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April 20, 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. I hereby offer Petitioners' rebuttal to Respondents exceptions and Petitioners' opposition to the motion of the Lakewood Board of Education to remand the matter for further hearings.

I. The Finding of the ALJ that Lakewood Students Do Not
Receive T & E Should Not be Rejected or Modified.

ALJ Susan M. Scarola found that Lakewood students "are not receiving a thorough and efficient education as required by the New Jersey Constitution." ALJ at 95. These findings were based on "numbers and statistics [that] are a matter of public record, are not in dispute, and have been explained and contextualized by witness testimony." ALJ at 64. N.J.A.C. § 1:1-18.6(c). The findings of the ALJ, who presided over the matter for almost four years, should be upheld unless they are contrary to substantial evidence in the record.

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"An order or final decision rejecting or modifying the findings of fact in an initial decision shall be **based upon substantial evidence** in the record and shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent and credible evidence in the record." N.J. A.C. § 1:1-18.6(d). (boldface added).

Respondents' exception to the findings of the ALJ should be rejected. Although Petitioners take exception to the reluctance of the ALJ to determine that the SFRA is unconstitutional, her finding of facts relating to the adequacy of education in Lakewood must be upheld given the Legislature's intent in creating the OAL as the forum to make fact-sensitive determinations in specialized matters.

Lakewood students are 91% are low-income (T2 45-9 to 19), 25% are classified as Limited English Proficiency (T2 40-18 to 19), 86% are Hispanic and 8.1% are African-American. (T2 123-18 to 23).¹ Lakewood students face

¹ Some students had little or no schooling in their native country. T3 212-13 to 12.

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multiple challenges and come from among the lowest income homes in New Jersey, but contrary to Respondents' exceptions, the district is not able to provide (with the loans) the opportunities and levels of support found in neighboring suburban districts.²

The district cannot **thoroughly** remedy educational deficiencies, nor can it make **efficient** and responsible interventions and choices, knowing that it must rely on even larger loans just to maintain its present levels of curriculum and support. What is sufficient for a suburban district is not constitutional for a district with so many

² **Inadequate and relatively low number of teacher supervisors.** MS T3 187-5 to 14, MM T3 233-18 to 234-22, MM T3 252-23 to 254-18. **Lack of assistant superintendents.** T3 236-1 to 19. Judge Metzger in Bacon heard testimony from the "two assistant superintendents in Lakewood." Bacon at 70. **Inexperienced teachers.** MW T2 69-6 to 15. MS T3 151-8 to 16 and T3 152-11 to 16. **Teacher instability.** MM T3 232-18 to 233-1. **Inadequate and relatively low number of instructional interventionists.** MM T3 239-10 to 240-6, MS T3 171-9 to 23. **Classroom sizes above capacity.** LW T2 16-7 to 16-25. MS T3 157-20 to 22. **Cuts in Athletic program.** LW T2 121-17 to 122-2. **Spanish is the only Foreign Language.** MM T3 217 10 to 14, T3 219-10 **Loss of in-house industrial arts and vocational Education .** MM T3 203-20 to 204-13. **Inadequate and relatively less in-class support and resource pullout services.** MM T36 242-6 to 243-20, MM T3 238-18 to 21. **Lowest teacher salary in the state.** The 2017 Taxpayers' Guide to Education Spending (admitted as evidence) shows Lakewood with the lowest median teacher salary of all 103 large K-12 districts with 3,500 or more students. Median Teacher Salary (2016-17): \$52,046; Salary Ranking Within Group (2016-17): 1|101; Median Teacher Salary (2015-16): \$50,436, Salary Ranking Within Group (2015-16): 1|103.



low-income struggling students. "If the educational fare of the seriously disadvantaged student is the same as the 'regular education' given to the advantaged student, those serious disadvantages will not be addressed. . . ." Abbott v. Burke (Abbott II), 119 N.J. 287, 374 (1990). Reliance upon loans every year, knowing that programs cannot be added to the budget and not knowing what will be cut, prevents well-planned intervention that is needed for low-income students with multiple deficiencies.

II. The Core Problem in Lakewood is Not Being Addressed or Acknowledged.

For twenty years the program and curriculum, faculty, staff and achievement have been decimated by a funding formula that does not fit. This is not a one-time, transitory problem or the "slightest deviation from T & E" (Respondents at 13). Nay, it is hard to imagine the provision of a thorough and efficient education at all in a district with a funding structure designed for 6,000 children serving 36,000 children.³ Just as imaginary is

³ This has been effectively admitted since advanced aid state may be provided to a district only if it is "necessary to ensure the provision of a thorough and efficient education." N.J.S.A. 18A:7A-56.



Respondents inference, despite the inherently intractable revenue problem, that "there is clear evidence that a deficiency is being appropriately addressed and sufficient progress being made toward its correction."⁴ Id.

Respondents trivialize the problem as if the right management could find a way to provide T & E within the SFRA budget.

III. The Curricular and Extra-Curricular Program is at Best "Sufficient" and "Barebones" Even with the Loans.

Respondents quote State Monitor David Shafter saying the 2015-16 budget, with the loan, was "sufficient." It was also called an "extremely responsible budget." T5 28-10. The 2015-16 budget was "sufficient" and "responsible" from a financial perspective meaning that the state monitor did not make any cuts from the previous year. (T5 28-7 to 10). In 2016-17 Mr. Shafter used the word "bare-bones" to describe the budget. (Id. 3 to 6). In 2017-18, when the sports program was cut, the word "barebones" was again used (27-21 to 23). "Sufficient" seems to mean that, with the

⁴ State Monitor Azzara: Q Okay. Does Lakewood have a revenue problem? A Yes. Q Does it have a spending problem? A No. T5 107-17 to 20. State Monitor Shafter: I think there's insufficient revenues to cover the required expenditures. T5 33-4 to 5.

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loan, it was not necessary to make cuts from the previous year. It does not mean that in the previous year, after two decades of countless cuts, or in the year at issue, funding was adequate from an educational perspective.

Adding insult to injury, on page 14 Respondents misquoted the ALJ about a "\$1.1 million sports program that the township has for the students." There was no such program. The ALJ was referring to \$1.1 million the township gave the district in 2017-18, of which \$557,000, was to restore the extra-curricular program. The sports program, including football, was cut that year because the \$8.5 million loan from the state was not sufficient for the district to offer it. The athletic director position and secretary were also terminated. The \$557,000 grant from the township to restore sports was not sufficient to restore the athletic director position and secretary. (T2 81-7 to 16, 118-15-23).

IV. Respondents have Not Produced Substantial Evidence to Contradict the ALJ's Findings that the Students are not Provided with T & E.

The ALJ also found that "only forty-four percent of students were enrolled in either a two- or four-year

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postsecondary school, compared with seventy-eight percent across the State.” ALJ at 68. Compare to how ALJ Solomon A. Metzger found Lakewood nineteen years ago. “More than 75 percent of high school students expect to pursue some type of post-secondary education.” Bacon v. Dep’t of Educ. EDU 2637-00 to 2656-00, 72 (Sept. 23, 2002).

Lakewood test scores also fell drastically over the last two decades. Respondents point to a recent **slight improvement**. They do not show that the so-called “gains” are statistically significant and inconsistent with Lakewood’s decades long dismal test scores or that they substantially contradict the findings of the ALJ. Any gains, if at all, are **despite** how Lakewood is funded, not because of.

When Petitioners filed in 2014, they complained that the “rich curriculum of a decade ago has been reduced to meeting basic requirements for graduation due to inadequate funding.” Petitioners’ expert witness, Dr. Danielle Farrie correlated two decades of classroom spending and test scores in Lakewood. She testified that since 2000 there was “a **strong correlation** between that decline in instructional spending with academic performance.” T3 81-18 to 20.

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Respondents faulted Dr. Farrie for not including in her analysis the PARCC scores that they claim improved slightly. She answered, "I looked at relative performance, and as I understand it, districts across the State, PARCC scores are all increasing, part of the reason why I restricted my analysis to 2014." (103-25 to 104-2). Respondents did not present evidence of or even argue any change in relative performance.

The "**strong correlation**" Dr. Farrrie found in Lakewood between the decline classroom spending and achievement should not be surprising. The Supreme Court has long recognized that input has a bearing, if not a "strong correlation," to output.⁵

We do not need to wait for Respondents to prove that New Jersey precedent is wrong and that there is little correlation between spending and achievement, or at not least in Lakewood. The ALJ had before her the most recent scores to the present date (except one) including all the PARCC scores. She found that "**Lakewood's test scores are**

⁵ In Robinson, the first New Jersey school funding case, the Supreme Court said, "the trial judge found constitutional demand had not been met and did so on the basis of discrepancies in dollar input per pupil. We agree. We deal with the problem in those terms because dollar input is plainly relevant" Robinson v. Cahill, 62 N.J. 473, 515 (1973).



woeful when considered in isolation and when compared to other districts." ALJ at 92.

No alleged improvement can obviate the necessity of confronting the core issue. Lakewood students once had a *relatively* **stable flow of funding**. Then over the last two decades, due to the failure of the previous and present funding laws, programs and courses were cut and educational funding became barebones. What is the logic to continue to deprive students of a stable flow of funding if they exhibit resilience with a slight improvement in test scores?

V. Evidence of Federally Funded Programs is Irrelevant to School Funding Litigation.

Respondents suggest that they are providing T&E in Lakewood with an "extensive number of opportunities provided to Lakewood students, both in basic skills and requirements as well as vocational education, technology and the arts."⁶ (p. 13). Federal funding such as Perkins

⁶ They list "robotics, coding, journalism, and horticulture," "a new technology classroom that supports these different opportunities, equipped with robotics, 3D printers, Apple T.V., and a Mac Air Cart," "culinary photography, and fashion design," and "graphic design, fashion and apparel, photography and film, video technology, business data entry and Army Junior ROTC." P. 14.

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grants and Title I provides for all the equipment and every program they list. Respondents do not list any programs paid out of the operating budget.⁷ The Abbott II Court was clear that "to the extent that the constitutional obligation is measured by the regular education provided by the district (the NCEB), federal aid is irrelevant." Abbott v. Burke, 119 N.J. 287, 331 (1990).

Respondents cited from their cross-examination of the Superintendent, Laura Winters, but fail to include her testimony of how these programs were funded. The following excerpt is from their cross-examination of her:

Okay. And you also do have some career programs in house as well, correct? A Yes. Q. . . Lakewood Township has been approved to have a graphics design program, is that correct? A Through Perkins, yes. Q And you have a fashion and apparel program, correct? A Perkins, yes. . . . These are all Perkins grants. Q And you have a photographic and film, video technology, technician and assistant program in house as

⁷ This does not imply that when federal funded equipment is used in the regular classroom a district paid teacher does not conduct the lesson.

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well? A Yes. Q And you have a business management. . .THE WITNESS: These are all Perkins grants. . .Q And you have a business data entry technology program as well? A Correct. Q And you also have an Army Junior, ROTC, ROTC program as well? A Correct. Q And that's in addition to the Ocean County. . . Q All right. Your high school has a new culinary classroom? A A couple years old. Q Couple years old. And you have a T.V. production studio? A Yes, these were all through the Title I programs, yes. . . Q And you have math labs at the high school? A Yes, Title I funding, yes. Q Again, I'm asking you, you have them. A But it's important to know how we got the money for it. T2 101-1 to 103-12

The large amounts of federal funding that were once available for these programs in Lakewood were drastically cut in 2017-18. Petitioners asked Marcy Marshall, the high school principal, "[H]ow much federal funding you got in the last -- in 2016/17? A The high school specifically got approximately 1.5 Million. Q And for 2017/2018? A The high school received 183 Thousand." She continued, "A lot of

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programs that were funded through that, and also teacher's stipends for after school programs were obviously had to be cut." T3 205-23 to 206-9

The unreliability of federal funding is one of the reasons why the Supreme Court "view[ed] the State's constitutional obligation to provide a thorough and efficient education as not adequately satisfied if dependent on federal aid, which today is subject to substantial fluctuation." 119 N.J. at 332.

VI. The Lakewood Board of Education 1) Cannot Move as a Participant, 2) was not Granted the Right to File Exceptions and 3) Its Appeal to Intervene and Remand the Case to the ALJ for Findings that T & E is Now Being Provided would be an Injustice to Student Petitioners Who are Harmed Every Day this Matter is Delayed.

The Lakewood Board of Education is not a party, but a participant, in this matter. N.J. A.C. § 1:1-16.6 provides:

(c) The judge shall determine the nature and extent of participation in the individual case. Participation shall be limited to: **1.** The right to argue orally; or **2.** The right to file a statement or brief; or **3.** The right to file

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exceptions to the initial decision with the
agency head; or **4.** All of the above.

The November 21, 2016 order allowing the BOE to participate did not affirmatively grant it the right to file exceptions. Moreover, the administrative code does not allow a participant to file motions, and certainly not such a drastic motion as remanding a seven year-old case after the initial decision.

In his July 23, 2015 ruling that the BOE is not a necessary party, ALJ John S. Kennedy wrote:

In prior New Jersey finance litigation the only plaintiffs/petitioners have been students and their parents. See Robinson v. Cahill, 118 N.J. Super. 223 (1973); Abbott v. Burke, 119 N.J. 287 (1990). In one such case, the State moved to dismiss the petition for lack of standing when the district, and not students and their parents, were named in the petition. See Bacon v. N.J. State Dept. Educ., 398 N.J. Super. 600 (App. Div. 2008). Therefore, I CONCLUDE that Lakewood School District is not necessary party to this litigation.

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The litigants Abbott were students and parents and in Bacon the BOEs became parties only by piggybacking on students and parents.

The BOE moved to intervene as a full party on three occasions. On the first day of the hearing, after six months of discovery involving the present BOE attorney, the ALJ denied a BOE motion to intervene and said, "the law of the case so far has been that Lakewood comes in as a participant. I might have decided differently a long time ago, but I'm not going to change it at this juncture, so you can participate, Mr. Inzelbuch." T1 22-15 to 18. On August 20, 2018, six months after Petitioners finished presenting their case and had already briefed the court in opposition to a second motion to dismiss, during oral argument, the BOE again moved to intervene. This was denied in a written order the same day. In paragraph 5 of another written order on October 9, 2018 the ALJ denied yet another motion to intervene.

At this state of the proceedings - the petitioner's case is nearly concluded and a motion to dismiss has been filed by the State - the addition of another party would cause undue

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delay in concluding these proceedings which have been protracted. Further, the petitioner is capable of presenting this matter on behalf of the parents and children who attend Lakewood's schools. Lakewood's motion to intervene as a party is again denied.

N.J.A.C. § 1:1-14.10 provides that a "ruling reviewable interlocutorily is subject to review by the agency head after the judge renders the initial decision in the contested case." That does not mean that the agency head cannot take into account that the prospective intervener failed to seek review until the end of seven years of litigation. The BOE waited to the day of the hearing, almost four years into the case, to move to intervene; continued to move to intervene at the most critical times in the matter diverting the attention of the parties from the merits; never took interlocutory appeal; and now, again moves to intervene to overturn an ostensibly favorable finding to the students of the BOE, after seven years of litigation, **without ever telling the Court of its adversity to Petitioners' position that T & E is not being provided.**

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The adverse position the BOE has suddenly taken at the conclusion of the matter contradicts its June 3, 2019 filing in federal court.

In the Complaint, Lakewood asserts that the additional \$36 million in funds from the DOE is insufficient in both form—in that it is a loan requiring repayment—and substance—as Lakewood now purportedly requires a further \$16,900,000 in order to provide a **“thorough and efficient” education to its students.**” Lakewood Board of Education v. New Jersey Legislature, et al., Civ. Action No. 19-14690 (FLW) **(July 8, 2020)**.

The BOE did not receive the \$16,900,000 and ostensibly, according to its pleadings, did not provide T & E, in 2019, the same year that it moves for the commissioner to remand for new evidence showing that it is providing T & E.⁸

⁸ The BOE, at 4, says that “the proceedings must be **reopened** so that the Administrative Law Judge (“ALJ”) may consider new, additional and/or critical evidence that is relevant to the ‘INITIAL DECISION’ and was ignored and/or not permitted.” This is perplexing given that the superintendent and business administrator testified, and the ALJ found them credible, in the presence of the BOE attorney. Nobody was aware or could have imagined that they were denied the opportunity present this new evidence or speak their mind during direct or cross examination.

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It should be noted that the BOE's federal case was dismissed in part because the BOE did not have **standing** on its own behalf or that of its students. "[T]here is no indication here that the students or their parents face any obstacles to litigating their claims themselves. Thus, I find that Lakewood has failed to overcome the general prohibition against third-party standing." Id. at 5. As for standing to bring the complaint on its own behalf:

The parties also dispute whether Lakewood has suffered a sufficient "injury" to satisfy the prudential criteria for standing. In its opposition brief, Lakewood asserts that it meets this requirement because the school district's **"failure to provide its students with an adequate education"** means that it is potentially liable in lawsuits brought by those students or their families. . . . [I]t is not clear whether such an "injury" is sufficient for prudential standing purposes." Id. At 5, ft. nt. 6. (boldface added).

Lakewood has taken a contradictory position in divergent forums on the issue of whether its students are provided an "adequate education." There is no difference between the

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facts and time period pleaded in the federal litigation and in their "motion" to remand this litigation.

Conclusion

The undersigned taught in Lakewood High School for nearly two decades. The program today is merely a shadow of the rich academic curriculum of when I started. Students went to four-year colleges, took various foreign languages and Latin, the school had an industrial art wing with woodshop, metal shop and auto shop, and had one of the finest marching bands in the state. The decline began long before the first loan in 2015. It is beyond any doubt that the district has a revenue problem. Respondent's fantasy that scores went up slightly and the program has been enhanced via temporary spike in federal funding cannot undo two decades of damage due to, and does not address the problem of, a funding formula that has no rational relationship to providing a thorough and efficient education in the district. Petitioners respectfully request that you uphold the decision of the ALJ "that Lakewood's students are not receiving a thorough and efficient education as required by the New Jersey Constitution." Petitioners also respectfully request, as explained their

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exceptions, that you find that failure of the SFRA to match
the demography of Lakewood and its exorbitant mandated
expenses is the cause.

Respectfully submitted,

s/Arthur H. Lang

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