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Attorney for Plaintiffs

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. Plaintiffs, 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 Defendants	OAL DOCKET No: EDU 11069-2014S Agency Ref. No.: 156-6/14 REPLY TO STATE RESPONDENTS' MOTION TO DISMISS THE AMENDED PETITION

Petitioners, Leonor Alcantara, individually and on behalf of E.A.; Leslie Johnson, individually and on behalf of D.J.; Juana Perez, individually and on behalf of Y.P.; Tatiana Escobar; and Ira Schulman, individually and on behalf of A.S., by and through their attorney, Arthur H. Lang, Esq., hereby reply in opposition to State Respondents' motion to dismiss the Amended Petition.

PRELIMINARY STATEMENT

The political branches have failed the children of Lakewood. The executive and legislature have been aware of their failure to adequately fund the district since 1991. Stakeholders in Lakewood public education cannot expect an elected leader, local or statewide, to champion their cause. In 2002 the local board of education had a golden opportunity as a party to *Bacon* to present a compelling case for their students in the Office of Administrative Law but pathetically failed them. The public school constituency has become exponentially smaller every year against an increasingly overburdened majority. The petitioning plaintiffs are among the disenfranchised few who have nowhere to turn other than to an impartial judge for their rights under the constitution of this great state.

I. THE LAKEWOOD SCHOOL DISTRICT IS NOT A NECCESARY PARTY TO THIS LITIGATION.

State Respondents seek to dismiss the Amended Petition because the Lakewood Board of Education (hereafter BOE) has not been named as a party. They claim that since "any likely administrative remedies (such as budgetary reallocations) would impact the District, the District must be joined in this action." (State Respondents Motion to Dismiss, hereafter "R"

at 8). State Respondents do not indicate whether the BOE should be a plaintiff or a defendant.

Counsel for Petitioners, a teacher at Lakewood High School, anticipated that the BOE would join the litigation and publically invited its participation together with his students. Instead, the BOE voted in executive session on July 17, 2014 *against* joining or supporting this litigation. State Respondents seek to penalize Student Petitioners for being abandoned by their own board of education.

State Respondents' motion to dismiss the Amended Petition for not including the BOE as a party glosses over the forty million dollars (and growing) coming off the top of every budget every year to support a large K-12 population not counted in the state funding formula. This expense is for services mandated by the United States Constitution (FAPE) and New Jersey Statute (remote transportation) and is not under the discretion of the BOE. Local taxpayers simply do not have the capacity to cover these costs and support the public schools on their own. The Amended Petition alleges, in part, that the Department of Education has been arbitrary and capricious for decades 1) in its methodology for determining the wealth of Lakewood and 2) for removing Lakewood from the District Factor Groups. Petitioners seek remedies of historic

injustices, including full SFRA funding and a change in how Lakewood is funded by the State. A resolution of these issues does not necessitate the participation of the BOE.

Lakewood taxpayers, who are already overextended spending one-quarter of their aggregate income on nonpublic education, have reached the breaking point. The children and their parents are crying for justice. Inclusion of the BOE, either as a plaintiff or as a defendant, will divert the litigation from the true cause of its failure, the fact that all the children do not count.

The disparity between the number of children served by the district and the number actually counted in the funding formula has increased every year. Yet State Respondents expect district administrators each year to support "achieve[ment] at higher levels (even though they have been failing abysmally), with either the same amount of money or less than they had before." *Abbott v. Burke* (*Abbott IV*), 149 N.J. 145, 195 (N.J., 1997). There simply is not enough money.

The *Abbott* plaintiffs were "children attending public schools in Camden, East Orange, Irvington, and Jersey City." *Abbott v. Burke (Abbott I)*, 100 N.J. 269, 277 (1985). Their school districts were not named as necessary plaintiffs or impleaded as defendants despite alleged local mismanagement.

The plaintiffs in this litigation are students residing in Lakewood. It is not necessary to include the Lakewood BOE as a party.

A. DISCOVERY WILL DETERMINE WHETHER THE STATE IS SUPPLANTING ITS CONSTITUTIONAL DUTY WITH FEDERAL FUNDS

State Respondents are correct to point out that "a critical issue in resolving Petitioner's constitutional claims will be the assessment of how the Lakewood District is spending its educational funds." (R-7). Student Petitioners will conduct discovery into district spending, and most specifically, how it is spending *federal* education funds. The constitutional mandate is to provide for a thorough and efficient system of pubic schools *without regard to federal funding.* "[F]ederal aid, targeted solely at helping poor children, is not intended to enable a state to keep in place a funding scheme that disproportionately penalizes them. . . . [T]o 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 (Abbott II)*, 119 N.J. 287, 331 (1990). It is almost certain that without federal money, the extent of the inadequacy in Lakewood would be even more pronounced.

The unique demography of Lakewood brings in more than

double the Title I allocation of any other district of similar student count and low-income. Contrast Bridgeton, an *Abbott* district of 5,209 public students, with Lakewood, a district of 5,767 public students, arbitrarily and capriciously denied *Abbott* status due to its large number of nonpublic students. Bridgeton had $3,815,905 available in Title I Part A funding for its 4,522 low-income public school students in 2013-14. Almost three times this amount, $10,093,379, was available in Title I Part A funding for Lakewood's 4,655 low-income public school students in 2013-14. This anomalous result is because Lakewood, a failing district like Bridgeton, has a large number of nonpublic students unlike Bridgeton. "LEAs serving Priority and/or Focus schools with Title I, Part A funds, up to a maximum of 30% of the total, Title I, Part A grant award must be reserved for the implementation of the schools' approved, School Improvement Plans (SIPs)."[1] Over $6.5 million of the $18,759,801 in Total Title I Part A available in 2013-14, including carry-over, was reserved *off the top* for Priority/Focus Interventions in Lakewood public schools.

All the children, including nonpublic students, count in the eyes of the federal government, *to the advantage of public school children*. By contrast, all the children do not count in

[1]http://education.state.nj.us/broadcasts/2014/MAY/13/11443/FY%202015%20ESEA_NCLB%20Allocations.pdf

the eyes of State Respondents, despite $40,000,000 in excess mandated expenses due to their large number, to *the disadvantage of public school children*. This is the heart of the matter.

It is ironic that inadequate state funding, the subject of this litigation, has increased the proportional amount of federal funds for the public schools, effectively further supplanting the state's responsibility. By underfunding Lakewood, State Respondents guarantee the failure of Lakewood public schools thereby guaranteeing the diversion of more federal money to the fill the gap. Discovery will determine the extent to which the constitutional requirement in Lakewood would be met if not for Federal Title I Part A funding.

To wit: the lions share of the Title I funds in 2013-14 were generated by the 14,715 low-income nonpublic students compared to 4,655 low-income public school students. Out of $18,759,801 In Title I Part A Lakewood was allocated last year, $9,367,786 went to the public schools (plus $725,593 in administrative expenses) while only $8,666,422 went to nonpublic students. Hence, even though the nonpublic student count generated 76% of the funds, nonpublic students only received 46%. Discovery will determine, among other allegations in the Amended Petition, whether the Department of

Education is *supplanting rather than supplementing* its obligation to provide T & E in Lakewood with the use of federal money. Even worse, we question whether inadequate state funding is forcing the BOE to fill its *general fund* with federal dollars.

If the Lakewood BOE is able to provide the remedial services admitted in the Amended Petition only through the use of federal funds or if those services do not adequately address the needs of Lakewood's disadvantaged students, then State Respondent have not meet their constitutional duty. All the more so when surrounding districts offer ESL and special education students an enriched program and support in all classes. Lakewood is a low-income urban district. Its "educational offering must contain elements over and above those found in the affluent suburban district. 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, and students in the poorer urban districts will simply not be able to compete." *Abbott v. Burke (Abbott II)*, 119 N.J. 287, 374 (N.J., 1990).

Below is table of Lakewood Title I Part A funding compiled

from State Respondents Electronic Web-Enabled Grant System.[2]

School Year	Public Low Income Student Count	Nonpublic Low Income Student Count	Total Title I Available For Lakewood LEA	Total Title I Generated by Public Student Count (estimate)	**Generated by Nonpublic Count *for Public School Use***	Total Title I For Use by LEA (LEA Public Amount + Adm. cost)	Generated by Nonpublic Count for Nonpublic School Use
2013-14	4,655 (24.0%)	14,715 (76.0%)	$18,759,801	$4,508,357	**$5,585,022 (224%)***	$9,367,786 + $725,593 $10,093,379	$8,666,422
2012-13	4,041 (23.4%)	13,244 (76.6%)	$16,405,671	$3,835,425	**$4,133,480 (208%)**	$7,197,236 + $771,669 $7,968,905	$8,436,766
2011-12	4,406 (26.6%)	12,135 (73.4%)	$8,727,354	$2,324,691	**$1,929,008 (183%)**	$3,817,331 + $436,368 $4,253,699	$4,473,655
2010-11	4,454 (28.5%)	11,196 (71.5%)	$9,021,680	$2,567,576	**$817,737 (132%)**	$4,208,678 + $433,056 $3,385,313	$4,379,946
2009-10	4,085 (29.8%)	9,608 (70.2%)	$7,510,748	$2,240,664	**$1,144,649 (151%)**	$3,042,711 + $342,602 $ 3,385,313	$4,125,435
2008-09	3,667 (32.6%)	7,586** (67.4%)	$6,336,429	$2,064,844	**$721,729 (135%)**	$2,477,601 + $308,972 $ 2,786,573	$3,549,856
2007-08	3,116** (34.1%)	6,022** (65.9%)	$5,290,811	$1,804,133	**$886,324 (149%)**	$2,432,715 + $257,742 $2,690,457	$2,600,354
2006-07	2,990** (32.9%)	6,110** (67.1%)	$5,428,106	$1,783,521	**$1,273,614 (171%)**	$2,787,074 + $270,061 $3,057,135	$2,370,971
2005-06	3,126 (50.0%)	3,129*** (50.0%)	$5,413,722	$2,706,861	**$716,923 (126%)**	$3,423,784 + $0 $3,423,784	$1,989,938
2004-05	3,095 (51.0%)	2,978*** (49.0%)	$4,593,339	$2,342,603	**$221,064 (109%)**	$2,563,667 + $0 $2,563,667	$2,029,672

* Percent of proportional share for use by LEA; ** High school students not counted;
***Nonpublic undercount remedied in 2006

Bridgeton

2013-14	4,522 100%	0	$3,815,905	$3,815,905	**$0 (100%)**	$3,815,905	$0

[2] http://njdoe.ewegp.mtwgms.org/NJDOEGMSWeb/logon.aspx

B. MISMANAGEMENT HAS HAD NO AFFECT ON THE DEFICIENCIES ALLEGED IN THE AMENDED PETITION

State Respondents seek the inclusion of the BOE as a party because it is possible that its "decisions caused a diversion of resources resulting in the programmatic and staffing deficiencies alleged in the Amended Petition. . . . ." (R-7). To the extent that we argue over breadcrumbs, this might be true. However, the huge deficiencies alleged in the Amended Petition have nothing to do with mismanagement. "No amount of administrative skill will redress this deficiency and disparity—and its cause is not mismanagement." *Abbott v. Burke (Abbott II)*, 119 N.J. 287, 381 (1990).

An audit released on March 18, 2014 faults the BOE for oversight of the Elementary and Secondary Education Act (ESEA) and the Individuals with Disabilities Education Act (IDEA) from June 2011-March 2013.[3] Another audit released on May 19, 2014 concerns NCLB Title I Part A Program.[4] A third audit released by the Office of Legislative Services on August 26, 2014 faults the Lakewood Board of Education for failing to properly oversee the expenditures of funds earmarked for the

[3]http://www.state.nj.us/education/finance/jobs/monitor/consolidated/CM-039-12.pdf
[4]http://www.lakewoodpiners.org/cms/lib01/NJ01001845/Centricity/Domain/4/State%20DOE%20NCLB%20Title%201%20Audit%20Findings.pdf

nonpublic schools from July 1, 2011 to December 31, 2013.[5] These audits are irrelevant to this litigation. The audits almost exclusively find fault with money earmarked for the seventy-five plus nonpublic schools in Lakewood.

The claim that the district has misallocated funds is not new. When *Abbott* was in the OAL, Judge Lefelt noted that the "State defendants acknowledge that some disparities exist, but contend that the causes are (a) local failures of effort and (b) mismanagement political maneuvering and outright illegalities which have diverted funds from the districts' educational programs."[6] *Abbott v. Burke*, EDU 5581-85 at 229, August 24, 1988. What is new, is the contention that Student Petitioners cannot be heard without joinder of the district as a party.

C. INCLUSION OF THE BOE AS A PARTY IS NOT NECESSARY BECAUSE THE COMMISSIONER HAS PLENARY AUTHORITY TO REALLOCATE DISTRICT EXPENDITURES

State Respondents moved for the Commissioner of Education to dismiss the Amended Petition before it was transferred to the Office of Administrative Law because it requires the participation of the Lakewood District. The "Commissioner cannot respond on behalf of, or be held accountable for, the

[5] http://www.njleg.state.nj.us/legislativepub/auditor/347013.pdf
[6] http//:njlegallib.rutgers.edu/legallib/njar/v13/p0001.pdf

decisions made by the Lakewood Board." (R-7). This is simply not true. The Commissioner of Education has the authority to determine and assess how Lakewood is spending its funds. There is no need to implead the BOE in order to reallocate appropriations.

The Commissioner has the power to reallocate BOE expenditures as part of the budgeting process. In all cases "the Commissioner may direct such budgetary reallocations and programmatic adjustments, or take such other measures, as deemed necessary to ensure implementation of the required thoroughness and efficiency standards." N.J.A.C. 6A:23A-9.4. State Respondents have it backwards. The Commissioner does not have to litigate against a board of education before he reallocates expenses. He reallocates and only afterwards the BOE litigates. "[T]he commissioner may summarily take such action as he deems necessary and appropriate, including but not limited to. . . redirecting expenditures. . . . A board of education may appeal a determination that the district is failing to achieve the core curriculum content standards and any action of the commissioner to the State board." *NJSA 18A:7F-6b*

Student Petitioners have brought their Amended Petition without the help or support of the BOE. They have delineated

their claims after years of painstaking research into the school law as applied to Lakewood. By contrast, State Respondents have immediate and direct access to the Lakewood BOE. In addition to three audits this year alone, and countless previous audits, the Commissioner assigned a state monitor to the Lakewood District in April 2014 pursuant to N.J.S.A 18A:7A-55 to "oversee the fiscal management and expenditures of school district funds, including, but not limited to, budget reallocations and reductions, approvals of purchase orders, budget transfers, and payment of bills and claims." The monitor began working in the Lakewood BOE central office (the former industrial arts wing of Lakewood High School) on April 27, 2014 and reports directly to State Respondents. The Department of Education and the Lakewood BOE are for all intents and purposes, fiscally and programmatically, *one and the same*. State Respondents do not need the participation of the Lakewood BOE in this litigation. They work hand-in-hand with it. State Respondents' refusal to answer for the allocation of expenditures in Lakewood without joinder of the BOE is a "flat disavowal of power despite the compelling circumstances [and] may be sharply contrasted with the sweep of our pertinent constitutional and statutory provisions and the tenor of our earlier judicial holdings."

Jenkins v. Morris Tp. School Dist., 58 N.J. 483, 493 (N.J., 1971). The motion to dismiss because the BOE is not a party is a poor excuse to avoid answering for the plight of the children who have brought claims against an establishment that cares little about their welfare.

D. THE COST OF NON-REMOTE TRANSPORTATION PALES IN COMPARISON TO THE DEFICIENCY IN STATE FUNDING

Discovery will determine the extent that non-remote transportation drains the budget. It appears to be $4 million, one-tenth the cost of mandated remote transportation and extraordinary special education services for 30,500 children in Lakewood. At least one student petitioner, D.J., benefits from non-remote transportation since she lives on a dangerous county road without sidewalks less than two and a half miles from her high school. At the time of filing the Amended Petition in early July all non-remote routes for students in grades 4-12 had been terminated. By information and belief, Plaintiffs allege that subsequent to the abolition of non-remote transportation in the May 2014 budget, the district did not reap the anticipated savings on its bussing bids. As a result of a political crisis involving the Township, BOE and parents of nonpublic students over the elimination of non-remote transportation, the BOE reached a compromise with the

Department of Education and several nonpublic schools. The DOE, through the state monitor, agreed to the restoration of courtesy bussing for students traveling more than a 1½ miles above fifth grade and the nonpublic schools agreed to tier their opening and closing times in order the reach maximum efficiency for mandated remote transportation. State Respondents are all too familiar with this thorn-in-the-side of the Lakewood BOE and any potential settlement of the issue will not substantially further the resolution of the monumental claims raised in this litigation.

II. PETITIONERS ARE DIRECTLY HARMED BY THE FAILURE TO ACHIEVE T & E IN LAKEWOOD

"Standing requires that a litigant have a sufficient stake and real adverseness with respect to the subject matter of the litigation, and a substantial likelihood that some harm will fall upon it in the event of an unfavorable decision." *New Jersey Bd. of Public Utilities, In re*, 200 N.J.Super. 544, 566 (N.J. Super. A.D., 1985). While the stake of the BOE and any harm to its members might be questionable as a matter of standing, the law is clear regarding Student Petitioners. In *Bacon, et. al v. New Jersey Department of Education*, OAL Dkt. Nos. EDU 2637-00 through 2646, 2649-00 through 2652, 2654-00 through 2656-00 (State Board Final Decision, January 4, 2006), cited by State Respondents, petitioning boards of education

moved for joinder of their students as plaintiffs. "In response to the Department's and Commissioner's motion to dismiss for lack of standing, the petition was amended to add several students attending some of the school districts and their parents." *Bacon v. State Dept. of Educ.,* 398 N.J. Super. 600, 607 (N.J. Super., 2008). Public Student Petitioners are the parties harmed by the deficiency of funding in their schools, not the members of the BOE. State Respondents are completely off base when they allege that Student Petitioners "focus on the harm faced by a third, necessary party: Lakewood District." (R-9)

At the time of filing, the children of petitioners Leonor Alcantara, Leslie Johnson, Juana Perez, and petitioner Tatiana Escobar, were counsel's students at Lakewood High School. E.A., Y.P. and D.J. were ninth grade students in three separate basic skills mathematics classes that counsel taught. Tatiana Escobar was an eleventh grade student in his geometry class. E.A. is classified for speech language services. Y.P. and D.J. are classified special education students. No special education teacher was provided for in-class support in any of the basic skills mathematics classes even though counsel is not a special education teacher. Tatiana Escobar is classified as a Limited English Proficiency (LEP) student. No LEP in-

class support was provided in her geometry class. This is not surprising. Counsel has four LEP students and one special education student in geometry this year with no in-class support. One of his LEP students is in a class of 28.

Student Plaintiffs also do not receive in-class support in history or science. These special needs and regular education students are typically crammed into classes of 25 or more in these courses. Science and social studies draw upon mathematics and Language Arts skills; needless to say, Student Plaintiffs are lost in the shuffle.

Since the time of filing, E.A. has moved out of the district and Tatiana Escobar has dropped out of school. E.A. may no longer have a stake in the outcome of this litigation but Miss Escobar still lives in Lakewood. Counsel has not despaired of the hope that she will return to school this year. Counsel asked her to join as a petitioner last year because of her diligence and aptitude despite her need for LEP intervention and her delayed acclimation to American school culture.

Miss Escobar, E.A., D.J., Y.P. and their peers in Lakewood High School have been affected by the lack of services alleged in the Amended Petition. A decade ago, Lakewood High School had in-class support *in every academic class.* Some districts

offer personal student supervision assigning a special education teacher to accompany students throughout the day. Had Miss Escobar received the LEP support offered in other districts, she might not have had to repeat geometry in eleventh grade. She might still be in school. Had Y.P. and D.J. received adequate support early on, they might have mastered basic skills mathematics before the ninth grade. Had E.A. received the remediation offered in other district, she too might have mastered basic mathematics before ninth grade. Her parents might not have chosen to move out of the district.

Student Petitioners would love to expand their interests and reap the opportunities their predecessors had in Lakewood High School a decade earlier. Unfortunately, their horizons are limited because the school no longer offers its formerly rich academic and vocational program. Y.P. aspires to become a nurse and complains that the school discontinued training in health care. Students were formerly engaged in weekly learning experiences at local hospitals and nursing homes.

A.S. is a low-income special education student parentally placed in a nonpublic school. He had previously been enrolled in the Lakewood Head Start program as a preschool public school child. He and all other nonpublic school students similarly situated also have a stake in this litigation. As

mentioned, the failure of Lakewood public schools has eliminated almost half the federal funds available to nonpublic low-income students. State Respondents' arbitrary and capricious revocation of Lakewood's DFG means that preschoolers in Lakewood only attend a targeted program, not a universal preschool. "District factor group A and B school districts, and district factor group CD school districts with a concentration of at-risk pupils equal to or greater than 40%, shall provide free access to full-day preschool for all three- and four-year old pupils. All other school districts shall provide free access to full-day preschool for at-risk pupils." *NJSA 18A:7F-54.* Since Lakewood has no DFG, it does not provide free access for all three and four-year old pupils even though the at-risk concentration of all children, *public and nonpublic,* is over 70%. The disproportionate allocation of IDEA funds by the district for students with the most extraordinary needs due to inadequate state funding has depleted IDEA funds leaving little or nothing for mainstreamed public and nonpublic special education students. The cost of the special needs of A.S. falls almost entirely on his parents who have no money left over for their other children.

The Parent Petitioners as Lakewood residents are taxed the maximum allowable under the law to partially fill the gap in

state funding. The "T[horough] & E[fficient] constitutional mandate does not protect taxpayers." *Stubaus v. Whitman*, 339 N.J. Super. 38, 56 (App. Div. 2001). However, State Respondents have penalized the township with a deficiency of funding because the vast majority of its citizens do not attend the public schools for religious reasons. In such a case, a colorable claim of equal protection might be raised. Parent Petitioners, like all residents of Lakewood, are affected by the traffic and congestion caused by the hundreds of busses on the streets, or even worse, the thousands of cars should the non-remote transportation be rescinded again. Every citizen of Lakewood, whether he or she is a senior citizen or a parent of a public or nonpublic school child has a stake in the outcome of this litigation.

The students named in the Amended Petition represent a cross-section of the unique demography of Lakewood's children. Counsel would not be hard pressed to replace Student Petitioners should any be dismissed. However, the time involved in moving to amend the petition would unnecessarily delay the outcome of this litigation. Should a particular LEP, special education, or nonpublic student be dismissed, remaining Student Petitioners yet pray for relief on all of the allegations raised in the Amended Petition even if they do

not share the same harm of a dismissed peer. *Each of the grievances* raised in the Amended Petition have a deleterious effect on large numbers of children in Lakewood. Squabbling over technicalities will only postpone a comprehensive remedy but will not forestall it. In any case, short of "a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." N.J.A.C 6A:3-1.16. Student Petitioners request that the Amended Petition immediately move forward to discovery so as not to delay justice for "the plight of these students, whose education and lives are at stake." *Abbott by Abbott v. Burke (Abbott III*), 643 A.2d 575, 136 N.J. 444, 456 (N.J., 1994).

III. THE PETITION SHOULD NOT BE DISMISSED BECAUSE THE PROCEEDING IS NECESSARY TO PROVIDE A FACTUAL RECORD FOR ADMINSITRATIVE AND JUDICIAL REMEDIES.

The "SFRA as applied to Lakewood is currently unconstitutional as it is impossible to provide T & E under provisions designed for 5,500 children when in reality the district serves a resident population of 30,500 children and growing."(Amended Petition-9). The district provides mandated remote transportation, textbooks, find and evaluate, and

extraordinary special education services for 30,500 K-12 students but is treated by State Respondents as a middle size district of 5,500 children. The local tax base, an urban low-income municipality, simply does not have the capacity to provide for all these children on its own. Contrary to the assertion of State Respondents, Student Petitioners do not pray for "the Commissioner to undertake certain legislative functions."(R-10). They petition the Commissioner to use his "far reaching powers and duties designed to insure that the facilities and accommodations are being provided and *that the constitutional mandate is being discharged*." 48 N.J. at 104 (emphasis added).

Certainly "[n]o administrative agency has jurisdiction to declare a statute unconstitutional." *Stubaus v. Whitman*, 339 N.J. Super. 38, 770 A .2d 1222, 1236 (N.J. Super., 2001). However, the law in New Jersey is clear that a constitutional T & E claim has to be first heard in the Department of Education. The *Abbott I* Court had to "decide whether the controversy, in the first instance, can and should be resolved in whole or in part before an administrative tribunal, or whether it must immediately be considered by the judiciary." *Abbott v. Burke (Abbott I)*, 100 N.J. 269, 296 (N.J., 1985). The *Abbott I* Court was "satisfied that the presence of

constitutional issues and claims for ultimate constitutional relief does not, in the context of this litigation, preclude resort in the first instance to administrative adjudication." *Id.* at 297. 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." *Id.* at 301. Such is the law in New Jersey. It makes sense for the administrative agency to first hear the case. "[A] proper reason for requiring exhaustion before a court passes upon constitutionality of a statute is that the court may need a factual development which will help it to resolve the constitutional issue." K. Davis, *The Exhaustion Problem*, 4 Administrative Law Treatise § 26:1, 436 (1983). Had Petitioners filed in Superior Court, State Respondents could well have moved to dismiss the complaint for failure to exhaust administrative remedies as it did early in *Abbott*.

The *Bacon* districts initially filed their complaint in Superior Court but the "matter was transferred to the Commissioner, with the December 1997 complaint serving as the basis for a petition of appeal to the Commissioner." 398 N.J. Super. at 607. As a result of the findings in the OAL, the

Department of Education recommended to the legislature that Salem City be added to the list of special needs districts in 2004 pursuant to N.J.S.A. § 18A:7F-3 (2004). The Amended Petition should not be dismissed in part because Lakewood is one of the largest urban areas in the state, has one of the lowest incomes of any municipality and has arbitrarily and capriciously not recognized as such.

Nothing is inappropriate in the Amended Petition by asking the Commissioner for a declaratory judgment that Lakewood should be treated as an urban DFG A or B district. Nothing is inappropriate in Amended Petition by asking the Commissioner for declaratory judgment that the mandated expenses, most pronounced due to the unique demographics of Lakewood, deprive its public school children of educational adequacy under our constitution. It is entirely appropriate for the Commissioner of Education to review the facts in order to facilitate a comprehensive and permanent remedy of the intractable issues raised in the Amended Petition. "Our courts have long recognized the sweep of the Commissioner's reviewing powers." *Board of Ed. of East Brunswick Tp. v. Township Council of East Brunswick Tp.*, 48 N.J. 94, 101 (N.J., 1966).

Student Petitioners allege that the legislature did not contemplate the unique demographics of Lakewood in enacting

the SFRA. The *Bacon* case that lead to the passage of the SFRA did not deal with the allegations raised in the Amended Petition. The Lakewood BOE, a party to the litigation, irresponsibly delivered the fate of its children to legal team concerned with litigating the cause of rural districts of populations less than 10,000. The claims raised in the Amended Petition were as valid, albeit on a smaller scale, in 1997 as they are 2014. It was not until a footnote of the Commissioner's decision that any mention of Lakewood's uniqueness is made.

> "The ALJ opined in passing that the relative size of Lakewood's nonpublic school population was a unique circumstance perhaps requiring individual attention, but that such a policy question was beyond the scope of the administrative forum. The district noted this comment and, in its exceptions, 'formally requested [the Department] to immediately consider and establish a mechanism to address head-on the ever-growing and unique situation of Lakewood.' (Lakewood's Exceptions at 4) The Commissioner declines to do so in the present context, finding this situation to be best addressed directly by the Legislature, should it deem appropriate." *Bacon et. al.*, (Commissioner Decision) at 149, ft. nt. 14 (2003)

The effort of the BOE was too little, too late and too half-hearted for justice to be rendered for its students. To the present day, the legislature has failed to remedy the inadequacy. Lakewood needs individual attention.

The fact-finding services of the Office of Administrative

Law are not for the sole purposes of declaratory judgment, for the purpose of recommending legislation or for the sole purpose of delivering a record to the Superior Court. The Amended Petition also prays for full funding under the SFRA as currently enacted. The Commissioner fully funds all the other former *Abbott* districts a full share of their SFRA allocation even though the SFRA does not distinguish the urban districts from every other district for full funding. The *Abbott XXI* Court ordered full funding for the urban districts even though the SFRA "abolished the designation of Abbott districts." *Abbott v. Burke(Abbott XXI)*, 206 N.J. 332, 470 (2011, J. Albin concurring). The funding was appropriated by the legislature in the Governor's budget without change to the SFRA. The Commissioner and Governor should not need an order of the Supreme Court to fully budget SFRA funding, especially if the Office of Administrative Law determines and the Commissioner concurs that public school students in Lakewood are deprived of T & E.

The Court has left it "to the Legislature, the [State] Board and the Commissioner to determine which districts are 'poorer urban districts.'" *Abbott v. Burke (Abbott IV)*, 149 N.J. 145 ft. nt. 37 (N.J., 1997). It is true that CEIFA of 1995 had a provision granting the Commissioner express

authority to designate urban districts and it is true that the SFRA removed that authority. However, the SFRA did not anticipate that the urban districts would not be fully funded. The SFRA simply did not conceive that the urban designation was still relevant. Once the SFRA was not fully funded, the Court ordered full SFRA funding for the urban districts.

The *Abbott IV* Court quoted from *Abbott II,* which was decided before the legislature granted the Commissioner authority to designate urban districts. "We leave it to the Legislature, the Board, and the Commissioner to determine which districts are 'poorer urban districts.'" *Abbott v. Burke* (*Abbott II)*, 119 N.J. 287, 385 (N.J., 1990). The Governor has the authority and the Commissioner has the responsibility to submit a budget appropriating full SFRA for a "poorer urban district" even if it happens not to have been a party in *Abbott v. Burke*.

CONCLUSION

Lakewood is an anomaly among New Jersey districts. The allegations raised in the Amended Petition are unique. No other district will be able to pray for the same relief. State Respondents can rest assured that relief for Lakewood will *not open the floodgates of litigation.* Lakewood is sui generis.

Student Petitioners represent the stakeholders in public

education in Lakewood, a political minority decreasing in size every year. They have no hope for relief from the elected branches of government. They look toward the Office of Administrative Law to assert their rights in the same manner as other disenfranchised minorities have historically petitioned judges to affirm their rights. Up against an increasing majority of citizens without stake in the public schools, they are indeed among the politically "discrete and insular minorities [that] may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products Co*, 304 U.S. 144, 152 (1938) ft. nt. 4.

Respectfully Submitted,

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