



CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

JOHN J. HOFFMAN
Acting Attorney General

JEFFREY S. JACOBSON
Director

September 2, 2014

David Hesse
Acting Commissioner of Education
New Jersey Department of Education
100 Riverview Plaza
Trenton, New Jersey 08625

Attn: M. Kathleen Duncan, Director
Controversies and Disputes

Re: Leonor Alcantara et al. v. David Hesse,
Commissioner of Education, et al.
Agency No. 156-6/14

Dear Commissioner Hesse:

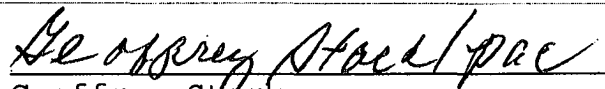
Enclosed is an original and one copy of a Brief on behalf of Respondent(s) in the above referenced matter. A Certification of Service is also enclosed.

Thank you for your courtesies.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By:


Geoffrey Stark
Deputy Attorney General

GS:pc

Enc.

C: Arthur Lang, Esq.





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

JOHN J. HOFFMAN
Acting Attorney General

JEFFREY S. JACOBSON
Director

September 2, 2014

Via Hand Delivery

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes
New Jersey Department of Education
One Riverview Plaza
P.O. Box 500
Trenton, NJ 08625-0500

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 Hespe, 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

Dear Ms. Duncan:

In lieu of an answer to Petitioners' Amended Petition, please accept this letter brief on behalf of David Hespe, Acting Commissioner of Education ("Commissioner"), the State Board of Education ("State Board"), and the Department of Education ("Department") (collectively "State Respondents"), in support of the State Respondents' Motion to Dismiss the Amended Petition.



TABLE OF CONTENTS

PRELIMINARY STATEMENT 2

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF THE FACTS 4

LEGAL ARGUMENT 5

 I. THE AMENDED PETITION MUST BE DISMISSED
 BECAUSE PETITIONERS HAVE FAILED TO JOIN THE
 LAKEWOOD SCHOOL DISTRICT, A NECESSARY PARTY
 TO THIS LITIGATION 5

 II. THE AMENDED PETITION MUST BE DISMISSED
 BECAUSE IT FAILS TO ALLEGE A SUFFICIENT
 FACTUAL BASIS TO DEMONSTRATE PETITIONERS'
 STANDING 8

 III. THE AMENDED PETITION SHOULD BE DISMISSED
 BECAUSE THE REMEDIES SOUGHT ARE NOT
 AVAILABLE IN THIS TYPE OF PROCEEDING 10

CONCLUSION 15

PRELIMINARY STATEMENT

Petitioners, consisting of a student and parents of students attending unidentified schools in the Lakewood School District ("Lakewood District"), as well as a parent of a nonpublic school student in Lakewood, bring this action challenging the allocation method and amount of State funding received by the Lakewood District. Similar to the claims raised 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), Petitioners here generally allege that the District shares certain characteristics with the districts identified as "Abbott

districts" in Abbott v. Burke, 119 N.J. 287, 394 (1990). Petitioners further claim that the State's funding methodology fails to provide adequate resources to the District, and that as a result Lakewood District students are deprived of a constitutionally mandated thorough and efficient education.

Petitioners' requested relief falls generally into four categories. First, they request legislative action by the Commissioner in the form of increasing funding appropriations. Next, they seek orders requiring the Commissioner to make certain policy recommendations to the Legislature. Petitioners then request unspecified administrative remedies. Finally, although brought as a petition of appeal pursuant to N.J.A.C. 6A:3-1.3, Petitioners also seek various declaratory rulings.

The Amended Petition should be dismissed for the following reasons. First, Petitioners failed to name the Lakewood District as a party, even though the district is indispensable to this litigation. Because Petitioners contend that they suffer educational deprivations due to inadequate funding, the Lakewood District must be joined to account for its management of those resources. Failure to name it as a party necessitates dismissal of the Amended Petition. Next, the Amended Petition fails to establish a factual basis for Petitioners' standing to bring this action. Finally, Petitioners request certain relief that cannot be provided in

this type of proceeding. For all of these reasons, the Amended Petition should be dismissed.

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS¹

On June 16, 2014, Petitioners filed a Petition with the Commissioner, naming State Respondents as the respondents. Neither the Lakewood Board nor the Lakewood District are parties to the Petition. Petitioners were notified on June 19, 2014, that the matter could not move forward until the Attorney General had been properly served with the Petition. Thereafter, on June 24, 2014, the Department was notified that the Attorney General's office had been properly served.

Subsequently, Petitioners filed an Amended Petition on July 7, 2014, and provided notice of proper service on July 10, 2014. The Amended Petition did not materially change the arguments raised in the initial Petition. State Respondents requested a 25-day extension of the deadline to file a response on August 4, 2014. The extension, until August 30, 2014, was granted on August 5, 2014. In lieu of an Answer, State Respondents now file this Motion to Dismiss the Amended Petition.

LEGAL ARGUMENT

I. THE AMENDED PETITION MUST BE DISMISSED
BECAUSE PETITIONERS HAVE FAILED TO JOIN THE

¹ The Procedural History and Statement of the Facts have been combined as they are inextricably linked.

**LAKWOOD SCHOOL DISTRICT, A NECESSARY PARTY
TO THIS LITIGATION.**

A Petition of Appeal filed with the Commissioner must name as a party "any person or entity indispensable to the hearing of a contested case." N.J.A.C. 6A:3-1.3(b). Failure to do so is grounds for dismissal of the petition. Ibid. Here, Petitioners' Amended Petition should be dismissed as they have failed to join the Lakewood District as a respondent in the suit.

An indispensable party is one that "has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest." Jennings v. M & M Trans. Co., 104 N.J. Super. 265, 272 (Ch. Div. 1969) (citing Allen B. Du Mont Labs, Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959)). The purpose of this mandatory joinder rule is to ensure that "'no injustice is done, either to the parties before it, or to others, which might otherwise be grounded upon a partial view only of the real merits.'" Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 19 (1989) (quoting J. Story, Commentaries on Equity Pleadings, 74 (19th ed. 1892)). As it is the recipient of education funding from the State and the entity responsible for ensuring that the funding is used appropriately to address the educational needs

of its students, the Lakewood District is clearly an indispensable party in this action.

Petitioners cite various examples of resource deficiencies in the Lakewood schools that they ascribe to inadequate State funding. See, e.g., (Amended Petition, ¶¶17 - 27). Yet at the same time, Petitioners acknowledge that the Lakewood District's budget is "over adequacy," in that the sum of its local levy and equalization aid exceeds the adequacy budget calculated pursuant to N.J.S.A. 18A:7F-51. (Amended Petition, ¶7). Therefore, a critical issue in resolving Petitioner's constitutional claims will be the assessment of how the Lakewood District is spending its educational funds. In order to make this determination, the Lakewood District must be a party to the action. Likewise, throughout the Amended Petition, Petitioners describe various administrative decisions made by the Lakewood District, such as the remodeling of the high school's industrial arts wing into new offices for the Board of Education or the Board of Education's decision to provide non-mandatory courtesy bussing to non-public school students. The Commissioner cannot respond on behalf of, or be held accountable for, the decisions made by the Lakewood Board. And to the extent that these decisions caused a diversion of resources resulting in the programmatic and staffing deficiencies alleged in the Amended Petition, resolution of the

claims requires the participation of the Lakewood District.

This is not a new issue. In Bacon v. N.J. Department of Education, supra, State Board Decision at 58, the State Board rejected the District's claim for additional resources, noting that "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." According to the Amended Petition, the cost of providing transportation for non-public school students continues to comprise a significant portion of the District's educational budget. See (Amended Petition, ¶72). Thus, because the District's budgetary decisions necessarily determine the allocation of educational resources, and because any likely administrative remedies (such as budgetary reallocations) would impact the District, the District must be joined in this action. The Petitioners' failure to name the Lakewood District requires dismissal of the Amended Petition. See N.J.A.C. 6A:3-1.3(b).

II. THE AMENDED PETITION MUST BE DISMISSED BECAUSE IT FAILS TO ALLEGE A SUFFICIENT FACTUAL BASIS TO DEMONSTRATE PETITIONERS' STANDING.

Parties may file a petition of appeal with the Commissioner to institute a contested case if the dispute arises under the school laws. See N.J.A.C. 6A:3-1.3(a). Such petition must include "a statement of the specific allegation(s) and essential facts supporting them which give rise to a dispute under the school laws" and "the relief petitioner is seeking." N.J.A.C. 6A:3-1.4(a). Here, Petitioners have not adequately set forth the basis for their claims.

Parties must have standing to file a petition and institute a contested case. Although New Jersey takes "a liberal view on the issue" of standing, Urban League of Essex Cnty. v. Mahwah Twp., 147 N.J. Super. 28, 33 (App. Div.), certif. denied, 74 N.J. 278 (1977), it is not automatically granted; standing must be established. In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 85 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005). Generally, "'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.'" Neu v. Planning Bd. of Twp. of Union, 352 N.J. Super. 544, 552 (App.

Div. 2002) (quoting In re N.J. Bd. of Pub. Utils., 200 N.J. Super. 544, 556 (App. Div. 1985)). Further, litigants usually have no standing to assert the rights of third parties. See Spinnaker Condo. Corp. v. Zoning Bd. of City of Sea Isle City, 357 N.J. Super. 105, 111 (App. Div.), certif. denied, 176 N.J. 280 (2003).

Here, Petitioners make no attempt to describe the real adverseness they face with respect to this litigation. Rather, they focus on the harm faced by a third, necessary party: the Lakewood District. As to Petitioners, the Amended Petition does not specify which public schools these students attend, or the harms that they have personally suffered as a result of the allegedly inadequate funding. It does not describe whether A.S., a non-public school student, receives any services paid for by the State. In fact, there is no explanation as to how A.S. has any connection to the claims made in the Amended Petition. In short, the Amended Petition provides no details about the stake that Petitioners have in the outcome of this litigation. Therefore, the Amended Petition should be dismissed because Petitioners have failed to demonstrate the requisite standing to proceed.

**III. THE AMENDED PETITION SHOULD BE DISMISSED
BECAUSE THE REMEDIES SOUGHT ARE NOT
AVAILABLE IN THIS TYPE OF PROCEEDING.**

Petitioners request a variety of remedies, including requiring the Commissioner to undertake certain legislative functions. And, although brought as a petition of appeal pursuant to N.J.A.C. 6A:3-1.3, Petitioners also seek various declaratory rulings. For the reasons set forth below, to the extent that the relief requested is not available in this proceeding, those claims in the Amended Petition should be dismissed.

1. The Amended Petition Improperly Seeks Relief in the Form of Funding Appropriations from the Commissioner.

In Count VI of the Amended Petition, Petitioners seek additional State education funding for the Lakewood District. Specifically, they ask the Commissioner to provide \$9,027,679 in transportation aid to the District. However, the Commissioner cannot appropriate State funds. It is a long-standing principle of constitutional law that "the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government." City of Camden v. Byrne, 82 N.J. 133, 148 (1980). Therefore, to the extent that the Amended Petition seeks relief in the form of additional State aid from the Commissioner, the claims must be dismissed.

2. The Amended Petition Improperly Seeks Declaratory Relief Where Such Relief is Unavailable.

Petitioners also seek a number of declaratory rulings from the Commissioner. Therefore, while Petitioners have filed an Amended Verified Petition of Appeal under N.J.A.C. 6A:3-1.3, they should have filed a Petition for Declaratory Ruling under N.J.A.C. 6A:3-2.1. Unlike a Petition of Appeal, which requires that a petitioner include "a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws," N.J.A.C. 6A:3-1.3(a), a Petition for Declaratory Ruling is much more limited in scope. See N.J.A.C. 6A:3-2.1(a). It does not deal broadly with all conflicts that arise under the school law, but narrowly involves a request for "a ruling with respect to rights, responsibilities and status arising from any statute or rule within the jurisdiction of the Commissioner." Ibid. (referencing N.J.S.A. 52:14B-8).

Interested parties may petition for a declaratory ruling, but "[t]he determination to entertain such petitions . . . shall be within the sole discretion of the Commissioner." N.J.A.C. 6A:3-2.1(a). Rather than reflect only the petitioner's viewpoint, a Petition for Declaratory Ruling "shall reflect adverse positions on the statute or rule in question by the parties in interest." N.J.A.C. 6A:3-2.1(a)(1). Additionally, a

petitioner seeking a declaratory ruling may not seek consequential relief arising out of the sought-after declaratory ruling. Ibid. Finally, a Petition for Declaratory Ruling "may not be based on underlying facts which are future, contingent, uncertain or disputed." Ibid.

The Amended Petition does not satisfy these requirements. First, Petitioners do not clearly identify the parties-in-interest. While Petitioners represent one side of their dispute, they do not specify whether their grievances are with the Lakewood Board, the District, the State Legislature, the Department, the Commissioner, or some other party. Further, the Amended Petition includes no discussion of any adverse position against which Petitioners' own position should be juxtaposed. See N.J.A.C. 6A:3-2.1(a)(1) (requiring a request for declaratory judgment reflect adverse positions). Nor do the requests for declaratory rulings seek a determination of "rights, responsibilities and status" arising from the operation of a statute or rule under the Commissioner's jurisdiction, as required. Ibid.

Further, Petitioners base their requests for declaratory judgment not on undisputed facts, but on their own interpretation of facts which are uncertain and/or disputed. See ibid. Such factual uncertainty makes a declaratory ruling impossible. Finally, many of Petitioners' requests for

declaratory relief are coupled with requests for consequential relief arising from the declaratory ruling. This consequential relief is prohibited by regulation. Ibid.

Here, Petitioners clearly request declaratory rulings, but have improperly sought them through an Amended Verified Petition of Appeal. The Amended Petition fails to satisfy the requirements set forth in N.J.A.C. 6A:3-2.1. Consequently, Petitioners are not entitled to the declaratory relief sought, and their Amended Petition must be dismissed.

Moreover, the specific declaratory rulings sought by Petitioners are not of a nature that can be granted by the Commissioner. For example, in Counts I and VII Petitioners request declaratory rulings that are so vague, they are impossible for the Commissioner to consider and must be dismissed. Count I seeks a declaratory ruling but does not specify the exact nature of the declaratory relief sought. (Amended Petition at p.9). In Count VII Petitioners request a declaratory ruling "that all Lakewood students are entitled to the same services for which students similarly situated elsewhere in New Jersey are entitled." (Amended Petition at p.32). Further, they specify that the ruling should "foreclose the possibility of a remedy that disparately impacts the children of Lakewood or that forces them to forego their rights and privileges under the current law." (Amended Petition at

p.32). Petitioners appear to be requesting that the Commissioner to affirm the broad principle of equality under the law, rather than determine rights, responsibilities and status arising under a statute or rule. Such vague, ambiguous, and overly broad requests must be dismissed.

In Counts III and IV Petitioners seek to have the Commissioner issue a declaratory ruling that Lakewood should be classified as an "urban district" for funding purposes, (Petition at pp.19-20), and that such classification should be retroactive. (Amended Petition at pp.22-23). Rather than seeking legislative solutions to their complaints about educational funding, Petitioners are instead improperly seeking a declaratory ruling on these Counts. Essentially they are asking the Commissioner to change the meaning of the State's educational funding statutes as they relate to Lakewood. Because Petitioners fail to satisfy the requirements for a declaratory ruling, their requests for such rulings should be dismissed.

CONCLUSION

For the reasons set forth above, Petitioners' Amended
Petition should be dismissed.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: 

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

cc: Arthur H. Lang, Esq. (via overnight service)