Exhibit 10

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May 24, 2023

Dr. Angelica Allen-McMillan
Acting Commissioner of Education
New Jersey Department of Education
Judge Robert L. Carter Building
100 River View Plaza
Trenton, NJ 08625-0500

RE: Alcantara, et al., v. Hespe, et al., Dkt. No. A-003693-20T2, OAL Dkt. No. 11069-14, Agency Dkt. No. 156-6/14

Dear Acting Commissioner Allen-McMillan:

I am writing as co-counsel to the Petitioners-Appellants in the above-captioned case to request that you provide a short and specific timetable for your action in response to the Appellate Division's remand to you in its unanimous March 6, 2023, decision.

My co-counsel Arthur Lang and I believe that you have, thus far, fundamentally misconstrued the Appellate Division's March 6, 2023, remand. It did not contemplate the need for a "comprehensive review,"[1] let alone a de facto relitigation of the question the Appellate Division has already decided--namely, that the district's public school students are being denied their fundamental constitutional right to T&E.

Instead, the court gave you a specific instruction—"to consider the [Petitioners']

[1] Apart from this case and the remand to you, however, you certainly have the authority to review any district if, in your judgment, it justifies the commitment of limited and scarce Department resources.

substantive arguments pertaining to the SFRA," and especially whether the State has met its "continuing obligation to 'keep SFRA operating at its optimal level.'"[2] Abbott v. Burke (Abbott XX), 199 N.J. 140, 146 (2009).[3]

In your May 12, 2023, Order on Emergent Relief, which denied the Petitioners' request for emergency relief as "moot,"[4] you supported your denial by indicating that you had, on that same date, "issued a letter directing the Department to **expedite** the comprehensive review referenced in *Alcantara v. Hespe, supra,*" presumably the one you ordered in your July 16, 2021, final decision rejecting ALJ Scarola's recommended decision that Lakewood public school students were being denied T&E.

So far as we can discover, 22 months after your order to the Department and almost three months after the Court's remand to you, there is no evidence that the Department has done anything regarding that review. All that you offer the Petitioners and the Court now is your May 12, 2023, direction that the Department "expedite" the review without any timetable for either the Department or yourself, and without any indication of what, if anything, has been done thus far.

If you are serious about intending to expedite the remand process, as your regulations require, you should abandon the flawed idea that it requires a "comprehensive review" and provide a detailed and specific timetable for the process that is necessary for you to respond to the

[2] The regulation relevant to your reviews and decisions, including this one, admonish you to "secure a just determination, simplicity of procedure, fairness in administration, and **elimination of unnecessary delay**." N.J.A.C. 6A: 4-4.4 (Emphasis added.). In our view, conducting a comprehensive review in the remand of this case would constitute an "unnecessary delay" and, therefore, be in derogation of your regulatory duty.

[3] The full quote from which the Appellate Division excerpted its remand instruction to you is instructive: "Our approval of SFRA under the State Constitution relies, as it must, on the information currently available. **But a funding formula's constitutionality is not a moment in time; it is a continuing obligation. Today's holding issues in the good faith anticipation of a continued commitment by the Legislature and Executive to address whatever adjustments are necessary to keep SFRA operating at its optimal level**. The three year look back, and the State's adjustments based on that review, will provide more information about the efficacy of this funding formula. **There should be no doubt that we would require remediation of any deficiencies of a constitutional dimension, if such problems emerge**." Abbott XX, 199 N.J. at146 (Emphasis added.).

[4] Our motion for leave to file an interlocutory appeal of your decision denying the Petitioners emergency relief is still pending with the Appellate Division.

Appellate Division's specific remand instructions.

Since it was the Petitioners' questions that frame the remand to you, let me remind you of what they are: (1) by how much is SFRA failing the LSD students;[5] and (2) what needs to be done to assure that SFRA starts "operating at its optimal level" for LSD students.

As we have stressed, you should already have detailed up-to-date information about LSD from Department and district data and records readily available to you[6] and, even more specifically, from the weekly reports statutorily required to be submitted to you or your designee by the multiple State monitors who have been assigned to the district continuously for the past nine years and who are statutorily required to remain in the district until the hundreds of millions of dollars in advance state aid loans have been fully repaid.[7]

Thus, if there were compelling evidence that the reality on the ground in LSD has fundamentally improved since the end of the 2018-2019 school year, you should already have access to it. Failing that, SFRA's insufficiency as to LSD is a continuing given—and that is certainly suggested by your certifications in support of still more advanced state aid loans to LSD since 2018-2019.

If, in fact, SFRA is still not operating at its optimal level for LSD students, and they are continuing to be denied their fundamental right to T&E, then the state's courts will insist on "remediation of any deficiencies of a constitutional dimension," as the Appellate Division already

[5] Both the ALJ and the unanimous Appellate Division panel found that LSD students were being denied T&E largely for fiscal reasons, although, curiously, they did not attribute that to SFRA, the State's main school funding vehicle. That causal nexus will be back before the courts in this case. The inadequacy of SFRA funding also was the indispensable heart of eight certifications by a succession of commissioners, including you, in support of advanced State aid loans to LSD. The governing statute provides explicitly that the commissioner's certification "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 (3) (a). In other words, that SFRA is providing insufficient funding for T&E.

[6] The governing statute, N.J.S.A. 52:14B-10 (b), provides that "Notice may be taken of judicially noticeable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the specialized knowledge of the agency or administrative law judge."

[7] N.J.S.A. 18A: 7A-55 (c).

instructed you.

Although it is not clear from the remand that, at this time, the court has assigned you responsibility for formulating remediation details, developing those details will be an urgent next step and your expert advice to the executive and legislative branches would be very helpful.

The last thing LSD students need now, however, is another lengthy hearing about whether the education they are receiving meets constitutional standards and, if it does not, whether SFRA is the cause. Seeking to create what is effectively an endless loop of hearings followed by administrative and judicial decisions based on the record generated at those hearings, and then the claimed need to update that record before a constitutional violation can be remedied,[8] is incompatible with your duty to ensure that all of New Jersey's students, and especially those who are disadvantaged, receive T&E in real time.

We have argued, possibly ad nauseum but without notable success thus far, that time is of the essence for Lakewood public school students.[9] As Justice Albin so aptly described it in *Abbott XX*I:

> Children go to school for a finite number of years. They have but one chance to receive a constitutionally adequate education. That right, once lost, cannot be reclaimed. The loss of that right will have irreparable consequences, particularly for the disadvantaged children to whom SFRA was intended to give a fair chance at a thorough and efficient education. Abbott v. Burke, 206 N.J. 332, 478 (2011) (concurring op.).

If anyone should have internalized, understood, and been prepared to address that compelling need as urgently as possible, even without the necessity for litigation such as this case, it is you. Indeed, you have both the constitutional and statutory obligation and power to do

[8] You should note that, throughout the hearing in this case, it was the Petitioners who sought to enlarge and update the record, based on evidence that you or the ALJ could judicially notice or that was already in the Department's or the district's data systems, and it was the State Respondents who sought to limit the record.

[9] It should not be necessary to remind you that those students in Lakewood's public schools are 100% low-income, 95% Latino and black, and, in substantial numbers, Limited English Proficient. In other words, they are quintessentially "disadvantaged" as New Jersey defines it and as Justice Albin understood it.

just that. I implore you to act as expeditiously as possible, in no event more than 45 days from the date of this letter.[10] Please use your time, energy and expertise to pave the way for a desperately needed remedial effort for Lakewood's public school students, not to invent further ways to delay their long-sought goal of T&E.

Sincerely yours,

Paul L. Tractenberg

cc (by electronic mail): Arthur H. Lang, Esq.
Matthew J. Platkin, Attorney General
Melissa H. Raksa, Assistant Attorney General
Christopher W. Weber, Deputy Attorney General
Ryan J. Silver, Deputy Attorney General

[10] In a case filed with you, as this one was, you have 45 days from the date a recommended decision is delivered to you by an ALJ to issue your final decision and that provides time for the parties to submit their views to you. See N.J.S.A. 52: 14B-10 (c). That seems the most analogous situation to the remand you have been issued by the Appellate Division. The main difference is that, when you decide how to respond to an ALJ's recommended decision, you have the decision and the record underlying it before you. Therefore, your action on this remand should provide not only an opportunity for the parties to provide their reactions, but also a short window prior to that to enable the Department to bring the record of SFRA's operation as applied to LPS up to date and to present findings and recommendations. Based on that procedure, you should be enabled to render a final decision without the need for additional hearings, testimony, etc. To bring this process within the 45-day limit, you could order the Department to provide its input within 15 days, give the parties seven days each to submit their views, and have 16 days for you to develop and issue your final decision on the remand. Given that you have had the Court's remand instructions for 80 days already, and the Department has had 22 months since your order of a comprehensive review, one might have hoped for a final decision on remand by now. Forty-five more days seems the most that can be considered even remotely consistent with expeditious treatment of this matter.

Exhibit 11

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., Appellants, v. ANGELICA ALLEN-MCMILLAN, Acting Commissioner of the New Jersey Department of Education; THE NEW JERSEY STATE BOARD OF EDUCATION; and THE NEW JERSEY DEPARTMENT OF EDUCATION, Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NUMBER: AM-482-22 CIVIL ACTION ON MOTION FOR LEAVE TO APPEAL THE MAY 12, 2023 INTERLOCUTORY DECISION OF THE COMMISSIONER OF THE DEPARTMENT OF EDUCATION AGENCY DOCKET NO.: 156-6/14

RESPONDENT'S BRIEF IN OPPOSITION TO APPELLANTS' MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL

Date Submitted: May 30, 2023

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

This matter is presently before the Commissioner of Education following remand in Alcantara v. Allen-McMillan, 475 N.J. Super. 58 (App. Div. 2023). Appellants seek leave to appeal the Commissioner's denial of their demand for the Commissioner to establish an expedited schedule for issuing a final agency decision. The relevant facts and procedural history are as follows.

A. Appellants' July 7, 2014 Petition of Appeal.

On July 7, 2014, a group of parents whose children are Lakewood School District students (collectively "appellants") filed a petition of appeal with the Commissioner alleging that the School Funding Reform Act of 2008 (SFRA), N.J.S.A. 18A:7F-43 to -71, was unconstitutional as applied to Lakewood, such that the district was not receiving sufficient funding to provide its students with a thorough and efficient education (T&E). (Aa24; Aa135); see N.J. Const. art. VIII, § 4, ¶ 1.[2] Specifically, the petition alleged that the SFRA did not take into account extraordinary costs the district incurred to provide transportation and special education services to a large number of students who attend non-public

[1] The procedural history and counterstatement of facts are closely related in this matter and have been combined to avoid repetition and for the court's convenience.

[2] "Aa" refers to appellants' appendix; and "Ab" refers to appellants' brief.

schools. (Aa24-25; Aa135-36). The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on September 4, 2014. (Aa25).

Appellants amended their petition four years later, on September 4, 2018, to clarify the relief they were seeking. (Aa27). The amended petition sought a determination that: (1) the SFRA as applied to Lakewood does not provide sufficient funding to enable the district to provide T&E as mandated in our State Constitution, N.J. Const. art. VIII, § 4, ¶ 1; (2) reliance upon discretionary State aid payments pursuant to N.J.S.A. 18A:7A-56 does not provide T&E funding that is certain and predictable; (3) the constitutional imperative regarding T&E requires sufficient funding that is not discretionary; and (4) the Commissioner recommend that this matter be remedied by the Legislature. Ibid.

B. The ALJ's March 1, 2021 Initial Decision.

A record was developed during the hearing for the 2014-2015 through 2018-2019 school years. (Aa28). On March 1, 2021, following a hearing that took place over the course of seventeen months and included extensive post-hearing briefing, the Administrative Law Judge (ALJ) issued an initial decision concluding that Lakewood was not providing T&E to its students for the applicable school years. (Aa23; Aa113-117). She also concluded that the SFRA was not a substantial or significant reason for that failure, and therefore was not unconstitutional as applied to the district. (Aa113; Aa117).

The ALJ noted the drastic demographic shifts experienced by Lakewood since the beginning of the century. Specifically, she noted that in 2000 Lakewood had a total population of about 60,000, but by 2019 the estimated population had grown to roughly 106,000, representing a 76% increase in only two decades. (Aa86). The ALJ observed that this rapid growth was due, in large part, to the "burgeoning" Orthodox Jewish community in Lakewood Township. Ibid. And within the population of school-aged children in the district, "there is a stark dichotomy between attendance at public schools and attendance at private or sectarian schools." (Aa86-87). For example, during the 2008-2009 school year, approximately 4,900 students attended the public schools, while 14,460 attended non-public schools — meaning only about 25% of the school-age population was attending public schools. (Aa87). By 2019, that population increased to around 6,000 students, but there were more than 30,000 students enrolled in non-public schools; thus, only 16% of Lakewood's student population attended public schools, while 84% attended other non-public schools. Ibid.

Because of these striking demographic trends, the ALJ concluded that the district's fiscal situation was adversely impacted, and that such fiscal issues were "attributed in large part to the extraordinary cost the district bears for its legal mandate to pay for transportation for private school students and for tuition

for special education students the district places in out-of-district private schools." Ibid. The ALJ also examined the educational performance of Lakewood's public school students compared to State averages, and found that the education received by public school students was not constitutionally adequate. (Aa113-17). However, she did not find that the failure to provide T&E was a result of any constitutional infirmity with the SFRA as applied to Lakewood. (Aa117). Rather, the district's failings were a result of a number of contributing factors distinct from the SFRA, including fiscal mismanagement by Lakewood, community choices, and other legislation. (Aa118-20).

For example, the ALJ noted that despite the rapid increase in the district's non-public student population — and attendant increase in transportation and special education costs — "the District decided to keep the [tax levy] stagnant." (Aa119). This, despite recommendations by the State-appointed monitor to increase the levy, meant that the district was "not taxing up to its local fair share" and "not generating the money that it could have been" which could have been used to support Lakewood's obligation to provide T&E. Ibid. Additionally, the ALJ found that Lakewood did not demonstrate it had done everything it could to cut down its ever-growing transportation costs, nor had it attempted to curb costs associated with educating special education students by educating them in-district. (Aa122-23). Lastly, the ALJ concluded that other, non-SFRA

legislation such as caps on local tax levies, N.J.S.A. 18A:7F-38, and the annual Appropriations Act contributed to the district's financial situation. (Aa120-21).

As a result of these voluntary choices and non-SFRA factors, the ALJ held that the SFRA was not unconstitutional as applied to Lakewood. (Aa125).

C. The Commissioner's July 26, 2021 Final Agency Decision.

On July 16, 2021, the Commissioner issued a final decision rejecting the initial decision in part and adopting it in part. (Aa144). In reaching her decision, the Commissioner accepted the ALJ's findings of fact, but disagreed that such findings led to the conclusion that Lakewood's public school students were not receiving T&E. (Aa140-41). She explained that "while Lakewood may be struggling to provide its students with the premier level of education that many have come to expect in New Jersey, these deficiencies do not rise to a constitutional deprivation." (Aa143). Further, the Commissioner found that the district's improvements in test scores and graduation rates over the course of the applicable time period, as well as the district's "diverse curriculum," negated a finding that students were not receiving T&E. Ibid.

Because the Commissioner rejected the ALJ's findings regarding T&E, she did not address the constitutionality of the SFRA except to generally concur with the ALJ's finding that it was not unconstitutional as applied to Lakewood. (Aa144). Notwithstanding this conclusion, the Commissioner, recognizing the

concerning educational deficits revealed during the course of the OAL hearing, ordered the Department of Education to "conduct a comprehensive review of the District's organization, structure and policies to assess its compliance with the quality performance indicators in accordance with [N.J.S.A.] 18A:7A-11 to determine how the District can improve its educational program." (Aa141).

D. The Appellate Division's March 6, 2023 Decision.

On March 6, 2023, the Appellate Division issued a published decision reversing the Commissioner's decision. (Aa22). The court reviewed the Department's statistics between 2015 and 2018, comparing the performance of Lakewood's public school students to State averages, and found that the Commissioner's decision was not supported by the evidence in the record. (Aa19). Specifically, the court found that Lakewood's graduation rates and standardized testing data showed that the district's public school system was ineffective, contrary to the Commissioner's findings. (Aa19-21). Furthermore, the court explained that other factors relied on by the Commissioner, such as the district's diverse course offering, were not significant enough to overcome the marked deficiencies. (Aa21). As a result, the court found that the district's public school students were not receiving T&E. (Aa22).

The court did not reach whether such a failure was a result of the SFRA. Instead, recognizing the Commissioner's authority to review and render a

decision in the first instance, the court remanded the matter to the Department to "consider the substantive arguments pertaining to the SFRA" in light of the Supreme Court's directive in Abbott v. Burke (Abbott XX), 199 N.J. 140 (2009) to "keep SFRA operating at its optimal level[.]" (Aa22 (quoting Abbott XX, 199 N.J. at 146) (internal quotation marks omitted)). The court did not set any parameters for the remand, nor did it retain jurisdiction over the matter. (Aa22).

Following the court's remand, the Commissioner took necessary steps to implement an expedited review of the Lakewood district and notified the parties of the expedited review by letter dated May 12, 2023. (Aa6-7).

E. The Commissioner's May 12, 2023 Interlocutory Decision.

On May 1, 2023, appellants filed a motion for emergency relief with the Commissioner, under N.J.A.C. 6A:4-3.5, seeking "an expedited schedule for [the Commissioner's] issuance of a final decision on the March 6, 2023[] remand" from the Appellate Division. (Aa145).[3]

Prior to issuing her decision on appellants' motion, on May 12, 2023, the Commissioner sent a letter to counsel for appellants advising that she had directed the department to expedite its comprehensive review of the district in

[3] Pursuant to N.J.A.C. 6A:4-3.5, applications for emergent relief before the Commissioner are to be reviewed in accordance with N.J.A.C. 6A:4-4.1(b), which adopts the standard for interim relief articulated by the Supreme Court in Crowe v. De Gioia, 90 N.J. 126 (1982).

order to execute her "obligations under the remand order and provide a well-informed opinion as to whether the SFRA is constitutional as applied to Lakewood." (Aa6-7). The Commissioner explained that such a review would provide her with additional and current information. Ibid. Specifically, the Commissioner noted that the data presently in the record relates to the 2014-2015 through 2018-2019 school years and, as such, is now outdated. Ibid. She explained that information regarding the intervening years would provide additional relevant, informative data concerning the district and SFRA, and also take into consideration the "unprecedented changes in the field of education as a byproduct of the COVID-19 pandemic." Ibid. She reasoned that an updated record is "required in order to make an appropriate informed decision about the SFRA and its application to Lakewood" and would "allow the Department to better identify the root causes that led to the education deprivations identified by the court and determine the appropriate responses." Ibid.

The Commissioner explained that the Department would engage experts to "examine Lakewood's operations and performance," and the Department would examine the "particular areas of concern raised by [appellants.]" Ibid. Following this expedited review, the parties would have an opportunity to "respond to the resulting report and recommendations[.]" Ibid. After receiving

all reports and responses, the Commissioner would then issue a final agency decision on the as-applied constitutionality of the SFRA. Ibid.

In addition to expediting the comprehensive review and setting a schedule, the Commissioner's letter also explained that the Department was exploring what "assistance, relief, or aid may be available to more immediately remedy" the district's immediate needs given the court's finding that Lakewood's students were not receiving T&E. Ibid. In terms of aid, the Department has, to date, approved applications from the district on July 8, 2022, and May 10, 2023, for waivers to proceed with contracting for student transportation services for the 2022-2023 and 2023-2024 school years. Ibid. Additionally, the Department has provided Lakewood with relief and aid through the provisions of loans against State aid beginning in June 2015 through March 2021, totaling $137,420,524. Ibid. And most recently, Lakewood received an additional $27,704,046 loan against State aid for the 2022-2023 school year. Ibid.

In light of the Commissioner's May 12, 2023 letter, she issued an interlocutory decision on the same date denying as moot appellants' motion for emergent relief. (Aa3-5). The Commissioner explained that because appellants' application sought an expedited schedule to issue her final decision, and because the May 12, 2023 letter and order to the Department accomplished just that, there was "no longer any questions pertaining to the timing of her decision that

require[d] resolution." (Aa4-5). Therefore, the Commissioner denied and dismissed appellants' application as moot. (Aa5).

Appellants' present motion for leave to file an interlocutory appeal followed. On May 19, 2023, their simultaneous application for emergent relief from this court was denied.

ARGUMENT

POINT ONE

APPELLANTS' MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THE INTERESTS OF JUSTICE WILL NOT BE SERVED BY PIECEMEAL REVIEW OF THE COMMISSIONER'S DECISION.

It is important to understand what exactly appellants seek to appeal, and what they do not. Appellants request interlocutory review only of the Commissioner's order denying their motion for emergent relief, which sought "an expedited schedule" for the Commissioner to issue a final decision on appellants' as-applied challenge. (Aa145). In denying appellants' motion, the Commissioner reasoned that the motion was moot because there was no actual, tangible issue left to be resolved, since her May 12, 2023 letter setting forth the procedure for a comprehensive review rendered the motion superfluous.

Despite seeking to appeal just the order denying their motion for emergent relief, appellants ignore the basis for the Commissioner's determination.

Instead, they attempt to collaterally attack the Commissioner's May 12, 2023 letter and announcement of the expedited schedule to issue her final decision. In doing so, appellants not only raise issues outside the scope of their intended appeal, they seek a rushed decision based on an outdated record on their as-applied challenge. But the comprehensive review is just what is necessary for the Commissioner to issue a meaningful decision. Appellants may disagree with the Commissioner's approach, but ultimately their application fails to set forth a grave damage or injustice warranting interlocutory review.

Interlocutory review is granted only in "exceptional cases" where it is required in the interest of justice. Grow Co. v. Chokshi, 403 N.J. Super. 443, 458 (App. Div. 2008); R. 2:2-4. The power to grant interlocutory review is "highly discretionary" and "exercised only sparingly," State v. Reldan, 100 N.J. 187, 205 (1988), in recognition of the strong public interest against piecemeal review of proceedings, Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008). Given the strong policy against piecemeal review, interlocutory review is permitted only where "some grave damage or injustice" may be caused by the order below. Id. at 599. Importantly, "the moving party must establish, at a minimum, that the desired appeal has merit and that justice calls for [an appellate court's] interference in the cause." Ibid. (citations omitted).

Because appellants cannot shoulder their burden to show either that the

interests of justice call for piecemeal review or that the Commissioner's decision is not in accord with the law, the motion for leave to appeal should be denied.

A. Appellants' Request for Emergent Relief Was Properly Denied as Moot.

Appellants argue that interlocutory review is necessary because the Commissioner "misapplied" the Crowe standards in denying their application for emergent relief. (Ab12-16). Appellants misunderstand and misstate the Commissioner's decision.

First, the Commissioner's decision to deny appellants' application as moot was correct. Mootness is a threshold justiciability determination. Jackson v. Dep't of Corr., 335 N.J. Super. 227, 231 (App. Div. 2000). Courts have long established that "[a]n issue is 'moot' when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006) (quoting N.Y. Susquehanna & W. Ry. Corp. v. State Dep't of Treasury, Div. of Taxation, 6 N.J. Tax 575, 582 (Tax Ct. 1984), aff'd, 204 N.J. Super. 630 (App. Div. 1985)). Moreover, courts do not decide cases presenting only hypothetical issues; there must be an actual dispute with tangible consequences. Cinque v. N.J. Dep't of Corr., 261 N.J. Super. 242, 243 (App. Div. 1993).

Here, appellants' motion for emergency relief sought "an expedited schedule for [the Commissioner's] issuance of a final decision on the March 6, 2023[] remand" from the Appellate Division. (Aa145). But as described above, the Commissioner's May 12, 2023 letter — issued separately from her decision denying the emergent motion — advised that in order for her to issue a final agency decision on the issue remanded by the court, she needs current and comprehensive information regarding the reasons the district is unable to provide T&E. (Aa7). And, understanding the urgency of the issue, she directed that the review be expedited. Ibid. While the Commissioner did not impose an express timeline for the review – which could potentially limit its depth and scope – she did outline parameters. Ibid. Specifically, the Commissioner called for the Department to first engage experts to "examine Lakewood's operations and performance," and for the Department to examine the "particular areas of concern raised by [appellants.]" Ibid. Recognizing appellants' interests in the outcome of the review, the Commissioner announced that they, along with the district, would have an opportunity to "respond to the resulting report and recommendations[.]" Ibid. After receiving all reports and responses, the Commissioner will then issue a final agency decision on the as-applied constitutionality of the SFRA. Ibid.

Because the Commissioner's May 12, 2023, letter announced her plan for

complying with the court's remand directive, she appropriately denied the application for emergent relief as moot. Appellants do not contest this point. Instead, appellants argue that the Commissioner "misapplied" the Crowe factors. (Ab12-16). But appellants' fail to point to any decision or discussion by the Commissioner concerning the Crowe standards; and for good reason — the Commissioner did not address the interim relief standards because she denied the application on other grounds, as outlined above. (Aa3-5). Rather, appellants exclusively object to the arguments contained in the Department's opposition to their motion for emergent relief. (Ab12-16). But the Department's opposition cannot be imputed to the Commissioner. And, importantly, appellants can only appeal orders of the Commissioner, R. 2:2-4, not arguments presented in an opposition brief.

For these reasons, the Commissioner's decision denying appellants' motion as moot was correct. Appellants' mere dissatisfaction with the specifics of the Commissioner's timetable is not a genuine dispute, nor is it a basis for interlocutory review and, as such, must be rejected. See id.

B. Appellants' Remaining Claims Lack Merit and Interlocutory Review is Not in the Interest of Justice.

Appellants focus their arguments on the Commissioner's May 12, 2023 letter expediting the comprehensive review and setting a schedule for issuing a

final decision. Specifically, they claim that the expedited, comprehensive review is redundant and unnecessary. (Ab16-19). Not only do appellants raise issues that are outside the scope of their intended appeal of the Commissioner's order denying their motion for emergent relief, they also ignore both the authority and the responsibility the Commissioner has to order the review. Because the Commissioner's May 12, 2023 letter is not part of this appeal, and because her expedited review does not contravene this court's instructions on remand in any way, appellants' motion should be denied.

First and foremost, appellants raise a number of arguments that are outside the scope of their intended appeal. As set forth more fully above, appellants' seek to appeal only the Commissioner's order denying their motion for emergent relief, which sought an "an expedited schedule" for the Commissioner to issue a final decision on appellants' as-applied challenge, on the basis that appellants' request was mooted by her May 12, 2023 letter. (Aa3-5, 145). But at no point do appellants attempt to explain how the Commissioner's decision was incorrect. Instead, appellants use this appeal to lodge a collateral attack on the Commissioner's May 12, 2023 letter and expediting of the comprehensive review. Because appellants seek to challenge issues that are not part of what they seek to appeal, their claims must be rejected.

To the extent the court entertains appellants' arguments concerning the

Commissioner's May 12, 2023 letter, appellants ignore the Commissioner's well-settled authority to conduct comprehensive reviews of districts. The Commissioner, as chief executive of the Department, is charged with the "supervision of all schools of the state" and is required to "inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the State[.]" N.J.S.A. 18A:4-23, -24. In discharging this responsibility, the Commissioner is authorized to conduct comprehensive reviews of districts to ensure that they are providing T&E to all students, and, where it is found that a district is not providing T&E, to ascertain the root cause of this deprivation. See N.J.S.A. 18A:7A-10, -11, -14; N.J.A.C. 6A:30-5.6.

Here, this court found that Lakewood's public school students were not receiving T&E and remanded the matter to the Commissioner to consider appellants' as-applied challenge to the SFRA. (Aa22). Because the court found that Lakewood's students were not receiving T&E, it is imperative that the Commissioner be able to invoke her statutorily prescribed supervisory authority to conduct a comprehensive review of the district in order to determine the source of this failure and take steps to rectify the situation. This is especially true here, where Lakewood's unique demographics and challenges are central to the as-applied challenge.

As the record reflects, Lakewood is an outlier in this State in terms of its demographic trends and public school enrollment. By 2019, for example, only 16% of Lakewood's student population attended public schools, while 84% attended other non-public schools. (Aa87). Lakewood contends that due to these trends, it has been forced to bear significant financial burden in providing transportation and special education services for its large private school student population. (Ab5). Thus, the Commissioner's comprehensive review will necessarily require an examination of the nature and extent to which the district's obligations to its non-public school students affect its operations and, importantly, whether the SFRA is a cause of its financial hardship and failure to provide T&E or whether it is due to other factors such as mismanagement or the district's statutory obligations to non-public students.

Furthermore, as appellants would have the Commissioner simply issue a decision on their as-applied challenge based on an outdated record, they not only seek to substitute their judgment for that of the Commissioner, but also ignore the fact that such a determination cannot be made without a complete record. In fact, the need to develop a current record in matters involving school funding, to allow the Commissioner to render a fully informed decision on the as-applied challenge, is one of responsibility for the Commissioner. As our Supreme Court has recognized, "[w]hether a statute passes a constitutional challenge 'as-

applied' to any individual school district at any particular time must be determined only in the factual context presented and in the light of circumstances as they appear." Abbott XX, 199 N.J. at 235 (citing Robinson v. Cahill, 69 N.J. 449, 455 (1976)). This rings especially true with respect to the SFRA because a "state funding formula's constitutionality is not an occurrence at a moment in time; it is a continuing obligation." Id. at 146 (emphasis added). This is because "the sufficiency of education is a growing and evolving concept" such that "what seems sufficient today may be proved inadequate tomorrow." Abbott v. Burke (Abbott I), 100 N.J. 269, 290-91 (1985) (quoting Robinson, 69 N.J. at 457-58). Without a comprehensive review, the Commissioner cannot meaningfully render a decision on appellants' as-applied SFRA challenge.

Importantly, the Commissioner's comprehensive review is in no way foreclosed by this court's remand order. Rather, by remanding to the Commissioner without retaining jurisdiction or setting parameters, the court entrusted the matter to the Commissioner's expertise in reviewing and rendering a decision on the as-applied challenge. (Aa22); cf. Bd. of Educ. of Twp. of Neptune v. Neptune Twp. Educ. Ass'n., 293 N.J. Super. 1, 11 (App. Div. 1996) ("where the broader subject matter of a case is within the purview of an administrative agency's authority, it is valuable to have the insights and policy reflections of that agency, even if the only issue to be decided is one of

constitutional dimension"). And the Commissioner's exercise of her authority is entirely appropriate and within reason. (Aa134).

Moreover, despite appellants' protestations to the contrary, the Commissioner is acutely aware of, and sensitive to, the urgency called for by this matter. That is precisely why the Commissioner ordered an expedited review. But, having said that, the Commissioner must also ensure that her decision is correct. To do so, she must be able to conduct a thorough, meaningful review of the record. The data and information in the record is, at best, five years old. (Aa7). Because of the nature of the questions involved, a comprehensive review to ensure an up-to-date and accurate record is not only imperative, but mandated. See Abbott XX, 199 N.J. at 146, 235.

Finally, the Commissioner has taken steps to assist Lakewood in the interim to address the district's immediate concerns by approving loans against State aid and is "exploring what [other] assistance, relief, or aid may be available to more immediately" address Lakewood's fiscal situation. (Aa7).

Thus, the Commissioner's decision to order an expedited review is not inconsistent with the remand order; rather, it is a necessary step in discharging her statutory and constitutional duty. And given the significant level of additional aid provided to Lakewood, the interests of justice do not call for interlocutory review in this case. As such, interlocutory review must be denied

as the interests of justice do not support piecemeal review in this case, and no grave injustice will befall appellants.

POINT TWO

APPELLANTS' REQUEST FOR THIS COURT TO ASSUME ORIGINAL JURISDICTION SHOULD BE DENIED.

Despite recognizing that this matter is properly before the Commissioner for issuance of a final agency decision, especially in light of the remand order, appellants ask this court to assert original jurisdiction under Rule 2:10-5 in order to avoid a "time-consuming" comprehensive review and because of the "uncertainties attendant to how the Acting Commissioner will respond to this Court's remand[.]" (Ab18-19). This request must be rejected.

Rule 2:10-5 states that this court "may exercise such original jurisdiction as is necessary to complete determination of any matter on review." But "it is clear that resort thereto by the appellate court is ordinarily inappropriate when fact-finding or further fact-finding is necessary in order to resolve the matter." Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 2:10-5 (2023) (citing Price v. Himeji, LLC, 214 N.J. 263, 294-95 (2013) (exercise of original jurisdiction discouraged when fact-finding required).

Here, for all of the reasons set forth in Point I above, the Commissioner's final determination as to the constitutionality of the SFRA as applied to

Lakewood requires further factual development and a determination about whether Lakewood's educational deficiencies are a result of the application of the SFRA or other forces. Importantly, because appellants bring an as-applied challenge to the constitutionality of the SFRA, the Commissioner must first be afforded an opportunity to develop the record and render a decision on an issue within her expertise. See Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 588 (2001); Neptune Twp. Educ. Ass'n, 293 N.J. Super. at 11. Only after completing this process would appellants be entitled to seek judicial review under Rule 2:2-3(a)(2). As set forth more fully above, a comprehensive, expedited procedure is in place for the Commissioner to review the record and issue a determination. (Aa4, Aa6-7). Thus, the need for fact-finding militates against this court assuming original jurisdiction.

Appellants have also failed to demonstrate that exigent circumstances exist to justify the assertion of original jurisdiction. See Pressler & Verniero, cmt. on R. 2:10-5 (citing Karins v. Atl. City, 152 N.J. 532, 541 (1998)). The only rationale appellants offer for this drastic request is that, in their opinion, the Commissioner's review is "ultimately unnecessary," time consuming, and there are "uncertainties" concerning how the Commissioner will respond to the remand order. (Ab19). But none of these are valid bases to invoke original jurisdiction on the grounds of exigency. Worse still, they ignore reality: the

Commissioner's response to the remand order is known, as she has ordered an expedited comprehensive review and provided a schedule for the steps to be taken. (Aa7). Whether or not appellants find the review necessary is irrelevant because this court, in remanding the matter, did not foreclose the Commissioner's authority to conduct a review, deferring to her expertise in the matter.

Lastly, appellant's claim that the court should invoke original jurisdiction because the Commissioner's decision is "advisory only" is meritless. To be sure, while courts are not ordinarily bound by an agency's determination of a strictly legal issue, Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973), courts do "afford substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing[,]" Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 420 (2009). And where, as here, the "resolution of a legal question turns on factual issues within the special province of an administrative agency, those mixed questions of law and fact are to be resolved based on the agency's fact finding." Campbell, 169 N.J. at 588. That process should be allowed to play out here. There is nothing in the record to suggest that the expedited review will not proceed in accordance with the Commissioner's instructions.

For these reasons, appellants' request that this court invoke original jurisdiction should be denied.

CONCLUSION

For these reasons, appellants' motion for leave to appeal should be denied.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/Ryan J. Silver
Ryan J. Silver
Deputy Attorney General

Date: May 30, 2023

Exhibit 12

FILED, Clerk of the Appellate Division, June 02, 2023, **AM-000482-22**, **M-005033-22 REJECTED**

PAUL L. TRACTENBERG
ATTORNEY-AT-LAW & LEGAL CONSULTANT
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973 – 879-9201
PAULLTRACTENBERG@GMAIL.COM

June 2, 2023

VIA E-COURTS
Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
P.O. Box 006
Hughes Justice Complex
Trenton, New Jersey 08625

RE: Alcantara, et al., v. Hespe, et al., Docket No. AM-000482-22; M-005033-22; Agency Ref. No. 156-6/14; Previous Appellate Dkt. No. A-003693-20T2

Dear Mr. Orlando:

Please accept this letter brief in lieu of a formal reply brief in support of the Petitioners-Appellants' Motion for Leave to File an Interlocutory Appeal of a May 12, 2023, decision by the Acting Commissioner of Education denying their motion for emergency relief in the above-captioned case.

At the outset, we should advise this Court that we are going to these procedural lengths because we feel so strongly, as we have proclaimed throughout this already nine-year-long litigation, that time is of the essence for our clients. The public school students of Lakewood need urgent action to vindicate their long-denied fundamental constitutional rights to a "thorough and efficient" education (T&E). They should not be made to wait for relief in the "ordinary course."

Nonetheless, we are mindful of the time pressures on this Court and, therefore, this letter

in lieu of reply brief will set forth concisely the five points on which this Court should focus.

First, the State has expressed concern that the Appellants' attempt to have this Court consider an interlocutory appeal of the Acting Commissioner's denial of emergency relief will lead to "piecemeal review" of the Acting Commissioner's action on the remand. (Rb at 10-12).[1] That concern is totally misplaced. What Appellants seek is merely an action preliminary to the Acting Commissioner responding to the remand—namely the establishment of a specific schedule or timeline for the Acting Commissioner's response to ensure that it meets her oft-stated desire to proceed expeditiously to a final decision on remand. To state the obvious, deferring consideration of whether an expedited schedule should be put in place until **after** the Acting Commissioner has issued her final decision makes no sense and serves no purpose at all.

Second, this Court should entertain the Appellants' appeal challenging the Acting Commissioner's interlocutory denial of their Motion for Emergency Relief because the denial was wrongly decided on the grounds of mootness. The basis of the mootness assertion was that the Appellants' motion sought an expedited schedule and that the Acting Commissioner's May 12, 2023, letter to co-counsel for the Appellants and her order to the Department "accomplished just that." (Rb at 9).

We beg to differ—nowhere in that letter, or in the Acting Commissioner's Order on Emergent Relief of the same date, is a schedule or timeline provided notwithstanding the assertion in the order that "With the Commissioner's determination of a schedule for the proceedings in this matter, as outlined in the May 12 2023, letter, there is no longer any question pertaining to the timing of her decision that requires resolution." (Aa at 4a-5a).

The Respondent's brief to this Court in opposition to Appellants' Motion for Leave to File

[1] "Rb" refers to Respondents' May 30, 2023, brief to this Court; "Ab" refers to Appellants' May 18, 2023, letter brief to this Court; and "Aa" refers to the Appellants' appendix submitted to this Court on May 18, 2023.

an Interlocutory Appeal seeks to obscure the Acting Commissioner's failure actually to establish an expedited, or any other, schedule for her action and final decision on remand by repeatedly invoking the phrase "expedited schedule" as if one had been established. At one point, however, in a moment of candor and accuracy, the brief states "While the Commissioner **did not impose an express timeline for the review**[2]—which could potentially limit its depth and scope—she did outline parameters." (Rb at 15) (Emphasis added.).

The "parameters," as immediately described in the Respondent's brief, are: (1) engagement of "experts;" (2) the opportunity for the Appellants and the Lakewood school district to "respond to the resulting report and recommendations (indicating that the production of a report and recommendations are other "parameters"); and (3) "[a]fter receiving **all reports** and responses, the Commissioner will then issue a final agency decision on the as-applied constitutionality of the SFRA."(Rb at 13) (Emphasis added.).

Neither the Acting Commissioner's order or letter, nor the Respondents' brief, explain how the listing of those "parameters" eliminates "any question pertaining to the **timing** of her decision." (Aa at 5a) (Emphasis added.).

Third, instead of basing her order on this distorted and inaccurate application of the mootness doctrine, the Acting Commissioner should have applied the *Crowe* standards as the governing regulation regarding applications for emergency relief requires (N.J.A.C. 6A:4-4.1). Appellants' letter briefs to the Acting Commissioner and to this Court spell out how the *Crowe* standards should be applied to their motion for emergency relief, and the Respondents' brief to the

[2] The common English language understanding of a "schedule" is that it connotes a "timetable," or a list "of intended events **and times**" (not just a list of intended events, such as the Acting Commissioner's "parameters"). Oxford Languages, https://google.com/search?q=schedule+meaning&ie=UTF-8&oe=UTF-8&hi=en-us&client=safari. (Emphasis added.) *See also* the following definitions of "schedule:" Dictionary.com, *id.* ("a plan of procedure, usually written, for a proposed objective, especially with reference to the sequence of and **time allotted for each item or operation**." (Emphasis added.); Merriam-Webster, *id*. ("a procedural plan that indicates **time** and sequence of each operation" (Emphasis added.); Britannica, *id*. ("a plan of things that will be done and **the times when they will be done**") (Emphasis added.).

Acting Commissioner presents an opposing view. The Acting Commissioner chose not to address those standards at all because of her faulty embrace of the mootness doctrine. Should this Court decide to grant Appellants leave to file an interlocutory appeal to the Acting Commissioner's Order on Emergent Relief, the briefs already submitted should be sufficient to inform this Court's decision on the appeal.

Fourth, absent any "express timeline" or "schedule" for the Acting Commissioner's proposed review, including her stated "parameters," and her final decision, the parties—and this Court—are left in limbo without any realistic expectation of a prompt, let alone "expedited," final decision as to this Court's remand order.

Given the nine-year history of this litigation, and the more recent history of the Acting Commissioner's orders to the Department regarding a "comprehensive review" of the Lakewood school district, the urgency of an "express timeline" or "expedited schedule" looms very large. After all, it has been more than 22 months since the Acting Commissioner ordered the Department to conduct a comprehensive review of the Lakewood school district on July 16, 2021,[3] more than three months since this Court's remand on March 6, 2023, and three weeks since the Acting Commissioner ordered the Department to expedite its 2021 review on May 12, 2023.

Yet, there is no evidence that either of the Acting Commissioner's orders to the Department, or this Court's remand, have led to any action by the Department. That suggests, inexplicably, that remedying the denial of a T&E education to Lakewood's public school students, found initially by ALJ Scarola on March 1, 2021, and by this Court, more than two years later, on March 6, 2023, is not a very high priority for the Acting Commissioner or the Department of

[3] 1 "[T]he Department is directed to conduct a comprehensive review of the District's organization, structure and policies to assess its compliance with the quality performance indicators in accordance with N.J.A.C. 18A:7A-11 to determine how the District can improve its educational program." (Aa141).

Education.

Fifth, this Court should do several things on an expedited basis: (i) grant the Appellants' Motion for Leave to File an Interlocutory Appeal; and (ii) in response to that appeal, order the Acting Commissioner to immediately issue an express timeline or schedule for the remand process, including the date by which her final decision will be presented.

CONCLUSION

The public school students of the Lakewood school district have been treated as disposable and dispensable for far too long. The State and this Court owe it to them to fully remedy, as expeditiously as possible, the denial to them of a fundamental constitutional right. The New Jersey Constitution, 50 years of state supreme court jurisprudence, common decency, and enlightened self-interest demand nothing less.

Respectfully submitted,

Paul L. Tractenberg

cc (by electronic mail): Arthur H. Lang, Esq.
Matthew J. Platkin, Attorney General
Donna Arons, Assistant Attorney General
Matthew J. Lynch, Deputy Attorney General
Carolyn G. Labin, Deputy Attorney General
Ryan J. Silver, Deputy Attorney General

Exhibit 13

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: AM-000482-22T1
MOTION NO.: M-005033-22
BEFORE: PART A
JUDGE(S): MARY GIBBONS WHIPPLE
MORRIS G. SMITH

LEONOR ALCANTARA
V.
ANGELICA ALLEN MC-MILLAN

MOTION FILED: 05/18/2023 BY: LEONOR ALCATARA
ANSWER(S) FILED: 05/30/2023 BY: EDUCATION

SUBMITTED TO COURT: June 08, 2023

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 9th day of June, 2023, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT

MOTION FOR LEAVE TO APPEAL DENIED

FOR THE COURT:

Mary Gibbons Whipple

MARY GIBBONS WHIPPLE, J.A.D.

156- 6/14
STATEWIDE
KLK

Exhibit 14

PAUL L. TRACTENBERG

ATTORNEY-AT-LAW & LEGAL CONSULTANT
123 WASHINGTON STREET
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973 – 879-9201
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June 13, 2023

Dr. Angelica Allen-McMillan
Acting Commissioner of Education
New Jersey Department of Education
Judge Robert L. Carter Building
100 River View Plaza
Trenton, NJ 08625-0500

RE: Alcantara, et al., v. Hespe, et al., Dkt. No. A-003693-20T2, OAL Dkt. No. 11069-14, Agency Dkt. No. 156-6/14

Dear Acting Commissioner Allen-McMillan:

As you should know, on June 8, 2023, the Appellate Division denied the Appellants' Motion for Leave to Appeal your interlocutory decision denying our motion for emergency relief. So, for the moment, our sole focus is again on the remand process assigned to you by the court on March 6, 2023.

In that connection, I want to call to your attention, a May 24, 2023, letter I sent you about the remand process to which I never received a reply. Attached is a copy of that letter.

I am writing now to renew the request for an expedited remand process, which your regulations, the urgency of remedying the adjudicated denial of T&E to the disadvantaged public school students of the Lakewood school district, and your constitutional and statutory obligations all support.

I will not repeat the reasoning articulated in my May 24 letter, but I will reiterate, yet again, the reason that time is of the essence for Lakewood public school students. As Justice Albin so aptly described it in *Abbott XX*I:

> Children go to school for a finite number of years. They have but one chance to receive a constitutionally adequate education. That right, once lost, cannot be reclaimed. The loss of that right will have irreparable consequences, particularly for the disadvantaged children to whom SFRA was intended to give a fair chance at a thorough and efficient education. Abbott v. Burke, 206 N.J. 332, 478 (2011) (concurring op.).

Those children deserve the support and collaborative efforts of everyone charged with ensuring that their fundamental constitutional rights are afforded, or that the denial of those rights is fully and expeditiously remedied. And that applies whether the responsible parties are their lawyers or the State's chief education officer.

Therefore, we ask you to join us in moving this matter along speedily to a conclusion, which will fully satisfy the State's constitutional obligation to Lakewood's disadvantaged public school students. To that end, my co-counsel Arthur Lang and I will be reaching out to your lawyers to schedule a conference call as soon as possible to confer about the focus and timetable for your response to the court's remand. I hope that you will honor your commitment to the Lakewood public school students by supporting that effort.

Sincerely yours,

Paul L. Tractenberg

cc (by electronic mail): Arthur H. Lang, Esq.
Matthew J. Platkin, Attorney General
Melissa H. Raksa, Assistant Attorney General
Christopher W. Weber, Deputy Attorney General
Matthew J. Lynch, Deputy Attorney General
Carolyn G. Labin, Deputy Attorney General
Ryan J. Silver, Deputy Attorney General

Exhibit 15

Gmail **Arthur Lang <lakewoodlaw@gmail.com>**

RE: [EXTERNAL] Conference

1 message

Christopher Weber <Christopher.Weber@law.njoag.gov> Wed, Jun 14, 2023 at 12:21 PM
To: Arthur Lang <lakewoodlaw@gmail.com>
Cc: Paulltractenberg <Paulltractenberg@gmail.com>, Matthew Lynch <Matthew.Lynch@law.njoag.gov>

Mr. Lang,

Matt and I are free this afternoon between 3 and 5. Thanks.

-Chris

From: Arthur Lang <lakewoodlaw@gmail.com>
Sent: Tuesday, June 13, 2023 1:35 PM
To: Christopher Weber <Christopher.Weber@law.njoag.gov>
Cc: Paulltractenberg <Paulltractenberg@gmail.com>; Matthew Lynch <Matthew.Lynch@law.njoag.gov>
Subject: Re: [EXTERNAL] Conference

Chris,

I teach in Lakewood High School until 1:30. I am available after that on Wednesday. Since we have finals on Thursday, I can be available at 11:30. Prof. T. also is available also on Wednesday and Thursday. What time would be convenient for Mr. Lynch and you?

Arthur

On Tue, Jun 13, 2023 at 12:58 PM Christopher Weber <Christopher.Weber@law.njoag.gov> wrote:

> Good afternoon -- Matt and I are both out of the office today.
>
> -Chris
>
> ---
>
> **From:** Arthur Lang <lakewoodlaw@gmail.com>
> **Sent:** Tuesday, June 13, 2023 12:32:48 PM
> **To:** Christopher Weber <Christopher.Weber@law.njoag.gov>
> **Cc:** Matthew Lynch <Matthew.Lynch@law.njoag.gov>; Paulltractenberg <paulltractenberg@gmail.com>
> **Subject:** [EXTERNAL] Conference

> Mr. Weber,
>
> Can we set up a conference call between counsel for the parties this afternoon between 3:00 pm and 4:00 pm?
>
> Arthur Lang
>
> CONFIDENTIALITY NOTICE The information contained in this communication from the Office of the New Jersey Attorney General is privileged and confidential and is intended for the sole use of the persons or entities who are the addressees. If you are not an intended recipient of this e-mail, the dissemination, distribution, copying or use of the information it contains is strictly prohibited. If you have received this communication in error, please immediately contact the Office of the Attorney General at (609) 292-4925 to arrange for the return of this information.

CONFIDENTIALITY NOTICE The information contained in this communication from the Office of the New Jersey Attorney General is privileged and confidential and is intended for the sole use of the persons or entities who are the addressees. If you are not an intended recipient of this e-mail, the dissemination, distribution, copying or use of the information it contains is strictly prohibited. If you have received this communication in error, please immediately contact the Office of the Attorney General at (609) 292-4925 to arrange for the return of this information.

Exhibit 16

Gmail **Arthur Lang <lakewoodlaw@gmail.com>**

Memorandum memorializing yesterday's conference call

1 message

Paul Tractenberg <paulltractenberg@gmail.com> Thu, Jun 15, 2023 at 5:29 PM
To: Christopher.Weber@law.njoag.gov, Matthew.Lynch@law.njoag.gov
Cc: Arthur Lang <lakewoodlaw@gmail.com>

Hi Chris and Matt,

Here's a self-explanatory memorandum. We look forward to another conference call on June 28 at 11 am or to an earlier communication from you about developments in the remand process or timetable.

Paul

Memo to State's lawyers in Alcantara memorializing our conference call on 061423.docx
18K

June 15, 2023

MEMORANDUM

TO: Christopher Weber, DAG
Matthew Lynch, DAG

FROM: Paul Tractenberg, Esq., Co-Counsel for Appellants
Arthur Lang, Esq., Co-Counsel for Appellants

RE: Memorializing a Conference Call on June 14, 2015, to Discuss the Remand of *Alcantara, et al., v. Hespe, et al.* to the Acting Commissioner of Education

This memorandum memorializes our conference call yesterday. As co-counsel for the Appellants, we initiated the call to discuss and seek to reach agreement about the content and timing of the Acting Commissioner's response to the Appellate Division's remand to her on March 6, 2023.

We succeeded in reaching agreement on a number of major points:

1. Time is of the essence for actually achieving a thorough and efficient (T&E) education for Lakewood's public school students;

2. The Acting Commissioner is on the record as supporting an expedited remand process;

3. The remand is limited to the issue of the School Funding Reform Act's (SFRA) constitutionality as applied to the Lakewood school district (LSD);

4. No evidentiary process or hearing (regarding either SFRA or T&E) is contemplated as part of the remand;

5. If the remand process includes any sort of "comprehensive review," it should be narrowly focused on the remand question—SFRA's constitutionality as applied to LSD, and not be more broadly focused as was the comprehensive review ordered by the Acting Commissioner in her final decision on July 16, 2021, long before the court found a denial of T&E and remanded the case solely for consideration of the SFRA question; and

6. You agreed to inform yourselves more fully regarding a May 4, 2023, decision of an Appellate Division panel (with two of the same judges who sat on the panel that ruled in our case on March 6, 2023) in the case of *In the Matter of the Cannabis Regulatory Commission's Disqualification of* [a number of applicants for license] and, particularly regarding language we quoted from that decision, including the following: "Where a remand has been ordered, a trial court or agency 'is under a peremptory duty to obey in the particular case the mandate of the appellate court exactly as it is written'" (p. 29).

We discussed, but did not reach agreement on, a number of other points relating to the remand. For the most part, these involved the absence of a timetable for the remand and for the Acting Commissioner's issuance of her final decision. We think it is fair to say that, as lawyers for the Acting Commissioner, you resisted our repeated attempts to elicit any sort of express timetable or even an estimate of when the remand process would begin in earnest, let alone when it would be concluded with the Acting Commissioner's final decision. Among the relevant points we discussed in that regard, were the following:

1. As to the focus of the remand process, you indicated that you would have to refer back to the Appellate Division's opinion to see whether we had accurately described the court's final paragraph regarding its instructions to the agency for the remand (in the court's words, "to consider the substantive arguments pertaining to the SFRA in light of our Supreme Court's directive in *Abbott* **[that] the State has a continuing obligation to 'keep SFRA operating at its optimal level'"**);

2. As to the timing of the remand process, although you indicated that some activities may be under way in the Department of Education (DOE) regarding that process, you acknowledged the following:

    a. The process will not be formally launched until a letter is issued for public dissemination and you anticipate that will be "in the not-too-distant future;"

    b. As far as you are aware, no one in the DOE has been assigned responsibility for any aspect of the remand process and there has been no outreach to the LSD; and

    c. You would have to check whether our report of the Acting Commissioner's videotaped testimony to the Senate Budget and Appropriations Committee at its April 18, 2023, hearing, almost a month and a half after the Appellate Division's remand of our case to her, was accurate (namely, that she testified she did not know the specifics of the remand or even who was representing her in the case and would have to "circle back" to the committee with that information).

At the conclusion of our conference call, we pressed you to get back to us as soon as possible on the timing issues we had raised —consistent with your agreement that time was of the essence and that the Acting Commissioner was committed to an expedited process. We proposed a few days at most, but you insisted on two weeks. Consequently, we scheduled a follow-up conference call on Wednesday, June 28 at 11 am. Our last request was that if you learn anything sooner, you communicate that to us immediately.

Of course, we stand ready to do anything at our end to facilitate the Acting Commissioner's expeditious action on the remand.

Exhibit 17

Gmail **Arthur Lang <lakewoodlaw@gmail.com>**

RE: [EXTERNAL] Memorandum memorializing yesterday's conference call

1 message

Christopher Weber <Christopher.Weber@law.njoag.gov> Tue, Jun 27, 2023 at 4:59 PM
To: Paul Tractenberg <paulltractenberg@gmail.com>, Matthew Lynch <Matthew.Lynch@law.njoag.gov>
Cc: Arthur Lang <lakewoodlaw@gmail.com>

Good afternoon,

Please see the attached correspondence in response to your memorandum. Because we do not have additional information to provide at this time, we believe tomorrow's telephone call is unnecessary and can be cancelled. Thank you.

Respectfully,

Christopher Weber, Deputy Attorney General

Section Chief – Education and Higher Education Section

Department of Law and Public Safety | Division of Law

Richard J. Hughes Justice Complex

25 Market Street, P.O. Box 112

Trenton, New Jersey 08625-0112

Phone: (609) 376-3100

Fax: (609) 943-5853

Christopher.Weber@law.njoag.gov

From: Paul Tractenberg <paulltractenberg@gmail.com>
Sent: Thursday, June 15, 2023 5:29 PM
To: Christopher Weber <Christopher.Weber@law.njoag.gov>; Matthew Lynch <Matthew.Lynch@law.njoag.gov>
Cc: Arthur Lang <lakewoodlaw@gmail.com>
Subject: [EXTERNAL] Memorandum memorializing yesterday's conference call

Hi Chris and Matt,

Here's a self-explanatory memorandum. We look forward to another conference call on June 28 at 11 am or to an earlier communication from you about developments in the remand process or timetable.

Paul

CONFIDENTIALITY NOTICE The information contained in this communication from the Office of the New Jersey Attorney General is privileged and confidential and is intended for the sole use of the persons or entities who are the addressees. If you are not an intended recipient of this e-mail, the dissemination, distribution, copying or use of the information it contains is strictly prohibited. If you have received this communication in error, please immediately contact the Office of the Attorney General at (609) 292-4925 to arrange for the return of this information.

Alcantara v. Allen-McMillan -- 6.27.23 Letter.pdf
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Governor

SHEILA Y. OLIVER
Lt. Governor

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MATTHEW J. PLATKIN
Attorney General

MICHAEL T.G. LONG
Director

June 27, 2023

VIA E-MAIL
Paul L. Tractenberg, Esq.
123 Washington Street
Newark, New Jersey 07102
paulltractenberg@gmail.com

Arthur H. Lang, Esq.
918 East Kennedy Boulevard
Lakewood, New Jersey 08701
lakewoodlaw@gmail.com

Re: Alcantara v. Allen-McMillan

Dear Counsel:

We write in response to your June 15, 2023 memorandum regarding our telephone conversation on June 14, 2023. We do not agree with your characterization of the conversation as set forth in your memorandum, and would object to the inclusion of that memorandum in any further proceedings.

It should be clear through the Commissioner's July 16, 2021 final agency decision and her various submissions during the proceedings before the Appellate Division that she is, and always has been, acutely aware that all of New Jersey's public school students, including the Lakewood School District's, are entitled to a thorough and efficient education. That you disagree with her approach to addressing the issues identified in Lakewood during the Alcantara proceedings is your prerogative, as it was your right to continue raising objections to the comprehensive review and otherwise seek interlocutory relief from the Appellate Division. However, we direct your attention to the Appellate Division's June 8, 2023 order, which was issued by two of the same judges who sat

on the panel that decided Alcantara v. Allen-McMillan, 475 N.J. Super. 58 (App. Div. 2023), denying your request for interlocutory review. We believe the order speaks for itself.

Simply stated, there is nothing in the court's recent order, or in its March 6, 2023 decision, stating that the Commissioner cannot or should not engage in the comprehensive review as part of the remand to consider the constitutionality of the SFRA as applied to the Lakewood District. As to the scope of the remand and the timeline for the expedited review, we likewise believe that the Commissioner's May 12, 2023 letter announcing the comprehensive review speaks for itself.

Finally, please be advised that the undersigned and Deputy Attorneys General Matthew Lynch and Ryan Silver represent the Commissioner with respect to any proceedings before the Appellate Division. We do not represent any party in the administrative proceedings before the Commissioner. As counsel for the Commissioner in the appellate proceedings, we agreed to informally speak with you as a professional courtesy. We therefore see no need to substantively respond to any of your memorandum's enumerated points.

Sincerely yours,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/Christopher Weber
Christopher Weber
Deputy Attorney General

Exhibit 18

Gmail **Arthur Lang <lakewoodlaw@gmail.com>**

Re: [EXTERNAL] Memorandum memorializing yesterday's conference call

1 message

Paul Tractenberg <paulltractenberg@gmail.com> Thu, Jun 29, 2023 at 8:54 PM
To: Christopher Weber <Christopher.Weber@law.njoag.gov>
Cc: Arthur Lang <lakewoodlaw@gmail.com>, Matthew Lynch <Matthew.Lynch@law.njoag.gov>, ryan.silver@law.njoag.gov, Matthew.Platkin@law.njoag.gov, Melissa.Raksa@law.njoag.gov, Donna Arons <Donna.Arons@law.njoag.gov>, Carolyn.Labin@law.njoag.gov, controversiesdisputesfilings@doe.nj.gov

Dear Mr. Weber,

Attached is a self-explanatory letter dated today replying to your June 27, 2023, letter to my co-counsel Arthur Lang and me.

Paul Tractenberg

On Tue, Jun 27, 2023 at 4:59 PM Christopher Weber <Christopher.Weber@law.njoag.gov> wrote:

> Good afternoon,
>
> Please see the attached correspondence in response to your memorandum. Because we do not have additional information to provide at this time, we believe tomorrow's telephone call is unnecessary and can be cancelled. Thank you.
>
> Respectfully,
>
> Christopher Weber, Deputy Attorney General
>
> Section Chief – Education and Higher Education Section
>
> Department of Law and Public Safety | Division of Law
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> Fax: (609) 943-5853
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> Christopher.Weber@law.njoag.gov

P A U L L. T R A C T E N B E R G

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N E W A R K, NJ 0 7 1 0 2
9 7 3 – 879-9201
P A U L L T R A C T E N B E R G @ G M A I L. C O M

June 29, 2023

VIA E-MAIL
Christopher Weber, Deputy Attorney General
Section Chief-Education and Higher Education Section
Department of Law and Public Safety/Division of Law
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, NJ 08625-0112

RE: Alcantara, et al., v. Hespe, et al., Dkt. No. A-003693-20T2, OAL Dkt. No. 11069-14, Agency Dkt. No. 156-6/14

Dear Mr. Weber:

Your June 27, 2023, letter to my co-counsel Arthur Lang and me was disappointing in both substance and tone. I thought that we had had a constructive conference call with you and your DAG colleague Matthew Lynch on June 14, 2023, and were looking forward to an equally constructive follow-up call on June 28 at 11 am. We even hoped that, in the interim, you might provide us with further information about a timeline for your client's response to the March 6, 2023, remand to her by the Appellate Division, which would accord with the court's specific remand instructions.

Unfortunately, in my view, your 11th hour letter, the day before our scheduled call, represented a big step away from a constructive approach and tone. Without going into unnecessary detail, I feel compelled to respond to your letter by raising the following points:

1. In your opening and closing paragraphs, you take issue with my characterization in a June 15, 2023, memorandum to you of what transpired during our conference call, but you fail to cite any inaccuracies or to "substantively respond to any of [my] memorandum's enumerated points."

2. You cite as evidence of the Acting Commissioner's "[acute awareness] that all of New Jersey's public school students, including the Lakewood School District's, are entitled to a

thorough and efficient education" both her July 16, 2021 final agency decision to the effect that those Lakewood students were **not** being denied T&E and her "various submissions" to the Appellate Division. You then attribute my criticisms of the Acting Commissioner's actions regarding Lakewood as a mere disagreement with her approach toward T&E, seemingly ignoring the fact that a unanimous panel of the Appellate Division agreed with my co-counsel's and my approach as a matter of law and fact and overturned her final decision.

3. You seem to cite the Appellate Division's one-word order issued on June 9, 2023, denying leave for my co-counsel and me to file an interlocutory appeal, as an indication that the court intended for the Acting Commissioner to have unfettered discretion as to how and when she would respond to the court's highly specific remand instructions.

4. You make no mention of the recent Appellate Division decision by a panel with two of the same judges who participated in our case, which I brought to your attention during our conference call, and you agreed to check out. In that opinion, the court stated that "Where a remand has been ordered, a trial court or agency 'is under a peremptory duty to obey in the particular case the mandate of the appellate court exactly as it is written.'"

5. You also were going to review the Appellate Division's remand instructions in our case to confirm that the court had specified, as I indicated during our conference call, that the remand to the Acting Commissioner was "to consider the substantive arguments pertaining to the SFRA in light of our Supreme Court's directive in *Abbott* [that] the State has a continuing obligation to 'keep SFRA operating at its optimal level.'"

6. You continue to assert without basis that the Acting Commissioner's May 12, 2023, letter to Mr. Lang and me (and I presume her order of the same date) "speaks for itself" in addressing "the timeline for the expedited review." Try as I might, I find nothing that constitutes a "timeline" or a "schedule" (the Acting Commissioner's characterization of what she had announced in her May 12, 2023, letter to Mr. Lang and me). Indeed, no date is specified at all. Moreover, during our June 14, 2023, conference call you resisted providing even an estimate of when the remand process, now three and three-quarters months old, would even begin, let alone culminate with the Acting Commissioner's final decision.

7. In the final paragraph of your letter, you advise Mr. Lang and me that you and your colleagues, Matthew Lynch, and Ryan Silver, "represent the Commissioner with respect to any proceedings before the Appellate Division," but that you "do not represent any party in the administrative proceedings before the Commissioner." Therefore, you stated, your conference call with us was informal and just a "professional courtesy." Unfortunately, you neglected to mention that either before or during the call, so this is the first I've heard of that claim. It also leaves unaddressed who, if anyone, is representing the Acting Commissioner or the Department in the administrative proceedings before her regarding the Lakewood remand ordered by the Appellate Division on March 6, 2023. Can you provide Mr. Lang and me, as a "professional courtesy," with the name and contact information of her lawyer in that proceeding? On some of my recent communications in

connection with this matter, in addition to copying you, Matthew Lynch and Ryan Silver, I have copied Matthew Platkin, Donna Arons, Melissa Raksa and Carolyn Labin. Is any of them the Acting Commissioner's lawyer regarding the remand, or is it someone else? Or doesn't she have a lawyer as her testimony to the Senate Budget and Appropriations Committee might have suggested?

Because you have failed to shed light on any of these important points, and now claim for the first time that neither you nor your DAG colleagues Matthew Lynch and Ryan Silver are even the Acting Commissioner's lawyers in connection with the remand process, and, therefore, presumably can't speak on her behalf regarding the remand, my co-counsel and I are planning to file a motion with the acting commissioner seeking clarification of her May 12, 2023, letter and order with regard to its responsiveness to the Appellate Division's specific remand mandate "exactly as it is written" and to a timeline or schedule, which includes express dates for her remand process and final decision. We tell you this informally and as a professional courtesy since, your comments about the remand process notwithstanding, we now know that you are not her lawyers in that connection.

Sincerely yours,

Paul L. Tractenberg

cc (by electronic mail): Arthur H. Lang, Esq.
Matthew J. Platkin, Attorney General
Matthew J. Lynch, Deputy Attorney General
Ryan J. Silver, Deputy Attorney General
Melissa H. Raksa, Assistant Attorney General
Donna Arons, Assistant Attorney General
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