
Paul Tractenberg, Esquire (Participant)
Sydney Finkelstein, DAG (for Respondent)
Edward Dauber, Esquire
Laura Winters, Superintendent of LBOE
State Monitor David Shafter
Robert S. Finger, Coordinator of Fiscal Services
Board President & Honored Board of Education Members
DICTATED ONLY