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Via Electronic Filing
Joseph H. Orlando, Clerk,
Superior Court of New Jersey, Appellate Division
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 006
Trenton, NJ 08625

Re: Leonor Alcantara, et al. v. New Jersey Dept. of Educ., et al.
Docket No. A-2493-23

Civil Action: On Appeal from a Final Decision of the Commissioner of Education

Letter Brief on Behalf of Respondents, Kevin Dehmer, Acting Commissioner of Education, and the New Jersey Department of Education, in Response to Appellants' Motion to Accelerate

Dear Mr. Orlando:

Please accept this letter brief on behalf of Respondents, Kevin Dehmer, Acting Commissioner of Education, and the New Jersey Department of Education, in response to Appellants' motion to accelerate.

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

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). (Ra2; Ra127-28);[2] see N.J. Const. art. VIII, § 4, ¶ 1. Specifically, the petition alleged that the SFRA did not take

[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] "Ra" refers to the Department's appendix; and "Ab" refers to Appellants' brief.

into account extraordinary costs the district incurred to provide transportation and special education services to a large number of students who attend non-public schools. (Ra17-18; Ra127-28). The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on September 4, 2014. (Ra18).

Appellants amended their petition four years later, on September 4, 2018, to clarify the relief they were seeking. (Ra20). 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. (Ra20-21). On March 1, 2021, following a lengthy hearing and the submission of post-hearing briefs, 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. (Aa17; Aa108-12). But 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. (Ra110). 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. (Ra110-17).

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." (Ra112). 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. (Ra115-17). 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. (Ra113-14).

As a result of these voluntary choices and non-SFRA factors, the ALJ held that the SFRA was not unconstitutional as applied to Lakewood. (Ra117).

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. (Ra136). 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. (Ra132-33). 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." (Ra135). 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. (Ra136). Notwithstanding this conclusion, the Commissioner recognized the concerning educational deficits revealed during the course of the OAL hearing, and therefore 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." (Ra133).

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. (Ra15). 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 and that that the district's public school students were not receiving T&E. (Ra12; Ra15).

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[.]" (Ra15 (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. (Ra15).

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. (Ra137-38).

E. The Commissioner's May 12, 2023 Interlocutory Decision and the Comprehensive Review.

On May 1, 2023, appellants filed a motion for emergency relief with the Commissioner seeking an expedited schedule for the Commissioner's issuance of a final decision on the March 6, 2023 remand from the Appellate Division. (Ra140).

Prior to issuing her decision on appellants' motion, on May 12, 2023, the Commissioner sent a letter to Appellants advising that she had directed the Department to expedite its comprehensive review of the district in 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." (Ra137-38). The Commissioner explained that such a review would provide her with additional and more current information. (Ra138). Specifically, the Commissioner noted that the data in the record at that time related to the 2014-2015 through 2018-2019 school years which was now outdated. Ibid. She reasoned that an updated record was "required in order to make an appropriate informed decision about the SFRA and its application to Lakewood" and would

also "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.

Further, 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. At the time of the Commissioner's letter, the Department had provided Lakewood with relief and aid through the provision of loans against State aid beginning in June 2015 through March 2021, totaling $137,420,524. Ibid. Additionally, for the 2022-2023 school year, Lakewood received a $27,704,046 loan against State aid. 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. (Ra139-41). 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." (Ra140-41). Therefore, the Commissioner denied and dismissed appellants' application as moot. (Ra141).

Appellants filed a motion for leave to file an interlocutory appeal of the Commissioner's decision on May 18, 2023 along with an application for emergent relief, arguing that the Commissioner lacked the authority to order a comprehensive review of Lakewood and this court should assume jurisdiction over the matter. (Ra142). On May 19, 2023, this court denied appellants' application for emergent relief and on June 8, 2023, it denied appellant's motion for leave to file an interlocutory appeal. Ibid.

On August 22, 2023, the Commissioner sent a letter to Appellants apprising them of the status of the comprehensive review of Lakewood. (Ra143). The Commissioner explained that the Department had retained the services of Dr. Kimberley Harrington Markus, a former Commissioner of the Department, to "oversee the comprehensive review and author a report and recommendations at its conclusion." Ibid. To assist Dr. Harrington in her review, the Department also retained Public Consulting Group (PCG) — a prominent public sector consulting firm with an extensive background in education — and Jeremiah Ford, an expert in New Jersey public school transportation. Ibid. PCG, in turn, assembled a multidisciplinary team of nine educational specialists and a financial auditing firm to conduct the evaluation.

As the Commissioner explained, Dr. Markus, PCG, and Mr. Ford would "collaborate with the Department to examine the Lakewood School District's

operations and performance in several key areas." (Ra143-44). These key areas included, but were not limited to, "educational policy, special education, administration and governance, and accounting." (Ra144). The review was also set to examine the "particular areas of concerns" appellants raised in their petition, such as transportation costs and special education funding. Ibid. In conducting this review, the Commissioner explained, the experts would examine information currently held by the Department and work closely with the district to obtain any additional information necessary. Ibid. Following receipt of the expert report, the Commissioner would issue a briefing schedule and afford Appellants and the district the opportunity to respond. Ibid. The Commissioner would then issue her final agency decision on the as-applied challenge to the constitutionality of the SFRA as applied to Lakewood. Ibid.

On October 24, 2023, Appellants filed a motion to enforce litigant's rights, asking this court to either: (1) establish a strict and expedited schedule for the Commissioner to issue a final decision on whether the SFRA is unconstitutional as applied to Lakewood; or (2) directly rule on the as-applied challenge. (Ra145). On November 27, 2023, this court granted Appellants' motion and ordered the Commissioner to conclude the comprehensive review and remand by April 1, 2024. Ibid.

On March 1, 2024, the report on the comprehensive review of Lakewood

was issued. (Ra147). The report answered two questions: (1) "what is the role of SFRA in deprivation of T&E in Lakewood Public School District?" and (2) "what other causes may be impacting the Lakewood Public School District to deliver T&E?" (Ra149). The report concluded that the SFRA was not the cause of the district's failure to provide T&E. (Ra177). Rather, the report outlined significant issues inherent with the district's overall management and functioning. For example, the report found the district to be plagued by poor communication, a lack of "intentional planning," and ineffective or inefficient systems. (Ra154-57). Additionally, the district's "pervasive inefficiencies, deficiencies, and the apparent shortfall in oversight and strategic systemic action . . . have culminated" in its failure to provide T&E. (Ra177).

F. The Assistant Commissioner's April 1, 2024 Final Agency Decision.

After reviewing the entire record in this matter, Assistant Commissioner Cary Booker issued a final agency decision on April 1, 2024, finding that "Lakewood's failure to provide T&E to its students does not derive, in significant part, from the provisions of the SFRA. (Ra398).[3] In reaching this decision, the Assistant Commissioner rejected Lakewood's argument that the SFRA fails to take into consideration its unique demographic situation and the

[3] The final decision on remand was delegated to Assistant Commissioner Booker pursuant to N.J.S.A. 18A:4-34.

fact that it bears extraordinary costs in providing transportation and special education services to more than 30,000 nonpublic school students. (Ra379). Rather, the Assistant Commissioner concluded, as the ALJ did, that "Lakewood's own choices and management issues have resulted in the unavailability of funds that could and should have been used to provide T&E to its students." (Ra388-89).

More specifically, the Assistant Commissioner found that Lakewood has "chosen not to require its tax base to further support its schools, and suffers from local mismanagement regarding its transportation and special education costs." (Ra389). These issues, rather than infirmities in the SFRA, are significant contributing factors in Lakewood's inability to provide T&E. (Ra398). Furthermore, other laws, such as those affecting local tax levies and annual appropriations, play as much of a role in Lakewood's finances as the SFRA. (Ra390-91). And Lakewood's ongoing and pervasive fiscal mismanagement have led to inefficient use of funds that otherwise could have been used to ensure students were receiving T&E. (Ra391-92). For example, the Assistant Commissioner noted that Lakewood has recognized transportation and special education services as being particular areas of concern, yet it has not taken steps to address these concerns. (Ra393-94). For these reasons, and in light of the information contained in the comprehensive report, the Assistant Commissioner

rejected Lakewood's claim that the SFRA was unconstitutional as applied to Lakewood. (Ra398).

This appeal followed.

ARGUMENT

THIS COURT SHOULD DENY APPELLANTS' MOTION BECAUSE THERE ARE NO URGENT CIRCUMSTANCES REQUIRING EXPEDITED REVIEW BY THIS COURT.

Appellants seek two forms of relief: (1) to accelerate this appeal pursuant to Rule 2:9-2; and (2) to "settle the record" through this court's amendment of the record on appeal. Because Appellants have failed to demonstrate a compelling, public need justifying expedited review of this matter, and because Appellants' have improperly sought to sidestep the Department's important role in establishing the record on appeal, Appellants' motion must be denied.

Generally, matters on appeal will comport with the time limits provided in Rule 2:6-11. The court may, however, accelerate the timing schedule of any appeal on its own motion, or on the motion of a party. R. 2:9-2. Acceleration is warranted only where "the litigation is of great public importance and urgently requires prompt final adjudication." DeSimone v. Greater Englewood Hous. Corp., 56 N.J. 428, 434 (1970) (granting motion to accelerate where the litigation concerned an issue of grave public importance — the approval of a

housing project "to provide low- and moderate-income families with safe, sanitary and decent living accommodations" — and acceleration would streamline the "panoply of litigation" that had arisen collaterally to the matter before the Court). This is not that type of case.

Appellants' motion satisfies none of the necessary criteria for accelerating an appeal. Indeed, Appellants cite to nothing more than their "belief" that time is of the essence. (Ab5). But this claim only demonstrates their misunderstanding of the nature of this matter and the appellate process generally. Regarding the first requirement that the litigation be of great public importance, Appellants' ignore that this matter focuses specifically on issues faced by the Lakewood Public School District — one of nearly 700 districts in New Jersey. And as this court has already recognized, the issues and circumstances concerning Lakewood make it "an outlier amongst other New Jersey school districts." (Ra3). Thus, unlike in the Abbott line of cases which Appellants seek to rely, this matter involves a single, uniquely challenged school district, and will not have a statewide resolution.

Also, Appellants have failed to show any reason for deviating from ordinary appellate procedures. This matter involves an extensive record before the Commissioner and Assistant Commissioner, including substantial motion practice, 11 hearing days with 15 witnesses and 131 exhibits entered before the

OAL, a remand, and a thorough comprehensive review of Lakewood's operations. All of this was reviewed and considered by the Assistant Commissioner in finding the SFRA was not unconstitutional as applied to Lakewood. Hurrying the appellate process, and therefore shortening this court's time to conduct a meaningful review of the significant record and the Assistant Commissioner's decision, is not appropriate and would not benefit this court or the parties.

Plus, this appeal concerns the limited issue of whether the SFRA is the cause of the district's failure to provide T&E. In the meantime, the Commissioner has taken steps to ensure Lakewood has sufficient funds to meet its immediate needs. (Aa146). And cognizant of his responsibility, the Commissioner is exploring additional measures to ensure that the district's students receive a constitutionally sufficient education.

Lastly, while not included in the notice of motion, Appellants also package this motion as one to settle the record under Rule 2:11-1(a) and effectively asks this court to create the statement of items comprising the record on appeal (SICR). (Ab1; Ab6). This claim also fails. First, the rule appellants cite does not concern records on appeal, but rather the docketing of appeals. R. 2:11-1(a). But even if Appellants had properly brought a motion to settle the record, the expansive and complex record in this matter necessitates the filing

of a SICR by the Department in accordance with R. 2:5-4(b), which will "facilitate[] . . . the appellate court's understanding of what proofs, exhibits, stipulations and the like the agency considered in reaching its determination." Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 2:5-4 (2024).

For these reasons, Appellants' motion to accelerate must be denied.

CONCLUSION

For these reasons, Appellants' motion to accelerate the appeal should be denied.

Respectfully submitted,

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