



State of New Jersey
 OFFICE OF THE ATTORNEY GENERAL
 DEPARTMENT OF LAW AND PUBLIC SAFETY
 DIVISION OF LAW
 25 MARKET STREET
 PO Box 112
 TRENTON, NJ 08625-0112

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

ROBERT LOUGY
Acting Attorney General

MICHELLE L. MILLER
Acting Director

April 14, 2016

Via Email to Valerie.Jennings@oal.nj.gov and Overnight Service

Hon. John S. Kennedy, ALJ
 Office of Administrative Law
 Quakerbridge Plaza, Bldg. 9
 P.O. Box 049
 Trenton, New Jersey 08625-0049

Re: 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; and Ira Schulman individually and as Guardian ad Litem for A.S. v. David Hesse, Comm'r of the N.J. Dep't of Educ.; the N.J. State Bd. of Educ.; and the N.J. Dep't of Educ.
 Agency Reference No.: 156-6/14
 Docket No.: EDU 11069-2014S

Dear Judge Kennedy:

Please accept this letter brief and enclosed Certification of the undersigned, Geoffrey N. Stark ("Stark Certification") in lieu of a more formal brief as State Respondents' Reply to Petitioners' February 19, 2016 Motion for Summary Decision.

TABLE OF CONTENTS

PRELIMINARY STATEMENT 2



PROCEDURAL HISTORY AND COUNTERSTATEMENT OF THE FACTS 3

ARGUMENT

THE MOTION FOR SUMMARY DECISION SHOULD BE DENIED
BECAUSE DISCOVERY IS NOT COMPLETE, THE FACTUAL
RECORD IS NOT FULLY DEVELOPED, AND PETITIONERS
HAVE NOT DEMONSTRATED THAT THEY ARE ENTITLED TO
RELIEF 14

A. PETITIONERS HAVE FAILED TO PRODUCE THE
NECESSARY FACTUAL EVIDENCE TO DEMONSTRATE A
RIGHT TO THE RELIEF REQUESTED 16

B. PETITIONERS MUST PROVIDE DISCOVERY RESPONSES
IN ORDER TO PURSUE THIS ACTION 23

CONCLUSION 25

PRELIMINARY STATEMENT

Petitioners, identified in the pleadings only as Lakewood residents who attend or whose children attend Lakewood public or nonpublic schools, filed this action seeking extraordinary relief in the form of additional State aid funding and other declaratory relief. Despite the breadth of their claims and relief sought, they flatly refuse to provide discovery as to their own identities, the specific nature of their claims, or the details of their alleged harm suffered. Yet they ask this Court to enter summary decision in their favor based on unauthenticated data culled from unidentified sources. Their motion should be denied.

Petitioners' motion is premature. Under the court-imposed discovery schedule in this matter, discovery does not

close until September 2016. And the State is entitled to discovery of the Petitioners' identities, claims and alleged harm. Indeed, counsel's offer simply to swap petitioners if the current petitioners have not suffered injury suggests they cannot prove their claims. The State is entitled to probe these issues before judgment is entered.

The decision Petitioners ask this Court to make also requires a robust factual record. Indeed, Petitioners' claims are reminiscent of the claims raised in the Bacon litigation-- which required extensive discovery related to the alleged educational deficiencies and spending practices in the Lakewood district. The State must explore those same issues here. For all of these reasons, Petitioners' motion should be denied.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF THE FACTS¹

The Lakewood Public School District

The Lakewood Public School District ("Lakewood" or "District") is located in Lakewood Township, Ocean County. It is undisputed that Lakewood's population includes a high number of families who choose to send their children to private schools. The school board also has a long-standing practice to provide costly services, particularly non-mandated courtesy busing, to the local nonpublic school student population. See

¹ For the court's convenience the Procedural History and Counterstatement of the Facts have been consolidated as they are inextricably linked.

Office of Fiscal Accountability and Compliance ("OFAC") Review of the District Report of Transported Resident Students as of October 14, 2005, dated November 26, 2007, (Attached hereto as "Exhibit A" to the Stark Certification). Heightening the impact to Lakewood's budget is the prior practice of segregating busing routes by gender and failing to work with the nonpublic schools to align starting times, increasing the costs of its nonpublic student busing.

In April 2014, when Lakewood reported that it would need emergency funds to cover its costs for the remainder of the 2013-2014 academic year, the Department of Education ("Department") installed a fiscal monitor in the District pursuant to N.J.S.A. 18A:7A-55. In addition to Lakewood's transportation costs, Lakewood also has high costs associated with sending children, pursuant to their Individualized Education Plans (IEP's), to out-of-district settings for special education. Since the initial monitor was installed, the Department has also placed two additional monitors in the district to review particular payments made by the district, and to monitor Lakewood's special education program. See appointment letters for Theresa Pollifrone-Sinatra and David Shafter (Attached hereto as "Exhibit H" and "Exhibit I" to the Stark Certification).

The Bacon Litigation

In December 1997 twenty rural school districts, including Lakewood, filed a Complaint in the Superior Court, Chancery Division against the Department, the Commissioner, and several other State officials, alleging that the State's funding statute² was unconstitutional as it applied to them, because under it they did not receive adequate funding. See Bacon v. N.J. State Dep't of Educ., 398 N.J. Super. 600, 606 (App. Div. 2008). Plaintiffs argued that they should be funded at levels comparable to the Abbott³ Districts. Plaintiffs, the so-called "Bacon Districts", sought designation as Abbott Districts,⁴ as well as a declaratory ruling that CEIFA was unconstitutional, and an Order directing that Bacon district funding be increased to the equivalent of the State's wealthier districts. Ibid.

² At the time the State's funding statute was the Comprehensive Educational Improvement and Financing Act of 1996, N.J.S.A. 18A:7F-1 to -42 ("CEIFA"). CEIFA has since been replaced by the School Funding Reform Act of 2008, N.J.S.A. 18A:7F-43 to -64 ("SFRA").

³ "Abbott District" refers to those poor urban districts identified by the Supreme Court as requiring additional funds to provide T&E under the New Jersey Constitution in Abbott ex rel. Abbott v. Burke, 119 N.J. 287 (1990) (Abbott II), and subsequent decisions.

⁴ The districts were "seeking a status comparable to that of the Abbott districts, although they do not wish to be included as such. Bacon v. N.J. State Dep't of Educ., No. 50-03, Comm'r Dec., slip op. at 6 n.8 (Feb. 10, 2003). (Exhibit B). Instead, the status sought, that of "Bacon" districts, would allow them "to receive funding at Abbott levels while retaining a degree of operational and programmatic flexibility not accorded to Abbott districts under currently applicable rule and decisional law." Ibid.

Similar to the Amended Petition in the current matter, the Bacon Districts alleged, solely on statistical data, that their educational conditions were similar to the Abbott Districts, despite using their resources as efficiently as possible. Ibid.

In February 1998, the matter was transferred to the Commissioner by consent of the parties. Id. at 207. The State moved to dismiss the matter for lack of standing, after which the Bacon Districts amended their petition to include students in the districts. Ibid. The Commissioner determined that the matter would be heard in bifurcated proceedings: phase one would determine whether the petitioners were "fully effectuating" CEIFA's provisions for low-income districts, and phase two to determine whether the districts were unable to provide a thorough and efficient education despite their efforts to effectuate CEIFA. Ibid.

After the first phase of the hearings, the ALJ issued an initial decision finding that the districts had established that they were using their funding for appropriate purposes, and were entitled to proceed to the second phase. Id. at 208. The Commissioner adopted the ALJ's Initial Decision and clarified that during the second phase "each district had to prove that educational deficiencies existed and that the deficiencies could not be remedied, under current law and funding levels, by different programmatic and fiscal choices." Ibid. (summarizing

the Commissioner's February 9, 2001, final agency decision).

Following the second phase of the hearings, the ALJ issued an Initial Decision that found five of the Bacon Districts were "special needs districts" while the remaining twelve districts were not.⁵ Bacon v. N.J. Dep't of Educ. (Bacon I), OAL DKT NOS. EDU 2637-00 through 2656-00, Initial Decision, (N.J. Adm. Sept. 23, 2002). at 49. (Attached hereto as "Exhibit C" to the Stark Certification). Importantly, Lakewood was not found to be a "special needs district." Ibid. On February 10, 2003, the Commissioner modified the ALJ's Initial Decision, and found that only Salem City qualified as a "special needs district." Ibid. The remaining districts had failed to demonstrate that CEIFA's funding was insufficient to provide students with a thorough and efficient education. Ibid. Of particular note, the Commissioner determined that Lakewood could not claim entitlement to special needs status when it could be providing more support for the educational program in the public schools but chose not to do so. See Bacon v. N.J. State Dep't of Educ., No. 50-03, Comm'r Dec., slip op. at 17 (Feb. 10, 2003). (Attached hereto as "Exhibit B" to the Stark Certification).

Ten districts, including Lakewood, appealed the

⁵ Three of the initial twenty Bacon Districts, Lower Township, Lower Cape May Regional, and South River had withdrawn from the case prior to the hearings. 398 N.J. Super. at 607.

Commissioner's decision to the State Board of Education. Bacon, supra, 398 N.J. Super. at 608. "Lakewood's appeal was limited to the Commissioner's determination that the district must use all of its available funds for educational programming, including monies that it is using to support courtesy busing, before it can claim that it is entitled to status as a 'special needs' district." Ibid. n.7. See also Bacon v. N.J. State Dep't of Educ., No. 4-03, State Bd. Dec., slip op. at 12 (Jan. 5, 2006). (Attached hereto as "Exhibit D" to the Stark Certification).

With regard to Lakewood's limited appeal, the State Board concurred with the ALJ and the Commissioner that the Lakewood community was able to support the schools to a greater extent than it had been doing. Specifically, the State Board "reject[ed] any suggestion that the Lakewood Board [was] somehow obligated to bear the cost of transporting large numbers of students who live non-remote from their schools." Bacon, supra, No. 4-03, State Bd. Dec., slip op. at 57. Further, the State Board stressed, "that it is well settled that the Lakewood Board has no legal obligation to provide courtesy busing to non-public school students even if it chooses to provide such transportation to its public school students." Ibid. (citing M.J.K.D. & A.W.D. o/b/o minor child A.K.D. v. Bd. of Educ. of the Twp. of Piscataway, Comm'r Dec. (Sept. 29, 1999)). The State

Board concluded its discussion of Lakewood by stating: "the Lakewood Board cannot claim that it must support the cost of the courtesy busing it has chosen to provide while seeking additional funds to support educational programming for its public school students." Id. at 58.

Regarding the broader question of CEIFA's adequacy, the State Board determined that the implementation of CEIFA had not resulted in the provision of a thorough and efficient education to the students in the Bacon districts. Further, the State Board concluded that a systemic remedy was necessary and that the starting point was to assess the educational needs in each of the Bacon districts and identify the approaches that would most effectively address those needs. Bacon, supra, 398 N.J. Super. at 611.

Eight districts, including Lakewood, appealed the State Board's decision to the Appellate Division. Bacon, supra, 398 N.J. Super. at 602.⁶ The appellants argued that the only remedy available was to grant them status as Bacon Districts, and award them the financial resources provided to the similar Abbott Districts. Id. at 615. However, in light of the recently enacted SFRA, the court did not grant the appellants' preferred relief. Instead, the court ordered that the

⁶ During the pendency of that appeal the SFRA was enacted in 2008, altering educational funding statewide. 398 N.J. Super. at 613-14.

Commissioner complete the needs assessments ordered by the State Board. Id. at 618-19.

Following the Appellate Division's decision, the Department completed needs assessments for the Bacon Districts, and the Commissioner issued a report for each district on September 14, 2009. Bacon v. N.J. Dep't of Educ., 443 N.J. Super. 24, 31 (App. Div. 2015), certif. denied, 2016 N.J. LEXIS 242 (March 8, 2016). Regarding Lakewood, the Department noted that under the SFRA Lakewood received a 20.5% increase in state aid over its CEIFA-level funding in the 2008-2009 academic year. See Lakewood Needs Assessment at 6, (Attached hereto as "Exhibit E" to the Stark Certification). The needs assessment also revealed that the District spent an unusually high amount of funds on out-of-district placements for special education students. Ibid.

The Department also noted "that it is impossible to make a true assessment of Lakewood's financial needs without analyzing the district's choice to expend a large amount of funds on non-mandated courtesy busing for both its public and nonpublic students." Id. at 9. The Department reaffirmed "that it is unacceptable for the district to allege critical unmet needs for its public school students while it spends such a substantial sum of money to provide a non-mandated courtesy service to its nonpublic students. Lakewood must revise its

priorities so that its resources are better directed to the needs of the students it is responsible for educating." Id. at 9-10

While the needs assessment found that Lakewood faced "significant challenges" it also noted that the District "could do significantly more with the funds currently available to it." Id. at 11. In particular, the Department recommended that Lakewood reconsider its courtesy busing policy, and develop strategies to educate more special education students in-district. Ibid. Neither Lakewood nor any of the Bacon districts appealed from the Department's needs assessments. See Bacon, supra, 443 N.J. Super. at 31.

On September 8, 2014, sixteen of the Bacon Districts, including Lakewood, filed a Complaint in the Law Division pursuant to Rule 4:67-6, seeking to enforce the needs assessments through an Order compelling additional school funding. Id. at 32. The Department moved to dismiss the Complaint on November 7, 2014, and the motion was granted on December 15, 2014. Id. at 33. In granting the Department's motion, the trial judge noted the sparse record before her when compared to the records before the Supreme Court in the Abbott cases. Ibid. She also found that Rule 4:67-6 was a narrow rule not meant to grant the Law Division jurisdiction where it had previously rested with a State agency. Ibid. Finally, she

noted that the needs assessments provided no conclusion regarding what level of funding under the SFRA was necessary to provide T&E. Ibid. The Plaintiffs appealed, and on November 6, 2015, the Appellate Division affirmed, Id. at 27, and the Supreme Court denied certification. Bacon v. N.J. Dep't of Educ., 2016 N.J. LEXIS 242 (March 8, 2016).

The Alcantara Litigation

On July 7, 2014, Petitioners filed the Amended Petition, alleging that Lakewood receives constitutionally inadequate funding under the SFRA due to the uniquely high number of nonpublic students residing in the district. See generally (Amended Petition, July 7, 2014). On September 2, 2014, State Respondents filed a Motion to Dismiss the petition in lieu of an Answer. State Respondents argued that the Petitioners lacked standing to bring their claims, failed to join Lakewood as a necessary party to the litigation, and failed to state a claim for relief. The matter was subsequently transmitted to the OAL. Petitioners responded to the State Respondents' motion on October 22, 2014. On March 11, 2015, the court granted Paul L. Trachtenberg's motion to participate in the case pursuant to N.J.A.C. 1:1-16.6. After additional briefing from both Mr. Trachtenberg and State Respondents, and oral argument on State Respondents' motion, the court denied the motion on July 24, 2015, finding that Petitioners did indeed

have standing, and that Lakewood was not a necessary party to the litigation.

On or about August 13, 2015, the parties, through a telephone status conference with the court, the parties, and Mr. Trachtenberg, agreed upon a discovery schedule that would conclude on September 1, 2016. Petitioners served discovery requests on December 28, 2015, while State Respondents served initial discovery requests on January 12, 2016. Petitioners' counsel sent a letter to State Respondents on January 28, 2016, indicating that he would not be providing responses to the State's initial interrogatories. (Attached hereto as "Exhibit F" to the Stark Certification). On February 19, 2016, Petitioners filed the instant Motion for Summary Decision.

In their motion, Petitioners reiterate the claims advanced in the Amended Petition and argue that data necessary to rule on their claim resides in the public record, and that there is no need to proceed with further discovery, or to proceed to a hearing.

On February 25, 2016, State Respondents served responses to Petitioners' Requests for Admissions. (Attached hereto as "Exhibit G" to the Stark Certification). State Respondents now file this brief in opposition to Petitioners' Motion for Summary Decision.

ARGUMENT

THE MOTION FOR SUMMARY DECISION SHOULD BE DENIED BECAUSE DISCOVERY IS NOT COMPLETE, THE FACTUAL RECORD IS NOT FULLY DEVELOPED, AND PETITIONERS HAVE NOT DEMONSTRATED THAT THEY ARE ENTITLED TO RELIEF.

Petitioners' filed this motion for summary decision approximately six months prior to the end of the discovery period. They have flatly refused to provide responses to the State Respondents' first set of interrogatories, leaving the State Respondents with no information as to their identities, the precise nature of their claims, or factual documentation of the harms they allegedly suffered. In their motion, they rely on statistical evidence culled from various sources and combined into spreadsheets by unidentified individuals, as well as other unauthenticated and/or unattributed documents. In short, the Petitioners' motion is premature and the record presented insufficient to support their claim for relief. The motion should be denied.

Summary decision is appropriate when "there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). This standard is the same as that set forth for a motion for summary judgment in the New Jersey Superior Court. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In Brill, the Supreme Court held that:

a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

[Ibid.]

Generally, it is inappropriate to grant summary judgment before the completion of discovery. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988). See also, James v. Chevron U.S.A., Inc., 301 N.J. Super. 512, 542 (App.Div. 1997) ("It is especially "inappropriate" to grant summary judgment when discovery is incomplete and when critical facts are peculiarly within the moving party's knowledge); Dobco, Inc. v. Brockwell & Carrington Contractors, Inc., 441 N.J. Super. 148, 157 (Law Div. 2015) ("Generally, summary judgment is inappropriate before the completion of discovery, and a litigant should have the opportunity for full exposure of its case"). The need to complete discovery and develop a full record is particularly critical in cases involving significant policy considerations. Jackson v. Muhlenberg Hospital, 53 N.J. 138, 142 (N.J. 1969) Here, Petitioners have refused to provide a response to the State Respondents' initial discovery request, and move for summary decision before the completion of the

discovery process. On that basis alone the motion for summary decision must be denied.

A. PETITIONERS HAVE FAILED TO PRODUCE THE NECESSARY FACTUAL EVIDENCE TO DEMONSTRATE A RIGHT TO THE RELIEF REQUESTED.

Petitioners here allege that they have been deprived of a constitutionally required thorough and efficient education, and seek relief in the form of additional State aid for the Lakewood School District as well as other declaratory judgments. New Jersey courts have consistently held that in order to consider claims for the extraordinary relief sought here, a fully developed factual record is a necessary prerequisite. Thus, in Abbott v. Burke, 100 N.J. 269, 301 (1985) (Abbott I), the Supreme Court remanded the case to the Commissioner for fact-finding, noting that "the ultimate constitutional issues are especially fact-sensitive and relate primarily to areas of education specialization." Abbott v. Burke, 100 N.J. 269, 301 (1985) (Abbott I) (emphasis added). In Abbott v. Burke, 149 N.J. 145, 199 (1997) (Abbott IV) the Court reiterated the need for a developed factual record noting that "[t]he determination of appropriate remedial relief . . . is both fact-sensitive and complex." More recently, the Supreme Court again recognized the need to develop a thorough factual record before ruling on the question of the constitutionality of the SFRA. In 2008 the Court remanded the case to a Special Master to develop a factual

record, noting that because the record contained little beyond competing affidavits, "[t]he question [was] not suited for summary disposition." Abbott v. Burke, 196 N.J. 544, 566 (2008) (Abbott XIX). The Court further instructed that "[l]ive testimony and cross-examination will be required to resolve disputed matters of fact." Ibid. Three years later, in another iteration of the Abbott litigation, the Court sought additional fact-finding, and remanded it once again. See Abbott v. Burke, 206 N.J. 332, 356-57 (2011) (Abbott XXI).

Similarly, in the Bacon litigation, the OAL also engaged in extensive fact-finding prior to issuing findings regarding the constitutionality of CEIFA. As described above, the parties developed a detailed record in the OAL upon which the State Board ultimately concluded that Lakewood had not demonstrated a constitutional violation, in part because of questionable spending practices of the Lakewood district. Bacon, supra, 398 N.J. Super. at 609-609. Similarly, here, it will be necessary for the parties to fully explore the educational deficiencies alleged by Petitioners in order to determine whether they stem from inadequate State funding, as Petitioners allege, or from inefficient spending practices by the District, as occurred in the past, in order for the Commissioner to determine what, if any remedy is appropriate.

In striking contrast to the extensive fact-finding

required by the OAL and the courts in the Abbott and Bacon litigation, Petitioners seek to vindicate their claims on the thinnest of records consisting only of Requests for Admissions they argue should be deemed admitted, unauthenticated, misconstrued, and/or mischaracterized documents, and an excerpt of a video. Such a record is not sufficient for deciding issues that are "especially fact-sensitive." Abbott I, supra, 100 N.J. at 301.

First, Petitioners rely on what they claim are the State Respondents admissions during discovery. This argument fails because Petitioners are misapplying OAL discovery procedures. Petitioners assert that because State Respondents' responses to their Requests for Admissions were provided more than 15 days after they were served, Petitioners are entitled to rely upon such questions as being admitted. However, the parties, at a telephone conference with ALJ Kennedy on August 13, 2015, agreed to a discovery schedule, with an end date of September 1, 2016. State Respondents did not violate the discovery end-date. The Administrative Code also requires that any party alleging it has been aggrieved in the discovery process request a telephone conference prior to making a motion regarding discovery. N.J.A.C. 1:1-10.4(d). Petitioners did not follow this procedure. On February 25, 2016, the State Respondents served their response to Petitioners' Request for

Admission, denying Petitioners' Requests for Admissions. See (Exhibit G). Thus, to the extent Petitioners base their motion on the presumed admissions, that argument must be summarily rejected.

Petitioners also rely upon unauthenticated and unattributed documents to claim that there are no material facts at issue. For example, Petitioners claim that the magnitude of Lakewood's transportation costs have a detrimental effect on the district's ability to provide T&E. To support this contention, Petitioners rely upon a document purportedly distributed by the State Monitor at a January board meeting as proof of the district's transportation figures. See Pa50-Pa59 ("Petitioners' Exhibit C"). The document does not identify its creator, the purpose or context of its creation or the source of the figures therein. This naturally raises questions regarding the accuracy of the data, the context in which it is presented and whether the submissions provide a complete picture of Lakewood's finances so as to be at all relevant in this matter. Specifically, there is no explanation of how the creator of Petitioners' Exhibit C defines "mandated" transportation or whether that definition comports with the definition inherent in statute and decisional law. See, e.g., Bacon, supra, No. 4-03, State Bd. Dec., slip op. at 57 (Exhibit D).

Petitioners also reference a video in which Lakewood's

fiscal monitor, Mike Azzarra, appears to opine in a school board meeting that the overarching source of Lakewood's fiscal woes are a lack of revenue, not improper spending. See, e.g., Pb21. However, the video containing Mr. Azzarra's statement shows only his apparent response to a question, and does not present the question that Mr. Azzarra was asked or any context or explanation of the greater discussion occurring at the meeting. The video should not be considered uncontested, as Petitioners claim it is, nor should it be relied upon. The State Respondents are entitled to probe, through discovery and cross-examination at a hearing, the full context of any alleged statements therein.

Finally, Petitioners rely on statistical data allegedly culled from public data. While certain financial figures may be available in the public record, a mere review of numbers is simply insufficient to determine whether a constitutional violation exists. Bacon, supra, 398 N.J. Super. at 607-08; Exhibit B. Determinations as to whether children are receiving T&E are of such a magnitude that they cannot be made via statistics and data alone. This is particularly so when the figures presented to the court as uncontested have been arranged and contextualized by Petitioners' counsel and are not subject to cross-examination at this stage. As referenced above, and in State Respondents' responses to Petitioners' Requests for

Admissions, State Respondents are not familiar with the creation of the exhibits Petitioners rely upon, and in some cases, deny that the figures therein are accurate.

For example, Petitioners allege that there are 19,904 students receiving mandatory transportation from Lakewood pursuant to N.J.S.A. 18A:39-1. (Pb9, ¶23, relying on Pa53). Petitioners' failure to authenticate the accuracy of the data in Petitioners' Exhibit C undermines their argument regarding Lakewood's transportation costs. Based on the limited exhibits submitted, there are no reliable means of making a factual finding at this stage of the litigation. While the exhibits submitted may reflect that there are 19,904 students being bussed to school in Lakewood, they do not show the number that must be bussed. Petitioners' exhibits are silent as to whether Lakewood has been organizing its busing routes to maximize efficiency, or if there are other available solutions that could reduce the district's costs. And Petitioners admit that "[s]ome of this [transportation] expense includes discretionary non-remote hazardous transportation pursuant to N.J.S.A. 18A:39-1.5." (Pb17). However, there is no data presented that demonstrates how much of Lakewood's transportation expense is discretionary and how much is truly mandated, so Petitioners have failed to show what portion of Lakewood's budget is being used to provide discretionary transportation to nonpublic

students. This example highlights the need to allow the parties to complete discovery and develop a full record before reaching a determination on Petitioners' claims.

In sum, there is a long history of litigation alleging constitutional violations in Lakewood in an attempt to secure additional school funding. This case raises many of the same issues that were litigated in Bacon.⁷ Petitioners again seek relief in the form of additional State aid, and so the proofs necessary to satisfy Petitioners' claims should be the same as were required in Bacon. Those proofs must consist of more than mere statistical data presented without any testimony or evidence regarding what is actually occurring in the district's schools. The development of a detailed factual record was necessary in Bacon to determine not only the amount of money that the district received, but also how the district spent that money. Such detail is also necessary here. The unique circumstances of Lakewood demand a thorough and extensive record and as such, Petitioners' Motion for Summary Decision should be denied, and Petitioners should be ordered to comply with discovery.

⁷ Although it is not clear at this early stage of the litigation prior to the completion of discovery, it appears that some of the claims raised by Petitioners were fully litigated and resolved in the Bacon litigation. To the extent that is the case, those claims would be barred by the doctrine of collateral estoppel. See, Restatement (Second) of Judgments, §27 (1982).

B. PETITIONERS MUST PROVIDE DISCOVERY RESPONSES
IN ORDER TO PURSUE THIS ACTION.

As Petitioners have refused to respond to State Respondents' initial interrogatories, this court should deny their Motion for Summary Decision. Despite Petitioners' counsel's objections, the interrogatories were not served in bad faith, and were not overly specific. Rather, the State Respondents' initial interrogatories represent an attempt to gather necessary evidence about the experience of the Petitioners as they relate to the factual allegations pled in the Amended Petition. The minor Petitioners are the only parties in this case who actually attend the Lakewood schools, or in the case of A.S., a private school that is a beneficiary of Lakewood's expenditure of resources for the benefit of nonpublic students. Parties to litigation must comply with their discovery obligations.

Petitioners include references throughout the Amended Petition to a class of students much larger than the five students officially named as Petitioners in this matter. As a result, it appears that they are resisting discovery on the theory that their individual circumstances are not relevant, and that if Respondent were to challenge the appropriateness of any individual student Petitioner, "Counsel would simply change Petitioners." (Pb 36). Petitioners additionally cite State v.

Allen, 73 N.J. 132 (1977), to support its position that the individuals named as Petitioner in this litigation do not matter. (Pb at 35-36). During a March 15, 2016, telephone conference regarding this Motion, Petitioners' Counsel reiterated his belief that every Petitioner on this case is fungible. In arguing against the need to provide any response to Respondent's discovery requests addressed to the individual Petitioners, counsel affirmatively stated that the Petitioners could be any students currently in the Lakewood school system and thus the background and demographic information of the five students currently listed as Petitioners was wholly irrelevant to this proceeding.

If any and/or every current Lakewood student can adequately serve as a Petitioner in this matter, then Petitioners are effectively claiming to represent a class comprised of all Lakewood public school eligible students, rather than pursuing this petitions as individuals. But class action suits are not permitted in the Office of Administrative Law absent specific statutory authority. N.J.A.C. 1:1-1.3(a). No such authorization exists for Petitioners to claim representation of an entire class. Petitioners therefore consist only of the five specific students named in this matter. And it is these named Petitioners who must prove the constitutional violations alleged. The State Respondents are absolutely

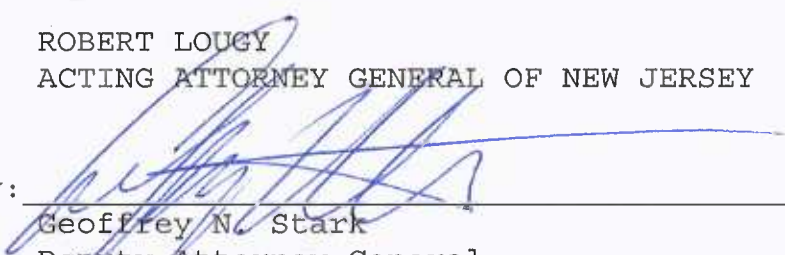
entitled to discovery into the precise nature of the Petitioners' claims and the harms that they allegedly suffered. See, e.g., N.J.A.C. 1:1-10.1 et seq. If the Petitioners continue to refuse to participate in discovery, they should be subject to appropriate sanctions, up to and including dismissal of the action. N.J.A.C. 1:1-10.5; 1:1-14.14; and 1:1-14.15. In the meantime, their failure to provide discovery necessitates denial of their motion for summary decision.

CONCLUSION

For the above stated reasons, Respondents respectfully request that Petitioners' Motion for Summary Decision be denied.

ROBERT LOUCY
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: _____


Geoffrey N. Stark
Deputy Attorney General
N.J. Attorney I.D. No.: 01811-2010

cc: Arthur Lang, Esq. (via overnight mail)
Daniel Grossman, Esq. (via overnight mail)
Paul L. Tractenberg, Esq. (via overnight mail)