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Guardian ad Litem for E.A.;)
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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.)
Petitioners,)
v.)
)
DAVID HESPE, COMMISSIONER OF THE NEW)
JERSEY DEPARTMENT OF EDUCATION;)
the NEW JERSEY STATE BOARD OF EDUCATION;)
and the NEW JERSEY DEPARTMENT OF EDUCATION)
Respondents.)
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)
)

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PETITIONERS' REPLY BRIEF TO RESPONDENTS' SUMMATION

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LEGAL ARGUMENT REPLYING TO RESPONDENTS

I. RESPONDENTS HAVE NOT ACKNOWLEDGED THE MAGNITUDE OF THE REVENUE PROBLEM IN LPSD AND HAVE NO PLAN TO REMEDY IT.

Petitioners alleged in the original petition that for decades the New Jersey Department of Education (the Department) has known about the unique demography of the Lakewood Public School District (LPSD) but still has not acknowledged that the funding mechanism designed for 6,000 children is ill equipped for a

district that serves far more children, now 38,000 children. LPSD essentially became insolvent needing advanced state aid to meet its operating budget because no more expenses could be cut after a decade of losing programs and specialized staff. Now, after five years of ever increasing advanced state aid, the Department still has not come to terms with the challenges of Lakewood's demography. The monumental funding crisis has no end in sight.

The following citation in Respondents' summation is apropos. "[T]he constitution does not require relief every time the slightest deviation from T&E is found, or where there is clear evidence that a deficiency is being appropriately addressed and sufficient progress is being made toward its correction." Bacon v. N.J. State Dept of Educ., No. 50-03, Comm'r Dec. slip op. at 137 (Feb. 10, 2003). (Respondents Summation, hereafter RS at 63). How can the expense of serving 38,000 children on a T & E adequacy budget for 6,000 children cause only the "[s]lightest deviation" from T & E for those 6,000 children? How can "sufficient progress been made toward its correction" when the only "progress" each year is another year of advanced state aid putting the Lakewood School district deeper in debt?

Respondents simply do not comprehend the singularity of the problem. They group LPSD, a district where the formula is a

gross misfit, with other districts, where the formula fits but they sometimes operate under adequacy. They mischaracterize "Petitioners argue[ment] that the SFRA must be unconstitutional as applied to Lakewood as they are operating under their adequacy budget. . . . There are many districts in the state that choose to spend above 'adequacy' and some that spend below that amount." RS at 63.

This nonchalant attitude and self-deception over the magnitude of the problem is shared at the highest level in the Department. The Assistant Commissioner of Finance claimed to have a plan but did not know what it was. When the Court asked his Deputy about the plan, he testified, "We're just going by year by year at this point." (T10 GF 146-3 to 6). The Department also does not acknowledge the scale of the problem. "Q So Lakewood doesn't stand out to you. A How so? Q As being a very unusual situation. A Everything I deal with is unusual, sir." (T10 GF 122-7 to 9).

How can Respondents argue that they are doing everything possible to ensure T & E if they do not acknowledge the uniqueness of the challenge and do not have a plan? The only way "sufficient progress" or any progress will be made is when the Court renders a decision that the Commissioner recommends to the legislature to find a remedy because the SFRA is unconstitutional as applied to Lakewood.

II. RESPONDENTS HAVE NOT CITED CASE LAW IN SUPPORT OF THEIR ARGUMENT OR CASE LAW TO DISPUTE PETITIONERS' ARGUMENT.

Respondents' summation ignored the legal precedents cited in Petitioners' summation that funding has to be predictable, non-discretionary and formulaic. They did not attempt to distinguish the case at hand from any of Petitioners' citations. They did not cite case law to the contrary or attempt to show that Petitioners' case law is not dispositive. They did not try to mitigate the surprising testimony of their witnesses that the Department has no plan. There is no end in sight to the loans, \$36 million last year, maybe \$45 this year, perhaps \$60 million next year ad infinitum. Policy makers on the highest level deny the urgency of the problem and do not have a plan fix it. We can only expect the endless cycle of borrowing, and borrowing to pay back the borrowing, to continue.

III. RESPONDENTS HAVE NOT REBUTTED ANY OF THE COURT'S PRELIMINARY FINDINGS IN THE SECOND MOTION TO DISMISS.

Respondents filed a motion to dismiss after Petitioners presented their case. The Court denied it effectively putting the burden upon Respondents to challenge Petitioners' argument, evidence and inferences.

"The evidence, together with the legitimate inferences therefrom, could sustain a judgment in favor of petitioners. That is, the testimony and documentary evidence presented by petitioners tends to show that LPSD cannot provide a thorough and efficient education

with the level of funding it receives under the SFRA and that, as a result, the SFRA is unconstitutional as applied to the LPSD. The testimony established a correlation between the level of school funding LPSD receives and low scores on statewide assessments, which are intended to measure a school district's success in delivering a thorough and efficient education through the NJSLs. A judgment in favor of petitioners could also be sustained by evidence that the Commissioner of Education has, in accordance with N.J.S.A. 18A: 7A- 56, certified that for the past four years, that the LPSD needs advance State aid "to ensure the provision of a thorough and efficient education." Accordingly, the motion is denied, and the respondents shall proceed with their case. (Order January 8, 2019 at 10-11).

Respondents had the burden and opportunity to bring evidence or arguments contrary to Petitioners' evidence and its inferences. 1) "LPSD cannot provide a thorough and efficient education with the level of funding it receives under the SFRA." 2) There is a "correlation between the level of school funding LPSD receives and low scores on statewide assessments." 3) For "the past four years, that the LPSD need[ed] advance State aid 'to ensure the provision of a thorough and efficient education.'"

A. RESPONDENTS DO NOT CITE ANY AUTHORITY HOLDING OR IMPLYING THAT THE PROVISION OF ADVANCED STATE AID CAN REMEDY AN UNCONSTITUTIONAL STATUTE AS APPLIED TO A DISTRICT.

Respondents argue that "the State aid advances, like the SFRA, cannot be viewed in a vacuum, but rather must be seen as provisions working together to meet a common goal to provide enough funding to a district to ensure the provision of T&E."

(RS at 66). SFRA state aid and advanced SFRA state aid, working together, are the present and future of the same unconstitutional stream of funding. No authority is cited that loans can remedy an otherwise unconstitutional funding statute. No authority is cited concerning the constitutionality of funding a district with *never ending* loans sinking the district deeper and deeper into debt.

Even if arguendo, the constitutional standard allows advanced state aid to meet a district's regular operating budget, such as Ohio statute R.C. 133.301(C) before it was found unconstitutional and repealed, LPSD is different. LPSD loans increase every year as the nonpublic population grows and spending correspondingly increases while SFRA revenue decreases or remains stagnant due to the fixed public school population. A district perpetually needing advanced state aid, even under a fully funded formula, is different than a district for which the SFRA otherwise provides sufficient funding but temporarily needs advanced state aid because of an insufficient appropriations act.

B. RESPONDENTS ATTRIBUTE THE REVENUE PROBLEM TO DISTRICT MISMANAGEMENT AND THE FAILURE TO TAP INTO THE WEALTH OF LAKEWOOD'S TAX BASE.

Respondents argue in Point III that the SFRA provides adequate funding. "THE FINANCIAL CONDITION IN LAKEWOOD IS THE

RESULT OF FACTORS OUTSIDE THE SFRA.” (RS at 67). The failure is due to mismanagement before the arrival of the state monitors in 2014 and the failure to raise taxes before 2014. Yet Respondents did not care enough to disclose how much revenue was lost over the years due to mismanagement. The Court is effectively expected to take a leap of faith that had the district not lost an undisclosed sum it would not have been \$80 million in debt. This is incredulous because state monitors have been in the district for almost six years and the amount of the advanced state aid has continually increased.

Respondents’ discussion over local taxation and property wealth is also wrong and irrelevant. They argue that taxes were not increased in 2011-13 (previous years to 2012-14 on R-3), but the failure to raise taxes in one year creates banked cap for the next three years pursuant to N.J.S.A. 18A:7F-39e so that LPSD could and did make up for the lost tax revenue in 2014 and 2015.¹

Respondents arbitrarily argue that Lakewood has a high ratio of equalized property value to *public school students*. But LPSD expenses cover a residential school population six times greater

¹ BOE resolutions March 28, 2013, banked cap \$3,730,652; May 13, 2014 banked cap \$1,872,480. January 15, 2020 found at <https://www.lakewoodpiners.org/domain/27>. See N.J.R.E. 201 for judicial notice of resolutions. Even if the lost taxes were not recovered, compounding at 2% a year would have added only 14.9% to the loss of revenue over seven years (1.02^7)

than the public school population so that the ratio of equalized property value to *all students* is six times less than the undisclosed ratio that Respondents calculate. A town of with 38,000 school age children, not including infants, with an annual birth rate of over 4,400,² a 21.3 median age,³ where 90% of public school students and 70% of nonpublic students are low-income, and ninth lowest per capita income out of 564 municipalities (P-7),⁴ does not have a large enough work force or enough income to bear the burden of the public schools on its own, particularly given that an extraordinary amount of the tax base's aggregate income is depleted for the tuition of its 32,000 nonpublic students, an expense if borne by the state would be six times the current adequacy budget of about \$120 million.

This discussion over wealth is academic. The plain fact is that SFRA in its present form as applied to Lakewood does not and will not ever work as it was intended. SFRA does not ensure that Lakewood receives the constitutionally required T&E revenue amounts. Proof of this is obvious and has clearly been shown by the continual need to provide T & E loans to Lakewood. In this instance SFRA must be fixed. Of course, only the legislature can

² P-8

³ P-39

⁴ The \$16,430 per capita income in the 2010 census (P-7.1) was updated by the Census bureau to an estimate of \$15,443 in 2017 (P-7.5).

decide upon a remedy, not the Court. The legislature might add a term into the adequacy budget, it might create new categorical aid, it might indirectly increase equalization aid by lowering the local fair share, or it might find for a combination of remedies. We petition the Court to make a recommendation that the formula has to be fixed to meet the constitutional standard, not how it should be fixed.

C. RESPONDENTS MINIMIZE A DECADE OF FAILURE BY ALL INDICATORS OF ACHIEVEMENT AND THE ACCOMPANYING ATTRITION OF THE SCHOOL PROGRAM BECAUSE OF A SLIGHT RISE IN SOME TEST SCORES AND GRADUATION RATES AND NEW FEDERALLY FUNDED PROGRAMS.

Respondents dismiss the findings of Petitioners' expert, Dr. Danielle Farrie, correlating low classroom spending to low test scores in Lakewood from 2000 to 2014 because the data is four years old.⁵ Instead, they made much ado about a slight improvement in raw PARCC scores but brought no experts to explain its significance and created no tables to compare LPSD scores with the state average or with districts the Department deems as peers of LPSD for comparison purposes. Petitioners created charts in their brief Opposing the Second Motion to Dismiss (at 15 to 17) showing that LPSD PARCC scores were dismal even compared to the lowest DFG A districts. Respondents also pointed to new programs but to their chagrin during direct and

⁵ During cross examination Dr. Farrie said, "[D]istricts across the State, PARCC scores are all increasing, part of the reason why I restricted my analysis to 2014." T4 DF103-24 to 105-2

cross-examination Petitioners' witnesses testified mostly that they were federally funded. Petitioners have cited mandatory authority that federal funding is not to be considered in New Jersey school litigation.

Respondents fail to mention that by every indicator that the Department uses to measure achievement, classroom spending, teacher salaries, test scores, and college attendance, LPSD is dismally below state average and can only be compared to the lowest achieving districts in the state. Moreover, 25% of students are English Language Learners, 90% are at-risk. Needy students need more resources.

CONCLUSION

The matter at issue is about a funding formula that is arbitrary and capricious as applied to Lakewood, having no rational relationship to its expenses and the residential population it serves. The issue is that the formula needs to rationally fit the mandatory expenses of the district not how financing the formula is to be divided between the state and locally. The issue would remain even if LPSD was a middle class suburban district; but LPSD is an urban district whose students are 90% low-income, 25% English Language Learners and 86% Hispanic, for whom the Supreme Court required a higher level of support for T & E. The heart of the matter is simply that a

district serving 38,000 school age children cannot provide a thorough and efficient education to its public school students under a formula designed for 6,000.

Respectfully Submitted,

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