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April 13, 2021

Re: Leonor Alcantara et. al., v. David Hespe et. al.

OAL Docket No: EDU 11069-2014 S

Agency Ref. No. 156-6/14

Dear Commissioner Allen-McMillan,

I represent the Petitioners in the above referenced controversy over T & E in Lakewood. I filed in 2014 on behalf of several of my students in Lakewood High School after a decade of witnessing the once rich curriculum reduced to bare bones because the school did not have money. It was obvious that the district budget designed for 6,000 students could not possibly provide T & E in the public schools because the district was mandated to provide services for a K-12 population of 36,000. The logic was undeniable. A hearing should not have been necessary because the numbers spoke for themselves. The test scores, teacher salaries, classroom spending, demography, household income, poverty level and a host of other data were all public record. The annually increasing loans began a year later in 2015 vindicating the cause. Yet after seven years of worsening finances and no possible administrative

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solution the matter still has not yet been recommended to the legislature for remediation.

The case is extremely simple. **SFRA funding has no rational relationship to the expenses in Lakewood.** The SFRA does not contemplate such a disproportionate ratio of nonpublic students to public school students. The cost of mandated remote transportation for all eligible nonpublic children¹ and a Free and Appropriate Education for special education students registering in the district consumes about half of the budget. Certainly many districts suffer insufficient state aid for transportation and special education expenses but the deficiency is marginal relative to overall funding. Lakewood, by contrast, is mandated to pay for the transportation of five times the number of its SFRA count of students and to offer a Free and Appropriate Education (FAPE) to a population six times its SFRA count.

¹ Whenever in any district there are elementary school pupils who live more than two miles from their public school of attendance or secondary school pupils who live more than 2 1/2 miles from their public school of attendance, the district shall provide transportation to and from school for these pupils. When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school. N.J. Stat. § 18A:39-1

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The needs assessment recommended by the ALJ is not going to find or fix anything that the three state monitors have not found or fixed over the last seven years.

On July 1, 2019 after Petitioners rested their case but before Respondents presented their case the Commissioner again requested from the Treasurer a state aid advance of \$36 million to Lakewood for the 2019-20 school year.² The record closed on November 28, 2019 and the Court's decision was dated March 2, 2021.

In her decision the ALJ discussed Respondents' argument about fiscal mismanagement and taxation dating back to 2011-14, community choices, other legislation and zoning.³

² This rendered moot Participant BOE's motion for emergency relief. "[O]n July 1, 2019, the Commissioner had written a letter to the State Treasurer requesting that \$36,033,862 be provided to the district in the form of advance aid for the school year 2019-2020, and that the State treasurer had approved the request." Bd. of Educ. of Twp. of Lakewood, Ocean Cty. v. NJ Dep't of Ed., EDU-8386-19, final decision, (Aug. 6, 2019).

³ What did Respondents mean by zoning? If they meant neighborhood schools, diverse sectarians live in each part of town and the government should not be entangled in the religious education of the child or dictate what school to attend. If they meant what their witness, Glenn Forney, said, "The growth in the number of non-public school students. . . is also a by-product of zoning, and the town council appoints the zoning board" (p.59), two neighboring towns have already had trouble with RLUIPA discrimination.

<https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-township-jackson-new-jersey-and-townships-planning>

<https://www.justice.gov/opa/pr/justice-department-settles-claims-against-toms-river-new-jersey-over-zoning-code-restricts>

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She came to the incredible conclusion that the SFRA was not the primary reason for Lakewood's inability to provide T&E. In her mind events from years ago played a more important role in Lakewood's inability to provide T&E than the SFRA's present day funding failings. It is apparent that the state monitors and other State officials are aware that SFRA has failed in Lakewood, and the problem. It is also apparent that the Legislature will not act voluntarily absent confirmation of this fact by a court.

Petitioners' Exceptions

The ALJ found that Petitioners failed to carry their 1) **"heavy burden"** to prove Lakewood's "inequities derive, in significant part, from the funding provisions' of the SFRA" because of 2) Fiscal mismanagement by Lakewood "with respect to the tax levy authorized under the SFRA," 3) Community choices not "to raise taxes as permitted under N.J.S.A. 18A:22-40 and N.J.S.A. 18A:7F-39," 4) Other legislation such as the Appropriations Act, 5) the lack of a comprehensive pre-school program, 6) failure to reign in transportation costs and 7) failure to reign in special education costs. Petitioners take exception to each.

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I. The Court Erred in Applying a "Heavy Burden" upon Petitioners.

The standard in Robinson and Abbott was **preponderance of the evidence**. "When a claim of inadequate funding is raised the ultimate constitutional issues are especially fact-sensitive and relate primarily to areas of educational specialization. Accordingly, the matter is to be remanded and transferred to the Commissioner of Education." Abbott v. Burke (Abbott I), 100 N.J. 269, 301 (1985). The Supreme Court in Abbott did not instruct the commissioner and OAL on remand to change "the usual burden of proof for establishing claims before state agencies in contested administrative adjudications [which] is a fair preponderance of the evidence." In re Polk License Revocation, 90 N.J. 550, 560 (N.J. 1982). ALJ Steven Lefelt understood the correct burden of proof when he decided Abbott in the OAL.

My most important function, as recognized by the Supreme Court, is, therefore, to resolve the factual disputes focused upon by the parties. Based on the record developed, I must determine how Chapter 212 has actually been implemented and

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whether plaintiffs proved their contentions to be more likely true than not by a preponderance of the believable evidence.” Abbott v. Burke, EDU5581-85 (initial decision), August 24, 1988.

ALJ Scarola quoted from Abbott XX⁴ and, to the contrary, concluded that petitioners had a “heavy burden” of proof. This is an error. The procedural posture of Abbott XX was a motion by the State to remove the Court’s remedial measures due to the passage of the SFRA. The discussion was over the standard of proof *for the State* to prove that the statute was doing what the Court ordered to be done.

Had this statute been enacted earlier in the history of school funding litigation. . . when the State first was required to devise a new formula to provide sufficient state support to assure that all school districts could meet the constitutional obligation, we would be approaching our task by attaching the familiar presumption of constitutionality. Abbott v. Burke, Abbott XX, 199 N.J. 140, 147 (N.J. 2009)

⁴ Abbott v. Burke, 199 N.J. 140 (2009)

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“Earlier in the history of school funding litigation” means after ALJ Lefelt and Abbott II found T & E deficiencies in urban low-income districts. Legislation to correct those deficiencies would have been **presumed** to sufficiently address their needs. By the time of Abbott XX the State’s burden was increased to **“convincing”** because the State was moving to remove the Court’s imposed remedy already in place to address the needs of Abbott districts with the passage of the new statute.

The discussion in Abbott XX was about a statute that purported to address the unique circumstances of the Abbott districts in providing T & E. This has nothing with the constitutionality of a statute **applied to circumstance that it does not purport to address**. Put another way, there is clear and convincing evidence that the SFRA does not contemplate the demography of Lakewood and beyond a shadow of a doubt it has no terms in its funding formula to address Lakewood’s expenses. The issue is whether it is “more likely true than not by a preponderance of the believable evidence” that T & E is not being provided. There is no second standard of proof, or “heavy burden,” to prove that the failure of the SFRA to address the unique

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circumstance of Lakewood is the cause of T & E not being provided. If not obvious, at best it is a question of causation that is "fact sensitive" with the same standard of proof as deciding if T & E is being provided. Likewise, ALJ Lefelt did not bifurcate the standard of proof, or impose a "heavy burden" in Abbott to prove that Chapter 212 was the cause of T & E not being provided when it was clear that the statute did not address the unique circumstances of the low-income urban districts. At best the question of the statute's causation was "fact sensitive" with the same standard of proof as deciding whether T & E was being provided.

II. Fiscal Mismanagement by Lakewood "With Respect To The Tax Levy Authorized Under The SFRA."

The ALJ erred in finding that the "District is now not taxing up to its local fair share" because in 2011-14 "not only was the District not generating money that it could have been during that time period, but that any additional revenue from increasing the levy would have compounded." p.97. The ALJ's table on page 71 shows that the tax levy was above or about the local fair share during that period. She faults the District for not passing even higher taxes

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in 2011-14 because the local fair share has increased faster than the district's ability to tax since then.

The ALJ turns Petitioners' claim on its head. The SFRA is the cause of the district not providing T & E precisely because it does not count all the children. It does not recognize or make provision for Lakewood's geometrically increasing expenses. According to the ALJ, Petitioners did not carry their "heavy burden" of proof that the SFRA is the cause of the district not providing T & E, in part, because the district could have taxed in 2011-14, *not for funding it needed during those years*, but for funding it would need in future years to provide for T & E, since the SFRA has no provision to cover Lakewood's geometrically increasing expenses either by state aid or locally.

By not recognizing Lakewood's unique expenses the SFRA does not have a provision to allow Lakewood to bypass the tax cap. The ALJ acknowledged that the SFRA provides that a district's "tax levy cap can be overcome to cover increased cost of medical insurance; enrollment; pension and government duties to another entity." p. 61 It also allows districts with increased expenses to bypass the tax cap proportionate to the increased enrollment pursuant to

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N.J.S.A. 18A:7F-37. The SFRA anticipates almost any foreseeable expense that could drain funding from T & E and makes provision for the district, the commissioner, or her monitor, to adjust a district budget and increase the tax levy, except for the kinds of expenses unique to Lakewood. No other district would be expected to rely upon taxing in advance or approving referenda because the SFRA assumes it can bypass the tax cap when needed. The ALJ's faulting Lakewood thereof flies in the face of the framework of the statute, and her reasoning, on the contrary, is why the SFRA is the cause of inadequate T & E. There is no rational relationship between state aid and local taxation per the statute and Lakewood's expenses.

The record does not indicate what taxes could have been raised during 2011-14 and does not indicate if any of it was recouped as a banked cap adjustment in a subsequent year.⁵ The record does show that the district needed an

⁵ A district "may add to its adjusted tax levy in any one of the next three succeeding budget years, the amount of the difference between the maximum allowable amount to be raised by taxation for the current school budget year and the actual amount to be raised by taxation for the current school budget year." N.J. Stat. § 18A:7F-39. Page 6 of the May 13, 2014 BOE Minutes on the district website clearly show the approval and use of \$1,872,480 in banked cap, unused taxing authority, from previous years.

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extra \$28 million loan in 2018. It would have taken a 35% tax increase in 2011 (2% is the maximum tax increase without adjustments), over \$25 million (or slightly more than \$25 million if spread over the three years), with compounding, to have negated the need for the loan in 2018 ($25,000,000 \times 1.02^7 = \$28,717,142$). But that is just to get to 2018-19. Compounding the \$28.7 million another 2% for the next year is \$574,000 not enough to cover the extra \$8 million (\$36 million) needed for 2019-20. Then there will be loans for 2020-21, 2021-22, 2022-23, 2023-24 and so forth.

There is nothing the district or the state monitors, who have all the powers of the district, could have done to keep up with mandated expenses. The expenses are growing faster than the ability to tax. The expenses are growing faster than the local fair share. The Business

Administrator testified:

We have a 2 percent cap on how far we can raise our property tax. Okay. But in general, if you look back historically, the budget keeps going up every year at least a minimum of 10 percent, a minimum of 10 percent, so if I could only raise

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taxes 2, but my costs are going up every year by 10, okay, there's an 8 percent spread. . . . [E]ven if I could trim 2 or 3 million dollars each year out of the budget, that's not going to come close to how much in general and on average and historically expenses have gone up. . . the choice is, raising class size to 50 students per class and firing 115 teachers." T3 193-15 to 194-20.

Everybody knows that the \$4.5 million, \$5.6 million, \$8.5 million and \$28.2 million loans in 2015-18 will keep on growing geometrically. **No rational fact-finder** would think that taxpayers in any town or city in New Jersey, regardless of size or wealth, could raise taxes on the level that Lakewood is forced to borrow each year **without end in sight**.

III. Community Choices Not "To Raise Taxes as Permitted under N.J.S.A. 18A:22-40 and N.J.S.A. 18A:7F-39."

The unwillingness of local voters in any district to bypass the tax cap via referendum is a poor excuse for the failure of the state to provide T & E, but most particularly in Lakewood, where a **referendum will not be a**

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one-time solution, but there will have to be another referendum the next year and the following year ad infinitum.

The ALJ's faulting Lakewood taxpayers for not providing T & E is even more objectionable because the overall educational cost paid by the vast majority of families in the Lakewood tax base for tuition in the nonpublic schools already cuts deeply into their income.

Adding insult to injury, Lakewood has the ninth lowest per capita income of the 564 municipalities in New Jersey.⁶ The 2016 census data in Exhibit 7-4, the latest numbers admitted into evidence, shows Lakewood per capita income was \$15,443, median household income was \$42,993 and 31.5% of the township's population lived in poverty. The State per capita income was \$37,538, median household income was \$73,702 and 10.4% lived in poverty.⁷ Lakewood poverty levels were as dismal relative to the state as those in the Abbott

⁶ Exhibit 7-1, admitted into evidence, Lakewood Township was ranked 555 out of 564 New Jersey municipalities in per capita income at \$16,430 based on the 2010 census population. Per capita income statewide was \$34,858. The median household income in Lakewood was \$41,527. The median household income is \$69,811 statewide.

⁷ Lakewood's median household income is especially concerning when considering the average household size statewide was 2.73 while in Lakewood Township it was 4.03 and 5.07 in Lakewood CDP, the area of the township where the majority of public and nonpublic students live (7-4).

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districts. “[P]laintiffs’ districts have per capita income that ranges from 49% to 81% of the State average per capita income, and urban aid cities have, on average, 72% of the State average.” EDU5581-85 at 498.

The **failure to count all the children** not only deprives the public schools of T & E, it falsely shifts the blame to the taxpayers of the district. Funding expert Melvin Wynn testified that because the nonpublic school children do not count “the district appears to be disproportionately wealthy relative to the small public school population.” p. 49. The district would not look wealthy if all of the children of Lakewood attended the public schools. The adequacy budget and equalization aid would increase by about \$400 million a year but **the local fair share would remain the same**. Equalized property value per student, instead of \$1.7 million (high property wealth) would be only \$280,000 (very low property wealth).⁸ However, since the vast majority of children attend nonpublic schools at the cost of Lakewood taxpayers, saving the state hundreds of millions, the same Lakewood tax base that would have

⁸ Petitioners’ Exhibit 3 and Respondents’ Exhibit 1, Notices to Districts 2019-19, show Equalized Valuation \$10,097,357,987. Dividing by 36,000 is \$280,402; dividing by 6,000 is \$1,682,892.

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otherwise have been considered to be one of the poorest in the state, by the wave of the wand, is considered "property wealthy."

IV. Other Legislation such as the Appropriations Act

The ALJ did not find SFRA inadequate, in part, because of cuts in the Appropriations Act. This is perplexing because if the Appropriations Act caused the lack of T & E then all the more reason that the legislature must act to appropriate adequate funding for T & E in the district. The ALJ wrote:

"As a result, for the 2018-2019 school year, for example, Lakewood would have received roughly \$13M in transportation aid if fully funded, but only received \$3M through the Appropriations Act; and for the same year, Lakewood's special education categorical aid was supposed to be \$5M, but the Legislature instead appropriated \$3M in such aid." p. 99.

Even if the SFRA was fully funded, the extra \$10 million for transportation and \$2 million in categorical special education aid would not have made more than a dent in the more than half of the budget diverted from regular

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education for these expenses. The ALJ quotes Robert Finger, the business manager:

For 2017-2018, the combined cost of transportation and special education was \$49.4 million plus \$28 million, for a total of \$78 million out of the total budget of \$144 million. More than 52% of the district's budget goes for special education and transportation. For 2018-2019, the projected costs for special education and transportation are a total of \$88 million. P. 22.

Just as surprising, the ALJ seemed to ignore that the table on page 51 shows that the Appropriations Act provided \$15 million in equalization aid while the SFRA only would have funded Lakewood with \$2 million, essentially a wash with the said \$12 shortfall for transportation and categorical special education. At any rate, the failure to fully fund the SFRA cannot be blamed for the necessity of a \$28,182,900 million loan and the \$1,566,821 of Emergency Aid Lakewood received for the 2018-19.

V. The Lack of a Comprehensive Pre-School Program

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The parties did not mention, argue or address this issue and it is irrelevant. SFRA preschool programs are funded separately and differently than programs for a school district's K-12 students. Plaintiffs did not challenge that portion of SFRA specifically dealing with preschool funding.

VI. Failure To Reign In Transportation Costs

The heart of the matter is that all the children do not count. The failure of the SFRA to account for the mandated expenses for a disproportionately large number of children is the cause of inadequate funding for T & E. Yet the ALJ wrote, “[T]here is an absence of evidence in the record to indicate that these rising costs are totally attributable to the rising number of nonpublic school students. . . .” p. 100.

Even with “an absence of evidence” this passage would be incredible but there is evidence. “Every year Lakewood Township is adding 2,500-3,000 non-public school students who are eligible for transportation.” P. 23. There was extensive testimony about the expense. It is hard to imagine the materiality of some unknown and unspecified

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cost when the increase of nonpublic school students receiving transportation is of such magnitude.

The ALJ also said, in the second part of the above sentence, that there was an absence of evidence "that Lakewood has done everything it can to rein in its transportation costs in order to free up more funds for T&E for its public school students." Id. This is contrary to the testimony of the state monitors. State Monitor Azzara said, "And we're operating as efficiently as we can." T5 109-7 to 8. State Monitor Shafter: "Q Okay. Now, at that time, when the District was still running the transportation, would you characterize that as an efficient system? A 16/17 I would say it was -- it turned out to be very efficient for that year?" Id. 19-16 to 20. Mr. Azzara said, "But right now, we --we have -- the District does have its own fleet. And it is doing transportation, the majority of it, in- house. Q Okay. Is that -- That has represented a cost savings for the District? A We believe it is. The Monitors, myself and David." 138-1 to 7. How can Petitioners be expected to prove a negative, the lack of existence of an expense that even the state monitors have not found?

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VII. Failure To Reign In Special Education Costs.

Seven years of state monitors, at times three working simultaneously, and still no cost-cutting measures have been found. Robert Finger, the business administrator testified:

"[E]ven if I could trim 2 or 3 million dollars each year out of the budget, that's not going to come close to how much in general and on average and historically expenses have gone up, so while it would be helpful, okay, there's really no way to say, okay, in order to cover the extra cost of transportation and tuition, I would just cut that out of the other part of the budget so we'll be even, or live within the 2 percent cap you couldn't do it, unless as we said last year, one thing we asked the state for additional money, well, the choice is, raising class size to 50 students per class and firing 115 teachers."T3-9 to 20.

Part of the problem of the SFRA as applied to Lakewood is census funding. It calculates special education funding based on 14.92% of total enrollment of the public schools

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while ignoring the 30,000 nonpublic students. Normally, the cost of a special education student entering a district is offset, more or less, by six regular education students entering the same district. However in Lakewood, the "Orthodox children attend non-public school yeshivas, but generally, if they have a learning disability, or need special education, they are enrolled in the public school district." p. 43. When a nonpublic special education child enters the district there is no commensurate offset of nonpublic regular education children entering the district. Very rarely, if at all, does a regular education Orthodox student enter the district. A budget designed for 6,000 public school students simply cannot provide FAPE to a population of over 36,000 children.⁹

Note on Findings with Regard to Advanced State Aid

⁹ Petitioners object to the ALJ's denial of allowing into evidence IDEA and Title I data from NJ Homeroom because the district reported the numbers. The 2017-18 IDEA application, Exhibit 14, shows that there were 5,840 nonpublic students with disabilities out of a nonpublic population of 29,221. Clearly not all classified nonpublic students are entering the district but enough, particularly those with the most severe disabilities, are opting for FAPE to drain tens of millions away from regular education without any proportional offset by regular education enrollment.

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"Lakewood's continued receipt of advance state aid is unsustainable and only serves to exacerbate Lakewood's financial difficulties by requiring Lakewood to repay these loans with future state aid." p. 103. While we agree with the ALJ, she does not go far enough. The funding for the loans, pursuant to N.J.S.A. 18A: 7A-56, is provided for in the annual Appropriations Act, in language which states,

Such amounts received in the "School District Deficit Relief Account," established pursuant to section 5 of P.L.2006, c.15 (C.18A:7A-58), including loan repayments, are appropriated, subject to the approval of the Director of the Division of Budget and Accounting.

N.J.S.A. 18A: 7A-56 was never intended to provide advance state aid payments of this magnitude (\$28 million in 2018-19 and increasing) or to be used repeatedly to fund the general operating expenses of a school district. It was intended to deal with existing deficits resulting from overspending in prior school years rather than to provide revenue to balance a district's approved budget in the current year.

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Lakewood had to accept such loans from the State because no other options were presented. This simply was forced borrowing. The debt that Lakewood has from this forced borrowing is staggering and its cyclical effect makes it more difficult each year to maintain school operations. The state aid advances in Lakewood, rather than being used in a manner envisioned by the statute, are nothing less than a clever disguise for the State's failure to assure that SFRA raises revenue sufficient for it to discharge its constitutional T&E obligations in Lakewood. Taken together, both SFRA as applied in Lakewood and N.J.S.A. 18A: 7A-56, leave Lakewood in a position of being incapable of achieving the constitutional purpose. The ALJ erred in her finding regarding SFRA and erred further by not ruling that the loans, as used in Lakewood, to fund the district's general operating expenses are inconsistent with our constitutional T&E standard.

Conclusion

The ALJ seems to blame everyone except the State education authorities who have ultimate duty to assure T&E. Truth be told, there is nothing they could have done. The magnitude of the problem is too great. The finances of the

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school district have continued to worsen geometrically after seven years under the watchful eyes of state monitors. The failure of the school district is not because of the defunct "courtesy" busing, "fiscal mismanagement" from a decade ago or the failure to raise taxes a decade ago. The numbers, tens of millions, soon a hundred million, simply does not add up. The heart of the matter is the that the SFRA does not acknowledge the existence of 30,000 children and growing. By not counting six-sevenths of the student population, Lakewood is falsely deemed property wealthy and the most needy children in the state are neglected of a public education.

Respectfully Submitted,

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