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., Appellants, v. ANGELICA ALLEN-MCMILLAN, Acting Commissioner of the New Jersey Department of Education; THE NEW JERSEY STATE BOARD OF EDUCATION; and THE NEW JERSEY DEPARTMENT OF EDUCATION, Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NUMBER: AM-482-22 CIVIL ACTION ON MOTION FOR LEAVE TO APPEAL THE MAY 12, 2023 INTERLOCUTORY DECISION OF THE COMMISSIONER OF THE DEPARTMENT OF EDUCATION AGENCY DOCKET NO.: 156-6/14

RESPONDENT'S BRIEF IN OPPOSITION TO APPELLANTS' MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL

Date Submitted: May 30, 2023

Donna Arons
Assistant Attorney General
Of Counsel

Ryan J. Silver (Attorney ID: 278422018)
Deputy Attorney General
On the Brief

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112
Attorney for Respondents
Ryan.Silver@law.njoag.gov

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page

STATUTES

REGULATIONS

NEW JERSEY CONSTITUTION

COURT RULES

SECONDARY SOURCES

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

This matter is presently before the Commissioner of Education following remand in Alcantara v. Allen-McMillan, 475 N.J. Super. 58 (App. Div. 2023). Appellants seek leave to appeal the Commissioner's denial of their demand for the Commissioner to establish an expedited schedule for issuing a final agency decision. The relevant facts and procedural history are as follows.

A. Appellants' July 7, 2014 Petition of Appeal.

On July 7, 2014, a group of parents whose children are Lakewood School District students (collectively "appellants") filed a petition of appeal with the Commissioner alleging that the School Funding Reform Act of 2008 (SFRA), N.J.S.A. 18A:7F-43 to -71, was unconstitutional as applied to Lakewood, such that the district was not receiving sufficient funding to provide its students with a thorough and efficient education (T&E). (Aa24; Aa135); see N.J. Const. art. VIII, § 4, ¶ 1.[2] Specifically, the petition alleged that the SFRA did not take into account extraordinary costs the district incurred to provide transportation and special education services to a large number of students who attend non-public

[1] The procedural history and counterstatement of facts are closely related in this matter and have been combined to avoid repetition and for the court's convenience.

[2] "Aa" refers to appellants' appendix; and "Ab" refers to appellants' brief.

schools. (Aa24-25; Aa135-36). The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on September 4, 2014. (Aa25).

Appellants amended their petition four years later, on September 4, 2018, to clarify the relief they were seeking. (Aa27). The amended petition sought a determination that: (1) the SFRA as applied to Lakewood does not provide sufficient funding to enable the district to provide T&E as mandated in our State Constitution, N.J. Const. art. VIII, § 4, ¶ 1; (2) reliance upon discretionary State aid payments pursuant to N.J.S.A. 18A:7A-56 does not provide T&E funding that is certain and predictable; (3) the constitutional imperative regarding T&E requires sufficient funding that is not discretionary; and (4) the Commissioner recommend that this matter be remedied by the Legislature. Ibid.

B. The ALJ's March 1, 2021 Initial Decision.

A record was developed during the hearing for the 2014-2015 through 2018-2019 school years. (Aa28). On March 1, 2021, following a hearing that took place over the course of seventeen months and included extensive post-hearing briefing, the Administrative Law Judge (ALJ) issued an initial decision concluding that Lakewood was not providing T&E to its students for the applicable school years. (Aa23; Aa113-117). She also concluded that the SFRA was not a substantial or significant reason for that failure, and therefore was not unconstitutional as applied to the district. (Aa113; Aa117).

The ALJ noted the drastic demographic shifts experienced by Lakewood since the beginning of the century. Specifically, she noted that in 2000 Lakewood had a total population of about 60,000, but by 2019 the estimated population had grown to roughly 106,000, representing a 76% increase in only two decades. (Aa86). The ALJ observed that this rapid growth was due, in large part, to the "burgeoning" Orthodox Jewish community in Lakewood Township. Ibid. And within the population of school-aged children in the district, "there is a stark dichotomy between attendance at public schools and attendance at private or sectarian schools." (Aa86-87). For example, during the 2008-2009 school year, approximately 4,900 students attended the public schools, while 14,460 attended non-public schools — meaning only about 25% of the school-age population was attending public schools. (Aa87). By 2019, that population increased to around 6,000 students, but there were more than 30,000 students enrolled in non-public schools; thus, only 16% of Lakewood's student population attended public schools, while 84% attended other non-public schools. Ibid.

Because of these striking demographic trends, the ALJ concluded that the district's fiscal situation was adversely impacted, and that such fiscal issues were "attributed in large part to the extraordinary cost the district bears for its legal mandate to pay for transportation for private school students and for tuition

for special education students the district places in out-of-district private schools." Ibid. The ALJ also examined the educational performance of Lakewood's public school students compared to State averages, and found that the education received by public school students was not constitutionally adequate. (Aa113-17). However, she did not find that the failure to provide T&E was a result of any constitutional infirmity with the SFRA as applied to Lakewood. (Aa117). Rather, the district's failings were a result of a number of contributing factors distinct from the SFRA, including fiscal mismanagement by Lakewood, community choices, and other legislation. (Aa118-20).

For example, the ALJ noted that despite the rapid increase in the district's non-public student population — and attendant increase in transportation and special education costs — "the District decided to keep the [tax levy] stagnant." (Aa119). This, despite recommendations by the State-appointed monitor to increase the levy, meant that the district was "not taxing up to its local fair share" and "not generating the money that it could have been" which could have been used to support Lakewood's obligation to provide T&E. Ibid. Additionally, the ALJ found that Lakewood did not demonstrate it had done everything it could to cut down its ever-growing transportation costs, nor had it attempted to curb costs associated with educating special education students by educating them in-district. (Aa122-23). Lastly, the ALJ concluded that other, non-SFRA

legislation such as caps on local tax levies, N.J.S.A. 18A:7F-38, and the annual Appropriations Act contributed to the district's financial situation. (Aa120-21).

As a result of these voluntary choices and non-SFRA factors, the ALJ held that the SFRA was not unconstitutional as applied to Lakewood. (Aa125).

C. The Commissioner's July 26, 2021 Final Agency Decision.

On July 16, 2021, the Commissioner issued a final decision rejecting the initial decision in part and adopting it in part. (Aa144). In reaching her decision, the Commissioner accepted the ALJ's findings of fact, but disagreed that such findings led to the conclusion that Lakewood's public school students were not receiving T&E. (Aa140-41). She explained that "while Lakewood may be struggling to provide its students with the premier level of education that many have come to expect in New Jersey, these deficiencies do not rise to a constitutional deprivation." (Aa143). Further, the Commissioner found that the district's improvements in test scores and graduation rates over the course of the applicable time period, as well as the district's "diverse curriculum," negated a finding that students were not receiving T&E. Ibid.

Because the Commissioner rejected the ALJ's findings regarding T&E, she did not address the constitutionality of the SFRA except to generally concur with the ALJ's finding that it was not unconstitutional as applied to Lakewood. (Aa144). Notwithstanding this conclusion, the Commissioner, recognizing the

concerning educational deficits revealed during the course of the OAL hearing, ordered the Department of Education to "conduct a comprehensive review of the District's organization, structure and policies to assess its compliance with the quality performance indicators in accordance with [N.J.S.A.] 18A:7A-11 to determine how the District can improve its educational program." (Aa141).

D. The Appellate Division's March 6, 2023 Decision.

On March 6, 2023, the Appellate Division issued a published decision reversing the Commissioner's decision. (Aa22). The court reviewed the Department's statistics between 2015 and 2018, comparing the performance of Lakewood's public school students to State averages, and found that the Commissioner's decision was not supported by the evidence in the record. (Aa19). Specifically, the court found that Lakewood's graduation rates and standardized testing data showed that the district's public school system was ineffective, contrary to the Commissioner's findings. (Aa19-21). Furthermore, the court explained that other factors relied on by the Commissioner, such as the district's diverse course offering, were not significant enough to overcome the marked deficiencies. (Aa21). As a result, the court found that the district's public school students were not receiving T&E. (Aa22).

The court did not reach whether such a failure was a result of the SFRA. Instead, recognizing the Commissioner's authority to review and render a

decision in the first instance, the court remanded the matter to the Department to "consider the substantive arguments pertaining to the SFRA" in light of the Supreme Court's directive in Abbott v. Burke (Abbott XX), 199 N.J. 140 (2009) to "keep SFRA operating at its optimal level[.]" (Aa22 (quoting Abbott XX, 199 N.J. at 146) (internal quotation marks omitted)). The court did not set any parameters for the remand, nor did it retain jurisdiction over the matter. (Aa22).

Following the court's remand, the Commissioner took necessary steps to implement an expedited review of the Lakewood district and notified the parties of the expedited review by letter dated May 12, 2023. (Aa6-7).

E. The Commissioner's May 12, 2023 Interlocutory Decision.

On May 1, 2023, appellants filed a motion for emergency relief with the Commissioner, under N.J.A.C. 6A:4-3.5, seeking "an expedited schedule for [the Commissioner's] issuance of a final decision on the March 6, 2023[] remand" from the Appellate Division. (Aa145).[3]

Prior to issuing her decision on appellants' motion, on May 12, 2023, the Commissioner sent a letter to counsel for appellants advising that she had directed the department to expedite its comprehensive review of the district in

[3] Pursuant to N.J.A.C. 6A:4-3.5, applications for emergent relief before the Commissioner are to be reviewed in accordance with N.J.A.C. 6A:4-4.1(b), which adopts the standard for interim relief articulated by the Supreme Court in Crowe v. De Gioia, 90 N.J. 126 (1982).

order to execute her "obligations under the remand order and provide a well-informed opinion as to whether the SFRA is constitutional as applied to Lakewood." (Aa6-7). The Commissioner explained that such a review would provide her with additional and current information. Ibid. Specifically, the Commissioner noted that the data presently in the record relates to the 2014-2015 through 2018-2019 school years and, as such, is now outdated. Ibid. She explained that information regarding the intervening years would provide additional relevant, informative data concerning the district and SFRA, and also take into consideration the "unprecedented changes in the field of education as a byproduct of the COVID-19 pandemic." Ibid. She reasoned that an updated record is "required in order to make an appropriate informed decision about the SFRA and its application to Lakewood" and would "allow the Department to better identify the root causes that led to the education deprivations identified by the court and determine the appropriate responses." Ibid.

The Commissioner explained that the Department would engage experts to "examine Lakewood's operations and performance," and the Department would examine the "particular areas of concern raised by [appellants.]" Ibid. Following this expedited review, the parties would have an opportunity to "respond to the resulting report and recommendations[.]" Ibid. After receiving

all reports and responses, the Commissioner would then issue a final agency decision on the as-applied constitutionality of the SFRA. Ibid.

In addition to expediting the comprehensive review and setting a schedule, the Commissioner's letter also explained that the Department was exploring what "assistance, relief, or aid may be available to more immediately remedy" the district's immediate needs given the court's finding that Lakewood's students were not receiving T&E. Ibid. In terms of aid, the Department has, to date, approved applications from the district on July 8, 2022, and May 10, 2023, for waivers to proceed with contracting for student transportation services for the 2022-2023 and 2023-2024 school years. Ibid. Additionally, the Department has provided Lakewood with relief and aid through the provisions of loans against State aid beginning in June 2015 through March 2021, totaling $137,420,524. Ibid. And most recently, Lakewood received an additional $27,704,046 loan against State aid for the 2022-2023 school year. Ibid.

In light of the Commissioner's May 12, 2023 letter, she issued an interlocutory decision on the same date denying as moot appellants' motion for emergent relief. (Aa3-5). The Commissioner explained that because appellants' application sought an expedited schedule to issue her final decision, and because the May 12, 2023 letter and order to the Department accomplished just that, there was "no longer any questions pertaining to the timing of her decision that

require[d] resolution." (Aa4-5). Therefore, the Commissioner denied and dismissed appellants' application as moot. (Aa5).

Appellants' present motion for leave to file an interlocutory appeal followed. On May 19, 2023, their simultaneous application for emergent relief from this court was denied.

ARGUMENT

POINT ONE

APPELLANTS' MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THE INTERESTS OF JUSTICE WILL NOT BE SERVED BY PIECEMEAL REVIEW OF THE COMMISSIONER'S DECISION.

It is important to understand what exactly appellants seek to appeal, and what they do not. Appellants request interlocutory review only of the Commissioner's order denying their motion for emergent relief, which sought "an expedited schedule" for the Commissioner to issue a final decision on appellants' as-applied challenge. (Aa145). In denying appellants' motion, the Commissioner reasoned that the motion was moot because there was no actual, tangible issue left to be resolved, since her May 12, 2023 letter setting forth the procedure for a comprehensive review rendered the motion superfluous.

Despite seeking to appeal just the order denying their motion for emergent relief, appellants ignore the basis for the Commissioner's determination.

Instead, they attempt to collaterally attack the Commissioner's May 12, 2023 letter and announcement of the expedited schedule to issue her final decision. In doing so, appellants not only raise issues outside the scope of their intended appeal, they seek a rushed decision based on an outdated record on their as-applied challenge. But the comprehensive review is just what is necessary for the Commissioner to issue a meaningful decision. Appellants may disagree with the Commissioner's approach, but ultimately their application fails to set forth a grave damage or injustice warranting interlocutory review.

Interlocutory review is granted only in "exceptional cases" where it is required in the interest of justice. Grow Co. v. Chokshi, 403 N.J. Super. 443, 458 (App. Div. 2008); R. 2:2-4. The power to grant interlocutory review is "highly discretionary" and "exercised only sparingly," State v. Reldan, 100 N.J. 187, 205 (1988), in recognition of the strong public interest against piecemeal review of proceedings, Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008). Given the strong policy against piecemeal review, interlocutory review is permitted only where "some grave damage or injustice" may be caused by the order below. Id. at 599. Importantly, "the moving party must establish, at a minimum, that the desired appeal has merit and that justice calls for [an appellate court's] interference in the cause." Ibid. (citations omitted).

Because appellants cannot shoulder their burden to show either that the

interests of justice call for piecemeal review or that the Commissioner's decision is not in accord with the law, the motion for leave to appeal should be denied.

A. Appellants' Request for Emergent Relief Was Properly Denied as Moot.

Appellants argue that interlocutory review is necessary because the Commissioner "misapplied" the Crowe standards in denying their application for emergent relief. (Ab12-16). Appellants misunderstand and misstate the Commissioner's decision.

First, the Commissioner's decision to deny appellants' application as moot was correct. Mootness is a threshold justiciability determination. Jackson v. Dep't of Corr., 335 N.J. Super. 227, 231 (App. Div. 2000). Courts have long established that "[a]n issue is 'moot' when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006) (quoting N.Y. Susquehanna & W. Ry. Corp. v. State Dep't of Treasury, Div. of Taxation, 6 N.J. Tax 575, 582 (Tax Ct. 1984), aff'd, 204 N.J. Super. 630 (App. Div. 1985)). Moreover, courts do not decide cases presenting only hypothetical issues; there must be an actual dispute with tangible consequences. Cinque v. N.J. Dep't of Corr., 261 N.J. Super. 242, 243 (App. Div. 1993).

Here, appellants' motion for emergency relief sought "an expedited schedule for [the Commissioner's] issuance of a final decision on the March 6, 2023[] remand" from the Appellate Division. (Aa145). But as described above, the Commissioner's May 12, 2023 letter — issued separately from her decision denying the emergent motion — advised that in order for her to issue a final agency decision on the issue remanded by the court, she needs current and comprehensive information regarding the reasons the district is unable to provide T&E. (Aa7). And, understanding the urgency of the issue, she directed that the review be expedited. Ibid. While the Commissioner did not impose an express timeline for the review – which could potentially limit its depth and scope – she did outline parameters. Ibid. Specifically, the Commissioner called for the Department to first engage experts to "examine Lakewood's operations and performance," and for the Department to examine the "particular areas of concern raised by [appellants.]" Ibid. Recognizing appellants' interests in the outcome of the review, the Commissioner announced that they, along with the district, would have an opportunity to "respond to the resulting report and recommendations[.]" Ibid. After receiving all reports and responses, the Commissioner will then issue a final agency decision on the as-applied constitutionality of the SFRA. Ibid.

Because the Commissioner's May 12, 2023, letter announced her plan for

complying with the court's remand directive, she appropriately denied the application for emergent relief as moot. Appellants do not contest this point. Instead, appellants argue that the Commissioner "misapplied" the Crowe factors. (Ab12-16). But appellants' fail to point to any decision or discussion by the Commissioner concerning the Crowe standards; and for good reason — the Commissioner did not address the interim relief standards because she denied the application on other grounds, as outlined above. (Aa3-5). Rather, appellants exclusively object to the arguments contained in the Department's opposition to their motion for emergent relief. (Ab12-16). But the Department's opposition cannot be imputed to the Commissioner. And, importantly, appellants can only appeal orders of the Commissioner, R. 2:2-4, not arguments presented in an opposition brief.

For these reasons, the Commissioner's decision denying appellants' motion as moot was correct. Appellants' mere dissatisfaction with the specifics of the Commissioner's timetable is not a genuine dispute, nor is it a basis for interlocutory review and, as such, must be rejected. See id.

B. Appellants' Remaining Claims Lack Merit and Interlocutory Review is Not in the Interest of Justice.

Appellants focus their arguments on the Commissioner's May 12, 2023 letter expediting the comprehensive review and setting a schedule for issuing a

final decision. Specifically, they claim that the expedited, comprehensive review is redundant and unnecessary. (Ab16-19). Not only do appellants raise issues that are outside the scope of their intended appeal of the Commissioner's order denying their motion for emergent relief, they also ignore both the authority and the responsibility the Commissioner has to order the review. Because the Commissioner's May 12, 2023 letter is not part of this appeal, and because her expedited review does not contravene this court's instructions on remand in any way, appellants' motion should be denied.

First and foremost, appellants raise a number of arguments that are outside the scope of their intended appeal. As set forth more fully above, appellants' seek to appeal only the Commissioner's order denying their motion for emergent relief, which sought an "an expedited schedule" for the Commissioner to issue a final decision on appellants' as-applied challenge, on the basis that appellants' request was mooted by her May 12, 2023 letter. (Aa3-5, 145). But at no point do appellants attempt to explain how the Commissioner's decision was incorrect. Instead, appellants use this appeal to lodge a collateral attack on the Commissioner's May 12, 2023 letter and expediting of the comprehensive review. Because appellants seek to challenge issues that are not part of what they seek to appeal, their claims must be rejected.

To the extent the court entertains appellants' arguments concerning the

Commissioner's May 12, 2023 letter, appellants ignore the Commissioner's well-settled authority to conduct comprehensive reviews of districts. The Commissioner, as chief executive of the Department, is charged with the "supervision of all schools of the state" and is required to "inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the State[.]" N.J.S.A. 18A:4-23, -24. In discharging this responsibility, the Commissioner is authorized to conduct comprehensive reviews of districts to ensure that they are providing T&E to all students, and, where it is found that a district is not providing T&E, to ascertain the root cause of this deprivation. See N.J.S.A. 18A:7A-10, -11, -14; N.J.A.C. 6A:30-5.6.

Here, this court found that Lakewood's public school students were not receiving T&E and remanded the matter to the Commissioner to consider appellants' as-applied challenge to the SFRA. (Aa22). Because the court found that Lakewood's students were not receiving T&E, it is imperative that the Commissioner be able to invoke her statutorily prescribed supervisory authority to conduct a comprehensive review of the district in order to determine the source of this failure and take steps to rectify the situation. This is especially true here, where Lakewood's unique demographics and challenges are central to the as-applied challenge.

As the record reflects, Lakewood is an outlier in this State in terms of its demographic trends and public school enrollment. By 2019, for example, only 16% of Lakewood's student population attended public schools, while 84% attended other non-public schools. (Aa87). Lakewood contends that due to these trends, it has been forced to bear significant financial burden in providing transportation and special education services for its large private school student population. (Ab5). Thus, the Commissioner's comprehensive review will necessarily require an examination of the nature and extent to which the district's obligations to its non-public school students affect its operations and, importantly, whether the SFRA is a cause of its financial hardship and failure to provide T&E or whether it is due to other factors such as mismanagement or the district's statutory obligations to non-public students.

Furthermore, as appellants would have the Commissioner simply issue a decision on their as-applied challenge based on an outdated record, they not only seek to substitute their judgment for that of the Commissioner, but also ignore the fact that such a determination cannot be made without a complete record. In fact, the need to develop a current record in matters involving school funding, to allow the Commissioner to render a fully informed decision on the as-applied challenge, is one of responsibility for the Commissioner. As our Supreme Court has recognized, "[w]hether a statute passes a constitutional challenge 'as-

applied' to any individual school district at any particular time must be determined only in the factual context presented and in the light of circumstances as they appear." Abbott XX, 199 N.J. at 235 (citing Robinson v. Cahill, 69 N.J. 449, 455 (1976)). This rings especially true with respect to the SFRA because a "state funding formula's constitutionality is not an occurrence at a moment in time; it is a continuing obligation." Id. at 146 (emphasis added). This is because "the sufficiency of education is a growing and evolving concept" such that "what seems sufficient today may be proved inadequate tomorrow." Abbott v. Burke (Abbott I), 100 N.J. 269, 290-91 (1985) (quoting Robinson, 69 N.J. at 457-58). Without a comprehensive review, the Commissioner cannot meaningfully render a decision on appellants' as-applied SFRA challenge.

Importantly, the Commissioner's comprehensive review is in no way foreclosed by this court's remand order. Rather, by remanding to the Commissioner without retaining jurisdiction or setting parameters, the court entrusted the matter to the Commissioner's expertise in reviewing and rendering a decision on the as-applied challenge. (Aa22); cf. Bd. of Educ. of Twp. of Neptune v. Neptune Twp. Educ. Ass'n., 293 N.J. Super. 1, 11 (App. Div. 1996) ("where the broader subject matter of a case is within the purview of an administrative agency's authority, it is valuable to have the insights and policy reflections of that agency, even if the only issue to be decided is one of

constitutional dimension"). And the Commissioner's exercise of her authority is entirely appropriate and within reason. (Aa134).

Moreover, despite appellants' protestations to the contrary, the Commissioner is acutely aware of, and sensitive to, the urgency called for by this matter. That is precisely why the Commissioner ordered an expedited review. But, having said that, the Commissioner must also ensure that her decision is correct. To do so, she must be able to conduct a thorough, meaningful review of the record. The data and information in the record is, at best, five years old. (Aa7). Because of the nature of the questions involved, a comprehensive review to ensure an up-to-date and accurate record is not only imperative, but mandated. See Abbott XX, 199 N.J. at 146, 235.

Finally, the Commissioner has taken steps to assist Lakewood in the interim to address the district's immediate concerns by approving loans against State aid and is "exploring what [other] assistance, relief, or aid may be available to more immediately" address Lakewood's fiscal situation. (Aa7).

Thus, the Commissioner's decision to order an expedited review is not inconsistent with the remand order; rather, it is a necessary step in discharging her statutory and constitutional duty. And given the significant level of additional aid provided to Lakewood, the interests of justice do not call for interlocutory review in this case. As such, interlocutory review must be denied

as the interests of justice do not support piecemeal review in this case, and no grave injustice will befall appellants.

POINT TWO

APPELLANTS' REQUEST FOR THIS COURT TO ASSUME ORIGINAL JURISDICTION SHOULD BE DENIED.

Despite recognizing that this matter is properly before the Commissioner for issuance of a final agency decision, especially in light of the remand order, appellants ask this court to assert original jurisdiction under Rule 2:10-5 in order to avoid a "time-consuming" comprehensive review and because of the "uncertainties attendant to how the Acting Commissioner will respond to this Court's remand[.]" (Ab18-19). This request must be rejected.

Rule 2:10-5 states that this court "may exercise such original jurisdiction as is necessary to complete determination of any matter on review." But "it is clear that resort thereto by the appellate court is ordinarily inappropriate when fact-finding or further fact-finding is necessary in order to resolve the matter." Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 2:10-5 (2023) (citing Price v. Himeji, LLC, 214 N.J. 263, 294-95 (2013) (exercise of original jurisdiction discouraged when fact-finding required).

Here, for all of the reasons set forth in Point I above, the Commissioner's final determination as to the constitutionality of the SFRA as applied to

Lakewood requires further factual development and a determination about whether Lakewood's educational deficiencies are a result of the application of the SFRA or other forces. Importantly, because appellants bring an as-applied challenge to the constitutionality of the SFRA, the Commissioner must first be afforded an opportunity to develop the record and render a decision on an issue within her expertise. See Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 588 (2001); Neptune Twp. Educ. Ass'n, 293 N.J. Super. at 11. Only after completing this process would appellants be entitled to seek judicial review under Rule 2:2-3(a)(2). As set forth more fully above, a comprehensive, expedited procedure is in place for the Commissioner to review the record and issue a determination. (Aa4, Aa6-7). Thus, the need for fact-finding militates against this court assuming original jurisdiction.

Appellants have also failed to demonstrate that exigent circumstances exist to justify the assertion of original jurisdiction. See Pressler & Verniero, cmt. on R. 2:10-5 (citing Karins v. Atl. City, 152 N.J. 532, 541 (1998)). The only rationale appellants offer for this drastic request is that, in their opinion, the Commissioner's review is "ultimately unnecessary," time consuming, and there are "uncertainties" concerning how the Commissioner will respond to the remand order. (Ab19). But none of these are valid bases to invoke original jurisdiction on the grounds of exigency. Worse still, they ignore reality: the

Commissioner's response to the remand order is known, as she has ordered an expedited comprehensive review and provided a schedule for the steps to be taken. (Aa7). Whether or not appellants find the review necessary is irrelevant because this court, in remanding the matter, did not foreclose the Commissioner's authority to conduct a review, deferring to her expertise in the matter.

Lastly, appellant's claim that the court should invoke original jurisdiction because the Commissioner's decision is "advisory only" is meritless. To be sure, while courts are not ordinarily bound by an agency's determination of a strictly legal issue, Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973), courts do "afford substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing[,]" Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 420 (2009). And where, as here, the "resolution of a legal question turns on factual issues within the special province of an administrative agency, those mixed questions of law and fact are to be resolved based on the agency's fact finding." Campbell, 169 N.J. at 588. That process should be allowed to play out here. There is nothing in the record to suggest that the expedited review will not proceed in accordance with the Commissioner's instructions.

For these reasons, appellants' request that this court invoke original jurisdiction should be denied.

CONCLUSION

For these reasons, appellants' motion for leave to appeal should be denied.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/Ryan J. Silver
Ryan J. Silver
Deputy Attorney General

Date: May 30, 2023