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<u>VIA EMAIL</u>

January 17, 2020

Honorable Susan M. Scarola, ALJ
Office of Administrative Law
Quakerbridge Plaza, Building 9
Mercerville, NJ 08625-0049

Re: Leonor Alcantara et. al. v. David Hespe et al.
OAL Docket No: EDU 11069-2014 S
<u>Agency Ref. No. 156-6/14</u>

Dear Judge Scarola:

As a participant in the above-captioned case, I am submitting this letter, in lieu of a more formal brief, in response to the state respondents' Post-Hearing Summation and Argument.

Frankly, I am feeling very much like a broken record. I have been arguing literally for years that your Honor should promptly forward your recommended decision to the Commissioner of Education (ironically, the first-named Respondent). And that your recommendation should be that the School Funding Reform Act of 2008 (SFRA) is unconstitutional as applied to the Lakewood Public School District (LPSD) because it does not guarantee enough funding to enable LPSD to provide its students with a thorough and efficient education (T&E). The fact that LPSD's students are primarily low-income Hispanic and Black only heightens the urgency of the State acting to protect their fundamental constitutional rights.

As I reviewed my recent submissions to your Honor, I was struck by how apt my last letter to you, dated July 3, 2019, more than six months ago, still is. As a courtesy to you, I am attaching a copy. In my letter today, I will amplify the points I made in July based on the State's Summation and Argument, which actually underscores, strengthens and even acknowledges those points. Yet again, in the strongest terms, I urge your Honor to transmit your recommended decision as soon as possible.

Today's letter is organized into three sections:

1. The key points that the State's Summation and Argument ignores or obfuscates;
2. The key points that the State's Summation and Argument clarifies or acknowledges; and
3. What your Honor should do now.

Key Points the State Ignores or Obfuscates

[to be completed this afternoon]

Key Points Clarified or Acknowledged by the State

The State's Summation and Argument clarifies or acknowledges the following points:

1. The extraordinary length of time this matter has been pending in the OAL without a recommended decision being transmitted to the Commissioner of Education;
2. The failure of SFRA itself to provide LPSD with sufficient funding for T&E, and the annual efforts of the Commissioner of Education, State Treasurer and Legislature to cobble together, through discretionary action, additional funding to supplement SFRA; and
3. The State's efforts to shift the blame for SFRA's unconstitutional funding to LPSD—including for the district's alleged conduct years ago, long before the petition in this matter was initially filed in June 2014.

The extraordinary length of time this matter has been pending in the OAL without a recommended decision being transmitted to the Commissioner of Education. In the State's Procedural History, it provides a number of key dates: (i) **June 24, 2014**, when the Petition was initially filed with the Commissioner (five and a half years, 66 and ½ months, and more than 2,000 days ago); (ii) **September 2, 2014**, when the State filed its **first** motion to dismiss (more than five and one-third years, 64 months, and 1,920 days ago); (iii) **October 22, 2014**, when the Petitioners filed their opposition to the State's motion to dismiss and this matter was transmitted to OAL as a contested case (more than five years, 62 and a half months, and 1,875 days ago); (iv) **March 11, 2015**, when ALJ Kennedy granted my motion to participate in this matter (more than four and three-quarter years, 57 and one-half months, and 1,725 days ago);[1] (v) **July 24, 2015**, when ALJ Kennedy denied the State's first motion to dismiss (more than eight months after the Petitioners filed their opposition; and almost four and one-half years, 53 months, and 1,600 days ago); (vi) **February 19, 2016**, when petitioners filed a Motion for Summary Decision

[1] The State failed to mention that it opposed my motion to participate and that that consumed months.

(almost four years, 46 months, and 1,380 days ago); **July 19, 2016**, when ALJ Metzger[2] denied the motion[3] (almost three and one-half years, 41 months, and 1,230 days ago); (vii) **February 2018**, when the Petitioners presented their case over five hearing days, concluding on February 22, 2018 (almost two years, 22 and one-half months, and 680 days ago); (viii) **April 30, 2018**, when the State filed its second motion to dismiss (more than one and two-thirds years, 20 months, and 600 days ago); (ix) **September 4, 2018**, when the Petitioners filed a Second Amended Complaint as your Honor ordered (more than one and one-third years, 16 months, and 480 days ago); (x) **October 3, 2018**, when the State filed its amended answer[4] (more than one and one-quarter years, 16 months, and 480 days ago); (xi) **January 8, 2019**, when your Honor denied the State's second motion to dismiss (exactly one year, 12 months and 365 days ago); and (xii) **July 23, 2019**, when the State rested its case after presenting six witnesses over four hearing dates earlier in July, 2019 (more than five and one-half months and 165 days ago).

To underscore the most important points in this extensive procedural history, the fundamental constitutional claims on behalf of LPSD students are still pending in OAL five and one-half years after the initial petition was filed with the Commissioner, more than five years since the matter was transmitted to OAL as a contested case, more than one and one-quarter years after the State filed its only answer to the students' petition (the Second Amended Petition), and exactly one year after your Honor denied the State's second motion to dismiss.

As the State's full procedural history makes clear, most of this matter's pendency in OAL has been occupied by procedural matters, often initiated by the State (e.g., its two failed motions to dismiss the petition, and its failed motion to preclude me from participating in this matter). Only a scant nine days of the total pendency of more than 2,000 days have been occupied by hearings (even though OAL's role in constitutional cases such as this one is primarily to amass a record on the basis of which the constitutional issues can be resolved by a court).[5]

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[2] This matter was re-assigned from ALJ Kennedy to ALJ Metzger in June 2016, and to your Honor in June 2017, more than two and one-half years ago.

[3] As the State acknowledges, ALJ Metzger had recognized that "[t]here is no question that Lakewood's demographics pose singular problems for the public-school budget." (State Summation at 3)

[4] The State was permitted to file an amended answer because its answer, originally filed on September 18, 2018, had a typographical error. This was the first answer filed by the State in this matter, more than four years after the Petitioners' original petition had been filed. The State's Post-Hearing Summation and Argument had indicated, without explanation, that "ALJ Kennedy did not require Respondents to file an answer." (State Summation at 2, n. 2).

[5] Perhaps the best analogy to this matter is *Abbott v. Burke*, where the case was referred to OAL by the New Jersey Supreme Court for the creation of a record. The OAL phase of the case wound up occupying "over eight months" of "extensive hearings and other proceedings," Abbott II, 119 N.J. 287, ___ (1990), only about 12% as long as the *Alcantara* matter has already been pending in OAL. During the eight+ month period *Abbott* was in OAL, ALJ Steven Lefelt conducted 100 hearing dates and wrote a 607-page recommended decision to the Commissioner, which became the foundation for the New Jersey Supreme Court's initial decisions in the case. Surely, in light of that analogy, pressing your Honor to issue your recommended decision now is not asking too much.

The time has come, actually is long overdue, to sever the Gordian knot and move this crucially important constitutional matter along to the Commissioner, the Legislature, and, if need be, to the courts.

The failure of the SFRA formula to provide LPSD with sufficient funding for T&E, and the annual efforts of the Commissioner of Education, State Treasurer and Legislature to cobble together, through discretionary action, additional funding to supplement SFRA. One of the central constitutional requirements articulated throughout the *Abbott* litigation, from *Abbott II* in 1990 to *Abbott XXI* in 2011, is that SFRA must **guarantee** that districts, and especially the Abbott/SDA districts,[6] actually receive annually **certain, predictable, consistent, non-discretionary and transparent funding** sufficient to afford its students a thorough and efficient education. As set forth as early as 1990 in *Abbott II*, the Court has ruled that "Districts must be 'assured' adequate funding for T&E" and that "'**Assure' means that such funding cannot depend on the budgeting and taxing decisions of local school boards. Funding must be certain every year**."[7] (Abbott II, 119 N.J. 287, 385) (Emphasis added.). Nor can such assured funding be dependent on federal aid or other non-SFRA funding that is "subject to substantial fluctuation." (119 N.J. at 330-331).

The Court has struck down for these reasons a series of funding statutes prior to SFRA, sometimes because of facial problems and sometimes because of the way in which the statute was applied. For example, the Public School Education Act of 1975, which had been found facially constitutional, if fully funded,[8] in *Robinson v. Cahill*, 69 N.J. 449 (1976), was found unconstitutional as applied in *Abbott II* because it failed to assure adequate funding of education in poorer districts and because T&E funding could not be allowed to depend on the ability of local school districts to tax, but had to be guaranteed and mandated by the state. Additionally, the Quality Education Act (QEA) was found constitutionally infirm because it "[**depended] on discretionary action** and **'fail[ed] to guarantee adequate funding**.'" (Abbott IV, 149 N.J. 145, 159 (1997). Even more specifically, the Court ruled that "Because the QEA's design for achieving parity depends fundamentally on the discretionary action of the executive and legislative branches…the statute fails to guarantee adequate funding for those districts. Accordingly, the conclusion is unavoidable that the **QEA does not comply with Abbott's mandate that the required level of funding…'cannot be allowed to depend on the ability of**

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[6] Although LPSD is not an Abbott/SDA district, a major thrust of SFRA was to largely eliminate the Abbott/SDA districts as a separate funding category and to establish a unified statewide system, which especially attended to the educational needs of at-risk students throughout the State and not just in the Abbott/SDA districts. In point of fact, the great bulk of LPSD's public school students fall into the at-risk category.

[7] In all cases where language quoted from court decisions appears in bold typeface, the emphasis has been added.

[8] Obviously, the NJ Supreme court has been concerned about whether the State would wind up fully funding either of the two school funding laws found facially constitutional during the past 45 years—the Public School Education Act of 1975 or SFRA of 2008—to the extent the Court made full funding a condition of constitutionality.

local school districts to tax…[and] must be guaranteed and mandated by the State….' [Abbott II,] 119 N.J. at 295, 575 A.2d 359. We so hold." (Abbott III, 136 N.J. 454, 451 (1994).

The State sold SFRA to the Court as a departure from QEA's discretionary approach, largely because of SFRA's elaborately constructed funding formula at the core of which, the State acknowledges, is the Adequacy Budget. But now, in implementing SFRA, the State has converted it into a discretionary funding system by refusing to enforce either the Adequacy Budget, or a central component of it, the Local Fair Share (LFS). The inevitable mathematical effect of this interpretation is to reduce State Equalization Aid, the main element of state aid under SFRA, and thereby either shift more of the burden of funding public education to local districts or shortchange students if the local districts fail to raise additional funds.

In *Abbott XX*, the Court found SFRA facially constitutional, but it did so based on two explicit conditions and on repeated warnings about the consequences of SFRA's implementation going astray or demonstrating that, even a properly implemented SFRA, might not result in a constitutional funding system.

Strikingly, neither of the explicit conditions has been met during SFRA's 11+ year life. One of the conditions—full funding—has been met only in SFRA's first year of operation, but not since. The second condition—that the State carry out a careful "look-back" evaluation of a fully-funded SFRA in its third year and periodically thereafter—could not be done because SFRA has not been fully funded. Evaluating an underfunded version of SFRA can provide little or no dispositive information about whether or not the fruits of SFRA's promise have been delivered.

In addition, the court put the State unmistakably on notice that it would not hesitate to revisit SFRA to determine whether it had worked as promised. Speaking most broadly, the Court warned that: "[A] state funding formula's constitutionality is not an occurrence at a moment in time; it is a continuing obligation. Today's holding issues in the good faith anticipation of a continued commitment by the Legislature and Executive to address whatever adjustments are necessary to keep SFRA operating at its optimal level. The three-year look-back, and the State's adjustments based on that review, will provide more information about the efficacy of this funding formula. There should be no doubt that we would require remediation of any deficiencies of a constitutional dimension, if such problems emerge.

For five and a half years the students of the Lakewood public schools have been arguing before your honor and two previous ALJs that that is precisely the situation they confront—a SFRA whose implementation desperately needs remediation so that their fundamental constitutional rights can be vindicated.

An especially mystifying aspect of SFRA's implementation regarding LPSD is the fact that, annually for the past five years, the Commissioner of Education has formally acknowledged in a certification to the State Treasurer that SFRA does not generate enough funds for LPSD to be able to provide its students with a T&E education. In my judgment, that alone should satisfy the petitioners' burden to establish that SFRA funding fails to meet constitutional requirements.

A consequence of that certification, and of the State Treasurer's acceptance of it, is that every year, in rapidly escalating amounts, LPSD has received advance state aid to supplement SFRA funding. The total amount of that advance state aid has grown to $___,____, with the most recent annual installment topping $28 million [?].

The State seems to believe that, so long as LSPD winds up with what the State claims is enough money to provide its students with T&E, it doesn't matter how and from where the funds come. As the Abbott jurisprudence conclusively demonstrates, however, that is just dead wrong. There are a variety of reasons why "advance state aid" cannot, as a matter of law, satisfy the State's constitutional obligation to assure that LPSD students:

1. "Advance state aid," based on an annual Commissioner's certification and State Treasurer's approval, is quintessentially discretionary because it is based on the "discretionary action of the executive and legislative branches;"
2. It is also uncertain and unpredictable, thereby precluding effective educational planning by LPSD;
3. Adding to the uncertainty and unpredictability of advance state aid is the fact that the statutory authority to recommend and approve it is available only so long as LPSD has state monitors in place; and
4. As the governing statute makes clear, advance state aid is actually a loan to LPSD against future state aid, rather than an outright grant of additional funding, since it must be fully repaid out of future state aid within ten years (as your Honor indicated, it operates rather like a Ponzi scheme since tomorrow's LPSD students will have to pay for the additional funding experienced by today's students, and eventually repayment of the rapidly increasing loans will consume virtually all of LPSD's future state aid).

The other way in which the State has periodically supplemented LPSD's SFRA funding is by budget notes added to the State's annual appropriations act. It is hard to imagine anything more discretionary than legislative budget decisions not expressly required by law.

The State's efforts to shift the blame for SFRA's unconstitutional funding to LPSD—including for the district's alleged conduct years ago, long before the petition in this matter was initially filed in June 2014. Ever since the start of New Jersey's school funding litigation, the State has sought to defend against the plaintiffs' charges of unequal or inadequate funding by

invoking the specter of local school district management, inefficiency and even corruption. There's plenty of money, intones the State in its testimony, documentation, briefs and oral arguments, but it's just being misused by local officials.

That argument has always been dismissed out of hand by the courts, and it should be now by your Honor. Essentially for the life of this matter in OAL, the State has had one or more state fiscal monitors actively engaged in the affairs of LPSD, with ultimate control over how district funds are spent. As your Honor certainly will recall, several years ago the then senior monitor, Michael Azzara, stated publicly at a videotaped board of education meeting that Lakewood's problem was a revenue problem not a spending problem. In other words, there simply wasn't enough money coming into the district to enable it to provide its students with a T&E education, even with the various forms of non-SFRA funding referred to above.

What Your Honor Should Do Now

As this letter-brief has made clear, the first thing your Honor should do as soon as possible is to recommend to the Commissioner a decision confirming what the Commissioner annually has been certifying—that SFRA funding is inadequate to assure LPSD students a T&E education. In other words, your Honor should recommend that SFRA as applied to LPSD fails to satisfy the state constitution's education clause.

As petitioners have made clear repeatedly, the reason why LPSD's SFRA funding is so clearly and substantially inadequate is obvious and uncontested—LPSD is demographically a unique school district in New Jersey. About 85% of Lakewood's school-age population attends private schools, as compared to the statewide average of about 11%. The transportation and special education costs of those 35,000 nonpublic school students drain almost half of the district's budget, which is mainly intended to provide full-day public schooling for LPSD's approximately 6,000 enrolled students, most of whom are low-income, Hispanic and Black.

It is no wonder that Mr. Azzara indicated that Lakewood's problem is a revenue problem. It continues to be a revenue problem, one that must be cured on a regular, certain, predictable, transparent and guaranteed basis. Your Honor could include in your recommended decision to the Commissioner at least two ways in which the State might cure that constitutional problem, both in the legislative, rather than executive, domain.

One is by a legislative amendment to the SFRA formula, which recognizes and provides for the unique demographics of LPSD and, perhaps, of any other districts moving substantially in Lakewood's demographic direction.

The other is by the State directly funding for all districts the costs they are required to bear for resident nonpublic school students. There is at least one significant legislative precedent for that approach--the State's assumption of the costs of TPAF (Teacher Pension and Annuity Fund) for all districts. Those TPAF costs are related, in large part, to local collective bargaining

decisions, and, therefore, they are not costs within the control or at the discretion of the State. Nonetheless, the State has paid them directly for all districts for many years.

Your Honor is urgently requested to rule in favor of the petitioners and to do so immediately.

Respectfully submitted,

Paul L. Tractenberg, Participant

cc: Arthur H. Lang, Esq.
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