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Via E-mail and Regular Mail

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Commissioner, Department of Education
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Re: Leonor Alcantara, et al. v. David Hespe, Commissioner of
the New Jersey Department of Education, et al.
OAL Dkt. No. EDU 11069-2014S
Agency Reference No. 156-6/14

Dear Commissioner Allen-McMillan:

Please accept this letter brief on behalf of Respondents, the Commissioner of the New Jersey Department of Education ("Commissioner"), the New Jersey State Board of Education ("BOE"), and the New Jersey Department of Education ("DOE") (collectively "Respondents"), as partial exceptions to the March 1, 2021 initial decision of the Honorable Susan Scarola, ALJ (the "ALJ" or "Judge Scarola"). The initial decision should be rejected, in part, because the collective Petitioners in this matter failed to prove that Lakewood Public School students are not receiving a thorough and efficient education ("T&E"). More specifically, the students



of Lakewood are receiving T&E, which is evident through their improving scores and other statistics indicating that the students are afforded all necessary opportunities in order to achieve success in college, career and life under the New Jersey Student Learning Standards ("NJSLs").

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PROCEDURAL HISTORY¹

The first petition of appeal in this matter was filed with the Commissioner on June 24, 2014, alleging that

the funding formula under the School Funding Reform Act, [N.J.S.A. 18A:7F-43 to -70 ("SFRA")], is unconstitutional as applied to Lakewood Township's public school students, such that the Lakewood Board of Education does not receive sufficient funding under the SFRA to provide its public school students with [T&E] because the SFRA does not take into account the extraordinary costs that the district incurs to provide transportation and

¹ While this matter involved extensive and protracted litigation over the course of five years, and across a range of factual and legal issues, Respondents limit their recitation of the factual and procedural history in this matter solely to the facts and issues that are relevant for purposes of these exceptions.

special education services to a large number of students who attend private schools.

[(Initial Decision at 2).]

After Respondents filed a motion to dismiss in lieu of an answer, the matter was transmitted to the Office of Administrative Law ("OAL") on September 4, 2014, as a contested case. Id. at 3. In their motion, Respondents argued that the Lakewood students are receiving T&E, which is measured by the New Jersey Student Learning Standards ("NJSLS"), and that they have engaged in extraordinary efforts to make that so. Ibid. Petitioners opposed the motion on October 22, 2014. Id. at 3-4. Paul Tractenberg, Esq., filed a motion for leave to participate in the proceedings pursuant to N.J.A.C. 1:1-16.6, and in opposition of Respondent's motion to dismiss. Tractenberg's motion to participate was granted. Id. at 4.

Oral argument was held on June 9, 2015, and the Honorable John Kennedy, ALJ, denied the motion to dismiss on July 24, 2015. Ibid. On February 19, 2016, Petitioners filed a motion for summary decision concluding that a hearing was not necessary, as all data could be found in the public record. Ibid. Respondents filed opposition and sought to join the Lakewood Board of Education as a necessary party. Ibid. The Lakewood Board voted to not participate. Ibid. On July 19, 2016, an order denying the motion for summary decision was issued by the Honorable Solomon A.

Metzger, ALJ. Ibid. The Lakewood Board then sought to join the action by filing a motion to participate, which was granted on November 21, 2016. Ibid. Petitioners followed by filing a motion for emergent relief related to the Lakewood district's 2017-2018 budget deficit, which Respondents opposed. Ibid. The motion was subsequently withdrawn when the issue was resolved through use of a State aid advance. Ibid.

The hearing in this matter took place on February 5, 7, 12, 13, and 22, 2018. Id. at 5. Following the last date of the hearing, Respondents filed a motion to dismiss the amended petition on April 30, 2018. Ibid. Petitioners and Tractenberg opposed the motion, and Petitioners sought to re-open their case to present testimony of another witness. Ibid. Following oral argument, Petitioners were ordered to file an amended petition to clarify the relief they were seeking and Respondents were permitted to file an answer. Ibid. Petitioners were also permitted to re-open the record to allow for the additional witness to testify. Ibid.

On September 4, 2018, Petitioners filed a second amended petition, which Respondents answered on September 18, 2018. Ibid. The second amended petition asked the Commissioner to determine:

- (1) that the SFRA as applied to the Lakewood School District does not provide sufficient funding to enable the school district to deliver the core curriculum content standards and extracurricular and cocurricular activities necessary for T&E;
- (2) that the

consequential reliance upon discretionary advance State aid payments pursuant to N.J.S.A. 18A:7A-56 to provide funding for T&E does not provide T&E funding in any given school year that is certain and predictable; (3) that the constitutional imperative regarding T&E requires sufficient funding that is not discretionary; and (4) that the Commissioner recommends that this matter be remedied by the Legislature.

[(Ibid.)]

On January 8, 2019, Respondent's motion to dismiss was denied, and the hearing continued on July 9, 10, 21, and 22, 2019. Id. at 6. The record closed on November 28, 2019, after submission of post-hearing summations. Id. at 7.

On December 17, 2020, Participant attempted to submit additional documents for consideration, but his request was denied by the ALJ, as Respondents objected to their consideration as record was already closed and the initial decision was underway. Id. at 7.

On March 1, 2021, an initial decision was entered by Judge Scarola, holding that (1) Lakewood is not delivering T&E to its public schools, and (2) the SFRA is not unconstitutional as applied to Lakewood. Id. at 104.

Based on her findings,¹ Judge Scarola recommended that the Commissioner and the DOE conduct a current "Needs Assessment

¹ Judge Scarola also found that the SFRA was not unconstitutional as applied to Lakewood.

regarding the ability of Lakewood to deliver a thorough and efficient education to its public-school students[.]” Id. at 104.

STATEMENT OF RELEVANT FACTS

This matter arises from an action brought by Petitioners alleging that Lakewood Public Schools are underfunded, and that its students are not receiving a thorough and efficient education (“T&E”), all in violation of the New Jersey Constitution. The school years at issue are 2014-2015 through 2018-2019. Id. at 3. The various Petitioners are “parents of children who attend Lakewood Township’s public schools.” Ibid. Petitioners argued that the students in Lakewood are not receiving T&E and that it is directly due to the fact that the SFRA is not providing sufficient funding to the public schools in Lakewood. Ibid. On the other hand, Respondents argued that the Lakewood students are receiving T&E, which is measured by the NJSLs, and that they have engaged in extraordinary efforts to make that so. Ibid.

Throughout the course of litigation, Respondents contended that Lakewood is in fact able to provide its public-school students with T&E, and that any question in regard to the SFRA being unconstitutional as applied to Lakewood should be rejected. It was further noted by Respondents that Lakewood’s relevant scores and measures meant to indicate whether T&E has been met were improving, even if those statistics were improving at a slow, but

consistent pace.

In her initial decision, Judge Scarola heavily relied on the testimony of Laura Winters, Malka Spitz-Stein, and Marcy Marshall, who she found to have “provided valuable insight into the characteristics of Lakewood’s student body, teachers, and programs, and credibly described Lakewood’s efforts to deliver T&E to public school students.” Id. at 66. Based on their testimony, she noted that “the district’s course offerings meet the State’s requirements for graduation” and that the district “has a special education preschool program for three-and four-year old students, but only offers general education preschool for four-year-old students.” Id. at 66-67. Additionally, she found that teacher turnover is significant in Lakewood as the average teacher salary is below the State average and the fact that “Lakewood lags well behind other districts in terms of per pupil classroom instruction spending classroom salaries.” Ibid.

Notwithstanding the fact that Lakewood’s standardized test scores and other metrics were below State averages during the relevant time period, Judge Scarola found that Winters and Spitz-Stein provided testimony that “standardized tests scores and other education benchmarks are improving . . . [,]” ibid., and that “in 2017-2018 some of the metrics improved slightly” when it came to students meeting or exceeding expectations on State English and

Math assessments. Id. at 69.

Judge Scarola determined that "in order to prevail on their claim that the SFRA is unconstitutional as applied to Lakewood . . . Petitioner must first show that Lakewood's public-school students are not receiving T&E." Id. at 91. She concluded that Petitioners had prevailed in their argument that Lakewood students are not receiving T&E. Ibid. The ALJ noted that T&E is measured through many different factors, including students' "test scores, their dropout rate, [and] their attendance at college[.]" Abbott v. Burke (Abbott II), 119 N.J. 287 at 391 (June 1990). Other indicators include "teacher-student ratios," "educational and experience level of professional staff", "facilities to accommodate appropriate class sizes", and "availability of advanced placement courses and programs for gifted students" among other factors. Bacon v. Dep't of Educ., 2006 N.J. AGEN LEXIS 108, *62 (Jan. 4, 2006).

Based on these measures, the ALJ found that "the education received by Lakewood's students is constitutionally inadequate and they are not being sufficiently prepared for college, career, and life." (Initial Decision at 92). She noted, however, that "these deficiencies alone do not suggest that Lakewood's students are not getting T&E[.]" and considered other factors in her calculus, including test scores, absenteeism rates, graduation rates, and

NJQSAC scores, among other things. Id. at 92-94. Teacher turnover, per pupil classroom spending and classroom salaries, and preschool programs were also considered. Ibid.

These exceptions follow. Respondents take exception to Judge Scarola's finding that Lakewood's students are not receiving T&E. Respondents agree with the court's conclusion that the SFRA is not unconstitutional as applied to Lakewood.

ARGUMENT

THE INITIAL DECISION SHOULD BE REJECTED IN PART BECAUSE PETITIONERS FAILED TO PROVE THAT THEY ARE UNABLE TO PROVIDE LAKEWOOD PUBLIC SCHOOL STUDENTS WITH A THOROUGH AND EFFICIENT EDUCATION.

Under N.J.A.C. 1:1-18.4(a), "within 13 days from the date of the judge's initial decision was mailed to the parties, any party may file written exceptions with the agency head." Exceptions shall include "findings of fact, conclusions of law, or dispositions to which exception is taken," and shall set forth supporting reasons for any proposed findings of fact, conclusions of law or dispositions "in lieu of or in addition to those reached by the judge[.]" N.J.A.C. 1:1-18.4(b)(1) to (b)(3). Upon reviewing the initial decision and the record developed at the OAL, the agency head "shall adopt, reject or modify the recommended report and decision." N.J.S.A. 52:14B-10. The agency head is within his or her authority to reject erroneous conclusions of law

or fact based upon a review of the record and his or her expertise in the area. "In reviewing the decision of an [ALJ] the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so." N.J.S.A. 52:14B-10.

Here, Respondents ask the Commissioner to find that the initial decision must be rejected, in part, as the ALJ improperly found that Petitioners have met their burden of showing that Lakewood's students are not receiving T&E. With the significant assistance and direction from the Commissioner and the State, T&E is in fact being provided to the students of Lakewood. Both the statistics and the testimony of both parties' witnesses support such a conclusion. In sum and substance, the ALJ focused her attention too narrowly, and failed to take all of the relevant evidence into account. Mindful that some of Lakewood's metrics are less than stellar, the fact remains that they are indeed improving. The ALJ's conclusion that Lakewood's students are not receiving T&E must be rejected.

The New Jersey Constitution requires the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, ¶ 1. Through the Abbott v.

Burke line of cases, the Supreme Court of New Jersey has provided significant guidance on the standards necessary to ensure the provision of T&E in New Jersey's public schools. See, e.g., Abbott v. Burke (Abbott IV), 149 N.J. 145, 166 (1997). In terms of the State's obligation to ensure proper funding, the Legislature has recognized that constitutional mandate by, among other things, enacting the SFRA. See generally N.J.S.A. 18A:7F-44.

Among the goals of the SFRA is to provide funding directly linked with, or otherwise "geared" towards, core curriculum content standards ("CCCS"), which embody the substantive standards defining the content of T&E. N.J.S.A. 18A:7F-44(i) and (q); Abbott IV, 149 N.J. at 168; Abbott v. Burke (Abbott XX), 199 N.J. 140, 149 (2009). The Department has taken measures to satisfy those standards and ensure the provision of T&E to New Jersey's students by establishing the New Jersey Student Learning Standards ("SLS"), which specify expectations in nine academic areas and set forth indicators at benchmark grade levels to clarify expectations for student achievement. N.J.A.C. 6A:8-1.1(a)(1) and (a)(2); see also N.J.A.C. 6A:8-1.1 to -5.3 (regulations pertaining to the SLS, statewide assessment system, and graduation requirements); Abbott v. Burke (Abbott XXI), 206 N.J. 332, 420-22 (2011) (discussing the CCCS). School districts are required to "align their curriculum and instructional methodologies to assist all students in

achieving NJSLS and to prepare all students for college and career” and “[p]rogress towards meeting the NJSLS [is] measured by the Statewide assessment system at grades three through 12[.]” N.J.A.C. 6A:8-1.2(c) and (d). The SFRA is designed to provide funding to schools in order to carry out these objectives. See (Initial Decision at 82-91).

Petitioners bear the burden of demonstrating that Lakewood’s public-school children are not receiving T&E, see id. at 90, but they fell short of satisfying that standard. Throughout the record, it was stated time and time again that, with the Commissioner’s assistance and substantial efforts, Lakewood has been able to ensure that T&E is provided to the Lakewood public school district. Petitioners’ own witnesses made this fact evident, and Petitioners themselves did not even testify or present specific evidence of any constitutional deficiencies in their education to indicate lack of T&E. They only cemented the point that although there are deficiencies, they are being addressed and progress is being made, even if it is at a slower pace than Petitioner would like to see. (2T69:21-23; 2T70:20; 2T91:21-25; 2T112:10-15; 2T115:17-19). Those shortcomings are critical to an analysis of whether or not T&E is being provided. See Bacon v. N.J. State Dep’t of Educ., 2003 N.J. AGEN LEXIS 1195, at *6-7 (Feb. 10, 2003) (“[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 towards its correction.”).

Specifically, Petitioners’ witnesses demonstrated that that Lakewood was in fact able provide public school students with T&E. For example, Mike Azzara stated that the District’s budget for the 2017-2018 school year contained what was needed in order for the district to provide T&E. (5T107:25-108:5; 5T108:22-25). David Shafter also established that T&E is being provided when he indicated that the 2017-2018 budget was “sufficient . . . to deliver the services to the students.” (5T26:12-21). In addition, Winters, Spitz-Stein, and Marshall all testified about the extensive number of opportunities provided to Lakewood students, both in basic skills and requirements as well as vocational education, technology and the arts. These opportunities are significant in that they indicate that these students are being offered what is needed in order for them to be prepared for college, career and life under the NJSLs, which necessitates “requirements that prepare students for success in post-secondary degree programs, careers and civic life in the 21st century.” (Initial Decision at 86-87); N.J.A.C. 6A:8-5.1(a).

Winters specifically spoke about ESL instruction being provided to elementary and middle school students as well as the

\$1.1 million sports program that the township has for the students. (Initial Decision at 16; 2T38:22-25; 2T39:1-8). Winters also mentioned the academically gifted program available at the elementary school as well at the opportunity for high school students to take multiple Advanced Placement ("AP") classes across subjects. Id. at 17; 2T100:4-17. She further testified that the District supports Career Academies in the Middle School by offering instruction in robotics, coding, journalism, and horticulture. (2T97:24-25; 2T98:1-24). Spitz-Stein discussed that students have computer access in elementary school for English and technology, and that in the middle school, one quarter of students are enrolled in robotics. Id. at 26. Additionally, the Middle School has a new technology classroom that supports these different opportunities, equipped with robotics, 3D printers, Apple T.V., and a Mac Air Cart. (2T99:1-14). Marshall added to the discussion by mentioning that students have access to "culinary, photography, and fashion design, among other programs." Id. at 27. This is made possible for students who attend the Ocean County Vocational Technical School, which helps prepare them to enter into a trade after graduation. (2T100:19-25). These programs include graphic design, fashion and apparel, photography and film, video technology, business data entry and Army Junior ROTC. (2T101:1-25; 2T103:1-21).

The credible testimony relied on in the initial decision seems to actually establish that fundamentals of T&E were being provided. In fact, the ALJ noted that "Lakewood's curriculum aligns with the NJSLs requirements for graduation, and the district offers courses in AP English and Spanish, and several classes in music, art, and computers" Id. at 92. All parties even stipulated to the fact that Lakewood offers all courses necessary to comply with State graduation requirements. (2T96:5-25; 2T97:8-9).

Further, Petitioners' school funding expert, Dr. Danielle Farrie, offered no testimony as to the current state of the Lakewood educational system. She only looked at Lakewood's performance on statewide assessments up until 2014 to support her hypothesis that Lakewood's educational performance was in decline. (4T80-8-19; 4T103:7-9). Her conclusions regarding Lakewood's educational state were four years out of date at the time she testified and should not be considered to establish that T&E is not currently being provided.

In demonstrating that T&E is being provided it is important to note that many of the district's schools did meet the State-set targets for 2017, and the District's performance improved from the 2015-2016 school year to the 2016-2017 school year. (Initial Decision at 26). Graduation rates have also gone up, improving by 6% from 2012 to February 2018, and are likely climbing since then.

Id. at 93; (2T112:10-15). Additionally, the district met most of its Every Student Succeeds Act ("ESSA") Accountability targets, and not one school in the District is in need of comprehensive or targeted support. (2T92:8-25; 2T93:1-9; 2T94:1-9). Additionally, with the assistance of the Commissioner, Reduction in Force ("RIF") letters that had been previously issued were rescinded or in some cases avoided entirely. (Initial Decision at 16; 2T67:20-25, 2T68:1-2, 2T24:13-24, 2T83:1-6). Also, programs that were threatened to be cut were restored. Ibid. All of these facts prove that there has been steady and consistent improvement in the district, specifically with help from the Commissioner and the Department. And taken together, they belie any notion that Lakewood's students are not receiving T&E.

Stated plainly, the ALJ failed to recognize these critical improvements in her decision. And while standardized test scores and graduation and AP enrollment rates may be low, Lakewood has shown that they have the ability to improve these issues one step at a time. Id. at 69. The ALJ incorrectly assumed that Lakewood's students are not being sufficiently prepared for college, career and life. Id. at 91. While improvements may not be occurring at the breakneck speed Petitioners demand, the record does not support a finding that students are not receiving T&E. Rather, they are consistent and indicate that students are taking rigorous courses,

improving in their test scores, and graduating from high school at improving and constitutionally sufficient rates. In that vein, "[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 towards its correction." See Bacon, 2003 N.J. AGEN LEXIS 1195 at *6-7.

With the significant assistance from the Commissioner and the Department, Lakewood's deficiencies have been and will continue to be addressed, and progress has been made towards correction. The ALJ's determination that T&E is not being provided to Lakewood's students must be rejected.

CONCLUSION

For the reasons set forth above, the Commissioner should rule that Lakewood has provided T&E to its public school district students.

Respectfully submitted,

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