



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON MOTION**  
**TO DISMISS AT END OF**  
**PETITIONERS' CASE**

OAL DKT. NO. EDU 11069-14  
AGENCY DKT. NO. 156-6/14

**LEONOR ALCANTARA, ET AL,**

Petitioners,

v.

**DAVID HESPE, COMMISSIONER OF  
EDUCATION, ET AL.,**

Respondents.

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**Arthur Lang**, Esq. and **Daniel L. Grossman**, Esq., appearing for petitioners

**Jennifer Hoff**, **Lori Prapas**<sup>1</sup>, **Lauren Jensen** and **Geoffrey N. Stark**, Deputy Attorneys General, appearing for respondents (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

**Michael Inzelbuch**, Esq., appearing for Participant Lakewood Board of Education

**Paul L. Tractenberg**, Esq., Participant

BEFORE **SUSAN M. SCAROLA**, ALJ (Ret., on recall):

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<sup>1</sup> Ms. Prapas participated during the hearing and the filing of briefs but passed away prior to completion of the hearing.

## **STATEMENT OF THE CASE**

Petitioners, consisting of students and parents of students attending schools in Lakewood School District (LPSD), as well as parents of students attending nonpublic schools in Lakewood, filed this action challenging the allocation method and amount of State funding received by LPSD. They contend that the School Funding Reform Act (SFRA), N.J.S.A. 18A:7F-43 to -63, is unconstitutional as applied to the LPSD, such that LPSD does not receive enough funding under the SFRA to provide its students with a constitutionally-required thorough and efficient education because the SFRA does not take into account the extraordinary costs that LPSD incurs to provide transportation and special education services to Lakewood's nonpublic school students.

Petitioners generally allege that Lakewood shares certain characteristics with the districts identified as "Abbott Districts" in Abbott v. Burke, 119 N.J. 287 (1990), and that as a result, Lakewood students are deprived of a constitutionally mandated thorough and efficient education (T&E). Petitioners' requested relief falls into several categories. First, they request that the Commissioner increase funding appropriations to Lakewood. Next, they seek orders requiring that the Commissioner make certain policy recommendations to the State Legislature. They also seek various declaratory rulings and administrative remedies.

## **PROCEDURAL HISTORY**

The original Petition of Appeal was filed with the Department of Education on June 24, 2014, and amended on July 7, 2014. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on September 4, 2014, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On September 2, 2014, the respondent filed a motion to dismiss in lieu of an answer and to add Lakewood as a necessary party which was contested by Lakewood.

Following the submission of briefs and oral argument, the motion was denied on July 23, 2015, by the Hon. John Kennedy, ALJ.

On January 14, 2015, Paul L. Tractenberg, Esq., filed a motion for leave to participate pursuant to N.J.A.C. 1:1-16.6.<sup>2</sup> On March 11, an order was entered permitting Mr. Tractenberg to participate in the litigation.

On February 19, 2016, the petitioners moved for summary decision, which application was denied on July 19, 2016, by the Hon. Saul Metzger, ALJ (retired, on recall).

On November 21, 2016, an order was entered permitting Lakewood to participate pursuant to N.J.A.C. 1:1-16.6.

Prior to the commencement of the hearing, the Township of Lakewood Board of Education (BOE) moved to intervene as a party, which application was denied.<sup>3</sup>

The hearing was held on February 5, 7, 12, 13, and 22, 2018. At the conclusion of the petitioners' case on February 22, 2018, the respondents moved for dismissal of the matter. As both parties wanted the transcripts before submitting their written motions and replies, a telephone conference was held on March 22, 2018, to set an expeditious briefing schedule.

In the meantime, on March 14, 2018, the petitioners filed an application for emergent relief, alleging the same causes for relief set forth in the original due-process petition, which was in the process of being heard and which was the subject of the pending motion for dismissal. At the March 22, 2018, telephone conference, counsel for petitioners advised that his emergent application had been filed in anticipation of a

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<sup>2</sup> Mr. Tractenberg is a participant pursuant to N.J.A.C. 1:1-16.1.

<sup>3</sup> Lakewood's counsel had changed since the commencement of these proceedings.

shortfall in excess of \$20,000,000 and funding issues in the proposed Lakewood school budget for 2018–2019.<sup>4</sup>

On March 27, 2018, the application for emergent relief was denied.<sup>5</sup>

The respondents' Brief on the motion to dismiss at the end of the petitioners' case was filed on April 30; the petitioners' brief was filed on May 31, 2018; and the respondents' reply brief was received June 11, 2018.<sup>6</sup> Additional correspondence and legal argument was received thereafter. The record closed on the motion after the testimony of Mr. Melvyn Wyns on December 18, 2018.

### **ARGUMENT**

The respondents contend the following:

Point I. The Amended Petition should be dismissed because the remedies sought are not available in this proceeding.

- A. The Amended Petition Improperly seeks relief that can only be granted by the state legislature.
- B. Petitioners' requests for declaratory rulings are not properly before the OAL and should be dismissed.

Point II. Petitioners have not shown that Lakewood is failing to provide them with a thorough and efficient education.

The petitioners contend:

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<sup>4</sup> The budget had not yet been adopted by the Board, nor had it yet been reviewed by the County superintendent.

<sup>5</sup> Petitioners appealed to the Commissioner and to the Appellate Division, which appeals were later withdrawn as the DOE loan to the district was announced.

<sup>6</sup> Both requested and were granted extensions of time to file their briefs.

POINT I. The motion must be denied because the large deficits and loans to the Lakewood school district while under the control of the state monitors support petitioners' challenge to the allocation method and amount of state funding received by the Lakewood school district.

Point II. The motion to dismiss should be denied because the state monitors, the business administrator and petitioners' experts testified that the adequacy budget does not provide enough revenue for a thorough and efficient public education.

Point III. The motion for dismissal should be denied because the deficiency in funding correlates to a failure in all commonly accepted indicators of student achievement.

Point IV. The motion should be dismissed because the law of the case is that the office of administrative law is the proper forum and that a full record must be developed.

Point V. The motion to dismiss should be denied because the presence of federally funded programs is not a defense to a challenge to the allocation method and amount of state funding received by a school district.

Point VI. The motion to dismiss should be denied because petitioners have met their burden of proof with the documentary evidence marked for the record.

The petitioners, parents of students who attend public school and nonpublic school in Lakewood, petition the Commissioner of Education for a determination that the funding formula under the SFRA is unconstitutional as applied to LPSD due to the district's unique circumstances, which include extraordinary transportation and special education costs associated with Lakewood's 31,000 nonpublic school students, and which result in the failure to provide the LPSD's 6,000 public school students with a constitutionally-mandated thorough and efficient education. Petitioners have named the Commissioner, the State Board of Education, and the Department of Education as respondents.

In support of their petition, petitioners have presented certain documentary evidence and the testimony of several witnesses. According to petitioners' documentary evidence, LPSD has been under the supervision of a State monitor since 2014. In addition to SFRA funding, the LPSD has received nearly \$47 million in advance State aid payments since the 2015-2016 school year. Under the School District Fiscal Accountability Act (SDFAA), N.J.S.A. 18A:7A-54 to -60, "[t]he 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" and "[t]he 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(a). Most recently, the Commissioner recommended, and LPSD received, \$28 million in advance aid for the 2018-2019 school year. Under the SDFAA, such aid "shall be repaid by the school district through automatic reductions in the State aid provided to the school district in subsequent years." N.J.S.A. 18A:7A-56(b).

Petitioners presented the testimony of Dr. Ross Haber, an expert in demographics; Laura Winters, LPSD's Superintendent; Malka Spitz-Stein, a Supervisor of Science, Technology, Engineering, and Math for LPSD; Marcy Marshall, principal of Lakewood High School; Robert Finger, LPSD's current Assistant Business Administrator and former Business Administrator; Dr. Danielle Farrie, an expert in educational funding; David Shafter and Mike Azzara, who serve as State monitors for the LPSD; and Melvyn Wyns, an expert in school funding.

Respondents have filed a motion for judgment of involuntary dismissal. In an administrative hearing, a respondent may rely on R. 4:37-2(b) to move for involuntary dismissal at the close of the petitioner's case "on the ground that upon the facts and upon the law the [petitioner] has shown no right to relief." 37 New Jersey Practice, Admin. Law & Practice, § 5.19 (Steven L. Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000); R. 4:37-2(b). According to respondents, involuntary dismissal is appropriate because petitioners have failed to show that Lakewood's public-school children are not receiving a thorough and efficient education. Instead, respondents

argue, the testimony from petitioners' witnesses shows that LPSD's students are, in fact, receiving the education to which they are constitutionally entitled.

In support of their argument, respondents note that "Mr. Shafter stated that the 2017-2018 budget, after the state aid advance, was 'sufficient . . . to deliver the services to the students'"; that "Ms. Spitz-Stein testified that, at least in the areas of Math and Science, the District has and is implementing curricula consistent with the SLS [Student Learning Standards];" and, that "Ms. Winters, Ms. Spitz-Stein, and Ms. Marshall all testified to the extensive list of opportunities available to Lakewood's students, not only in basic skills and requirements, but in access to vocational education, technology, and the arts." Respondents also submit that the testimony revealed that test scores and graduation rates in the district have been improving.

While respondents acknowledge that LPSD faces yearly budget deficits, respondents dispute that these fiscal issues "establish that the students of Lakewood are not receiving a thorough and efficient education . . . especially so where the Department ensured, without fail, that the District's deficit was filled through a state aid advance." According to respondents, "the Department has provided financial assistance to Lakewood through state aid advances for the past [several] years in order to ensure that the District could provide thorough and efficient education to its students." This aid, respondents submit, has allowed LPSD to avert teacher layoffs and program cuts.

In opposition to respondents' motion, petitioners counter that they have presented ample evidence of the constitutional deficiency of the SFRA as applied to the LPSD. Petitioners assert that "the statute needs a correction to cover the expense of providing mandated transportation and special education services to a population of 31,000 nonpublic children, funds that must come out of the adequacy budget before a dime is spent on the public schools' costs as defined in the statute." Petitioners note that the testimony from their witnesses revealed that "[a]fter special education and transportation costs and reimbursement, there remains only '60-65% of the state and local revenue that the SFRA deems necessary for students to achieve the state's curriculum standards" and "\$78 million, 53% of \$144 million 2017-2018 operating

budget, is spent on transportation and special education.” As a result, “\$67 million remains out of \$102,184,260 in SFRA adequacy for regular education in Lakewood.”

Petitioners contend that State aid advances are evidence that the SFRA funding formula, as applied to Lakewood, is unconstitutional. According to petitioners, “[a] loan just fixes the deficits which are merely symptoms of the inadequate adequacy budget” and “[t]he presence of the recent \$28 million loan and prior loans are not an answer [to] the challenge brought by Petitioners, on the contrary, they are an implicit admission that the SFRA (adequacy budget) as applied to Lakewood needs to be corrected.”

Petitioners’ witnesses testified about the effect insufficient SFRA funding has on LPSD’s students, which includes a large number of low-income and limited-English proficient students. For example, Dr. Farrie testified that there is a nexus between per-pupil classroom spending - \$6,600 in LPSD vs. \$9,000 State average - and poor test scores, and that even if scores in LPSD are improving, relative performance to the rest of the State is constant or declining. Petitioners’ witnesses also testified about low graduation rates and the adverse impact inadequate funding has on the quality and quantity of teachers in the district. Finally, Mr. Wyns testified that the funding situation for LPSD is projected to get more dire due to the advance State aid the district has received, and may need in the future, because under the SDFAA, those loans “[are to] be repaid by the school district through automatic reductions in the State aid provided to the school district in subsequent years.”

### **LEGAL ANALYSIS AND CONCLUSION**

The applicable standard for a motion for judgment of involuntary dismissal is “whether ‘the evidence, together with the legitimate inferences therefrom, could sustain a judgment in favor’ of the party opposing the motion, *i.e.*, if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied.” Dolson v. Anastasia, 55 N.J. 2, 5 (1969) (quoting R. 4:37-2(b)). In considering a motion for involuntary dismissal, a judge “is not concerned with the worth, nature or extent (beyond



a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion.” Id. at 5-6.

Under the New Jersey Constitution, “[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years.” N.J. Const. art. VIII, § 4, ¶ 1. The SFRA is the Legislature’s most recent attempt to meet this obligation. Through the SFRA, the Legislature has recognized that “[e]very child in New Jersey must have an opportunity for an education based on academic standards that satisfy constitutional requirements regardless of where the child resides, and public funds allocated to this purpose must be expended to support schools that are thorough and efficient in delivering those educational standards.” N.J.S.A. 18A:7F-44(d).

The Legislature further recognized that “school districts must be assured the financial support necessary to provide those constitutionally compelled educational standards.” Ibid. Thus, the SFRA includes a funding formula that is designed to “provide State aid for every school district based on the characteristics of the student population and up-to-date measures of the individual district’s ability to pay.” Ibid. According to the Legislature, “[t]he formula provides adequate funding that is realistically geared to the core curriculum content standards, thus linking those standards to the actual funding needed to deliver that content.” N.J.S.A. 18A:7F-44(i).

The SFRA is “a weighted school funding formula” that starts with a “base per pupil amount,” which is “the cost per elementary pupil of delivering the core curriculum content standards and extracurricular and cocurricular activities necessary for a thorough and efficient education.” Abbott ex rel. Abbott v. Burke, 199 N.J. 140, 152 (2009); N.J.S.A. 18A:7F-45. The formula then accounts for increased education costs associated with higher grade levels, and impoverished, limited-English proficient, and special education students. Abbott, 199 N.J. at 152. The formula includes an adequacy budget, which “is based on the community’s wealth and ability to provide funding through local resources;” equalization aid, which “is State-provided aid to support the Adequacy Budget by funding the difference between a district’s Local Fair Share (LFS)

and its Adequacy Budget,” and, categorical aid, which covers certain special education costs.<sup>7</sup> Id. at 153-155.

The Supreme Court has held that the State funding formula must provide sufficient support for the delivery of a thorough and efficient education as defined by the Core Curriculum Content Standards, or what are now known as the New Jersey Student Learning Standards (NJSLS). Abbott by Abbott v. Burke, 149 N.J. 145, 168 (1997). The NJSLS, which have been adopted by the State Board of Education, are designed to prepare students for college, career, and life. N.J.A.C. 6A:8-1.1(a). The NJSLS specify expectations in nine academic areas - English; math; arts; health and physical education; science; world languages; technology; and twenty-first century life and careers, and “enable district boards of education to establish curriculum and instructional methodologies for the purpose of providing students with the constitutionally mandated system of ‘thorough’ public school instruction that promotes college and career readiness.” N.J.A.C. 6A:8-1.1(a) and (c). A district’s success in providing thorough and efficient education through the NJSLS is primarily gauged by the results of statewide tests. N.J.A.C. 6A:8-1.1(d) and (e).

After considering the testimony presented by petitioners, the respondents’ motion for involuntary dismissal must be denied. The evidence, together with the legitimate inferences therefrom, could sustain a judgment in favor of petitioners. That is, the testimony and documentary evidence presented by petitioners tends to show that LPSD cannot provide a thorough and efficient education with the level of funding it receives under the SFRA and that, as a result, the SFRA is unconstitutional as applied to the LPSD. The testimony established a correlation between the level of school funding LPSD receives and low scores on statewide assessments, which are intended to measure a school district’s success in delivering a thorough and efficient education through the NJSLS. A judgment in favor of petitioners could also be sustained by evidence that the Commissioner of Education has, in accordance with N.J.S.A. 18A:7A-56, certified that for the past four years, that the LPSD needs advance State aid “to

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<sup>7</sup> As the Court has explained, “[a] district’s LFS is the amount it is required to contribute in support of the Adequacy Budget” and “is determined by adding a district’s equalized property wealth and its equalized income wealth.” Id. at 155.

ensure the provision of a thorough and efficient education.” Accordingly, the motion is denied, and the respondents shall proceed with their case.

**ORDER**

It is hereby **ORDERED** that the respondents’ motion for dismissal at the conclusion of the petitioners’ case is hereby **DENIED**. The hearing shall continue on dates to be agreed upon. A telephone conference shall be scheduled forthwith.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

January 8, 2019

DATE

SMS/cb



**SUSAN M. SCAROLA**, ALJ (Ret., on recall)

**APPENDIX**

**WITNESSES**

**For petitioners:**

Dr. Ross Haber  
Laura Winters  
Malka Spitz-Stein  
Marcy Marshall  
Robert Finger  
Dr. Danielle Farrie  
David Shafter  
Michael Azzara  
Melvyn Wyns

**For respondents:**

None

**EXHIBITS**

**For petitioners:**

Brief and reply

**For respondents:**

Brief and reply

**For participants:**

Letters and briefs