

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3693-20

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.,

APPROVED FOR PUBLICATION

March 6, 2023

APPELLATE DIVISION

Petitioners-Appellants,

v.

ANGELICA ALLEN-MCMILLAN,
ACTING COMMISSIONER
OF THE NEW JERSEY
DEPARTMENT OF EDUCATION,
NEW JERSEY STATE BOARD
OF EDUCATION, and NEW
JERSEY DEPARTMENT OF
EDUCATION,

Respondents-Respondents.

Argued January 17, 2023 – Decided March 6, 2023

Before Judges Whipple, Mawla, and Smith.

On appeal from the New Jersey Commissioner of
Education, Docket No. 156-6/14.

Arthur H. Lang and Paul L. Tractenberg argued the cause for appellants.

Matthew J. Lynch, Deputy Attorney General, argued the cause for respondents (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Sydney Finkelstein, Deputy Attorney General, on the brief).

The opinion of the court was delivered by

WHIPPLE, J.A.D.

Appellants, parents of children enrolled in the Lakewood Public School District (Lakewood, or District), filed a petition alleging the District was not providing its public-school students a thorough and efficient education (T&E) as required by our State's Constitution. N.J. Const. art. VIII, § 4, ¶ 1. Appellants contend this is due to the failure of the New Jersey Department of Education (DOE) to adequately fund the District. To that end, they assert the School Funding Reform Act (SFRA), N.J.S.A. 18A:7F-43 to -70, which sets certain standards for the DOE, is unconstitutional as applied to Lakewood.

Administrative Law Judge (ALJ) Susan Scarola initially considered the case. After the development of a thorough record, she determined while the District was indeed failing to provide T&E, this failure was due to local mismanagement and other factors, not because of a constitutional defect in the SFRA. She denied appellants' relief on this basis.

Appellants petitioned the New Jersey Commissioner of Education (Commissioner) for review. The then acting Commissioner rejected the ALJ's conclusion the District had failed to provide an adequate education to its students, and therefore, because it found the District was providing T&E, did not reach the issue of constitutionality of the SFRA. She denied relief.

This appeal followed.

I.

The record demonstrates Lakewood's school district is in a unique and precarious position. This is due, in large part, to demographic trends in the area. Lakewood Township has seen a population rise in recent decades, due in large part to a thriving Orthodox Jewish community. As a result of this demographic shift, the township has approximately 37,000 school-aged children, however, only about 6,000 are enrolled in the secular public schools.¹ The majority—84%—are enrolled in private religious schools. Testimony before the ALJ established that this demographic trend is likely to continue and accelerate.

As a result, Lakewood is an outlier amongst other New Jersey school districts, in which most of the students are enrolled in public schools. The

¹ Demographically, 8.1% of the District's students are Black and 86% are Latino. The entire student body is eligible for free or reduced-price lunches based on household income. The District has a high percentage of students who speak English as a second language.

non-public school students in Lakewood alone constitute nearly a quarter of all such students in our state.

Like other districts, Lakewood's state-issued school aid is calculated based upon its 6,000 enrolled public-school students. However, Lakewood's education budget has been severely strained by its obligation to provide transportation and special education tuition to many of the 31,000 non-public school students not included in its aid calculation. The record developed before the ALJ is extensive, but the key takeaway is this: the total budget for the most recent school year at the time of that decision was \$143.45 million. Of that, over half—\$78 million—went to transportation and special education tuition for non-public students. This is an abnormal and unsustainable imbalance. By way of comparison, in neighboring districts, the costs of transportation and special needs tuition accounted for roughly four to seven percent of their annual education budgets.

The ALJ concluded the impact of this funding discrepancy on Lakewood's public schools was substantial. Lakewood had difficulty hiring and retaining teachers and other instructional aides. Classroom instructional salaries were the second lowest in the state on a per-pupil basis. A preschool program, which had been recommended in a 2009 needs assessment, was never implemented.

Student performance was also depressed. Test scores from 2014-15 indicated that only twenty-three percent of high school students met or exceeded expectations on the PARCC assessment for English, whereas only five percent met that threshold in math. Only six percent of district students scored above 1550 on the SAT, compared to forty-three percent of students statewide, placing Lakewood in the thirteenth percentile of all districts. While the ALJ noted scores did show improvement in the years that followed, overall scores remained low, far below state averages or targets. Also, between 2014 and 2019, absenteeism and dropout rates were very high, though again, a trend of improvement was borne out by the data.

Faced with this picture, the ALJ found the District was failing its students to a degree that offended the basic guarantees of our State Constitution. The Commissioner, however, rejected this finding. She reasoned that "[w]hile Lakewood's standardized test scores [and other metrics] are below the [s]tate average, they have shown consistent improvement" and therefore lacked constitutional defect.

II.

We consider whether the Commissioner erred in finding, contrary to the ALJ, the District had provided a constitutionally sound education to its students.

We begin with our standard of review. On appeal, our role in reviewing an administrative action is limited to three inquiries: (1) whether the agency's action violates express or implied legislative policies—i.e. the law; (2) whether the record contains substantial evidence to support the agency's findings; and (3) whether the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citing In re Stallworth, 208 N.J. 182, 194 (2011)). If the agency has satisfied these criteria, then "substantial deference" is owed, even if we would have reached a different result in the first instance. In re Herrmann, 192 N.J. 19, 28 (2007). Additionally, decisions "made by an administrative agency entrusted to apply and enforce a statutory scheme" are reviewed "under an enhanced deferential standard." E. Bay Drywall, LLC v. Dep't of Lab. & Workforce Dev., 251 N.J. 477, 493 (2022) (citing Hargrove v. Sleepy's, LLC, 220 N.J. 289, 301-02 (2015)).

With this deference in mind, we first observe that our Constitution requires the State provide "a thorough and efficient system of free public schools for the instruction of all the children . . . between the ages of five and eighteen years." N.J. Const. art. VIII, §4, ¶1. To achieve this mandate, the Legislature has passed various funding statutes and delegated certain powers to

the DOE and local school boards. Robinson v. Cahill, 69 N.J. 449, 458 (1976). "[W]hat a thorough and efficient education consists of is a continually changing concept." Abbott by Abbott v. Burke, 119 N.J. 287, 303 (1990) (Abbott II). Generally, however, a thorough and efficient education requires "a certain level of educational opportunity, a minimum level, that will equip the student to become 'a citizen and . . . a competitor in the labor market.'" Id. at 306 (alteration in original) (quoting Robinson v. Cahill, 62 N.J. 473, 515 (1973)).

To determine this baseline level of education, the New Jersey Student Learning Standards (NJSLS) measure T&E pursuant to N.J.S.A. 18A:7F-46² and serve as a basis for the evaluation of school districts. In Abbott XXI, our Supreme Court observed that standardized tests generally measure whether students are meeting certain minimum educational thresholds—and thereby, aid in determining whether a district is providing T&E. 206 N.J. at 424-26.

² Pursuant to N.J.S.A. 18A:7F-46, the State Board of Education must create core curriculum content standards (CCCS) aimed at ensuring that all children are "provided the educational opportunity needed to equip them for the role of citizen and labor market competitor[.]" and these standards establish what is necessary to achieve T&E. The CCCS "describe the knowledge and skills all New Jersey students are expected to acquire" Abbott ex rel. Abbott v. Burke, 206 N.J. 332, 471 (2011) (Abbott XXI) (Albin, J., concurring); N.J.A.C. 6A:8-1.3. These standards comprise nine academic areas: "English language arts; mathematics; visual and performing arts; comprehensive health and physical education; science; social studies; world languages; technology; and 21st century life and careers." N.J.A.C. 6A:8-1.1(a)(1).

Districts are also evaluated pursuant to the New Jersey Quality Single Accountability Continuum (NJQSAC). N.J.S.A. 18A:7A-10. NJQSAC assesses a school district's performance in five areas: "instruction and program [(most relevant to the T&E inquiry)]; personnel; fiscal management; operations; and governance." Ibid. Notably, the statute requires review of a "district's performance over time, to the extent feasible." Ibid.

Despite this extensive legislative background, there is no bright line rule for determining whether a district is providing T&E. However, given the fact the DOE is charged with carrying out this statutory scheme, we remain "mindful of an administrative agency's day-to-day role in interpreting statutes 'within its implementing and enforcing responsibility.'"³ In re State Bd. of Educ.'s Denial of Petition to Adopt Reguls. Implementing N.J. High Sch. Voter Registration L., 422 N.J. Super. 521, 530-31 (App. Div. 2011) (quoting Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001)).

Additionally, N.J.A.C. 1:1-18.6(b)-(d) provides us with explicit guidance for how to evaluate situations where a commissioner rejects the findings of an ALJ:

³ We do not substitute our judgment for that of an agency head and we defer to an agency's interpretation of its enabling legislation. Herrmann, 192 N.J. at 28; City of Newark v. Nat. Res. Council in Dep't of Env't. Prot., 82 N.J. 530, 539 (1980).

[T]he agency head may reject or modify conclusions of law, interpretations of agency policy, or findings of fact not relating to issues of credibility of lay witness testimony [so long as a final decision] rejecting or modifying the findings of fact in an initial decision [is] based on substantial evidence in the record and [states] with particularity the reasons for rejecting the findings

In finding the District's students were not receiving T&E, the ALJ focused on credible evidence in the record that Lakewood's test scores were well below state averages, and students fared poorly on performance in English and math. She also observed low rates of graduation and college enrollment, as well as high rates of chronic absenteeism. Moreover, while the District offered courses in AP English and Spanish, as well as art and technology, the ALJ noted the programs in industrial arts and auto mechanics had been recently cut. Finally, she noted the only foreign language study offered in-district was Spanish, despite a high rate of Spanish literacy within the student body to begin with.

However, when the Commissioner interpreted this same evidence, she saw a glass half full. Test scores and other metrics were low but trending higher. The District had cut some programs, but still provided certain AP classes, art and music programs, and courses in computer and library skills. Other language courses besides Spanish were available to students online. Lakewood had met various accountability targets under the Federal "Every

Student Succeeds Act" (ESSA),⁴ except for the middle school. On this basis, the Commissioner rejected the ALJ's determination and instead concluded Lakewood's students were receiving T&E.⁵

When faced with a review of the determinations of state agencies, particularly when operating within their areas of expertise, our deference to an agency's opinion is well established and generally desirable. However, an agency's determination cannot be sustained if it "lacks fair support in the record." Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (emphasis added) (citing Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). Based on our review, we conclude the record generated before the ALJ cannot fairly be said to support a finding Lakewood's students are receiving a constitutionally sound education. The Commissioner owed appellants a thorough review of their substantive argument: the funding structure of the SFRA was unconstitutional as applied to Lakewood's unique demographic situation.

III.

In determining Lakewood's students were receiving a constitutionally adequate education, the Commissioner made essentially three arguments.

⁴ Pub. L. No. 114-95, 129 Stat. 1802 (2015).

⁵ Notwithstanding her conclusion, the Commissioner ordered a comprehensive review pursuant to N.J.S.A. 18A:7A-11 to determine how the District could improve its educational program.

First, she asserted there was a positive trend of improvement in the school's testing averages. Second, while acknowledging cuts to various educational programs at the district, she observed the District still offered "all the courses required for graduation[,] " as well as five AP classes, music programs, and research skills courses. Third, while she acknowledged a "high rate of teacher turnover" and a high student-teacher ratio, she claimed Lakewood met various federal targets under the ESSA (with exceptions).

As legal support for her conclusion, she compared the above observations with the conditions described in Abbott II, a case concerning stark physical deficiencies in school facilities—students being taught in coal bins, eating lunch in the corridor, and using bathrooms without hot water. 119 N.J. at 363. In the Commissioner's estimation, because Lakewood lacked these desperate conditions, the quality of education it provided remained constitutionally sound.

The Commissioner's reliance on this aspect of Abbott II does not address the problem in Lakewood. Abbott II does not hold that all a school district must do to remain constitutionally compliant is provide adequate physical facilities. Instead, Abbott II observed "a thorough and efficient education requires a certain level of educational opportunity, a minimum level [which] . . . should[] be defined in terms of substantive educational content." Id. at

306-07 (citing Robinson, 62 N.J. at 515). Furthermore, "a thorough and efficient education requires such level of education as will enable all students to function as citizens and workers in the same society" Id. at 374.

The question is not whether Lakewood's public schools are direct physical analogues of the unacceptable conditions observed in a school over thirty-three years ago. Instead, it is whether, substantively, the District is failing to provide its students with a minimum level of educational content and opportunity as required by our Constitution today. Because we conclude the Commissioner used the wrong standard in making her factual determination, we instead evaluate whether there exists support in the record for the agency's conclusion under the correct standard. Allstars, 234 N.J. at 157.

IV.

We turn to the record to search for that support. In doing so, we review the DOE's own statistics, comparing the performance of Lakewood's public-school students to state averages. Because data pertaining to a number of school years between 2015 and 2018 is contained in the record, the numbers that follow are generally the most favorable to the Commissioner's argument and paint the District's performance in the best possible light.

First, the most basic analysis. New Jersey's average high school graduation rate was approximately ninety percent for the years in question.

Lakewood's best year had a graduation rate of eighty-two percent. In other words, in the best year on record at Lakewood, nearly one in five students did not graduate, whereas statewide the rate is one in ten. During the other years in the record, Lakewood's rate is approximately one in four. As to what opportunities await the students who do graduate: the statewide average for enrollment in post-secondary education is approximately seventy-three percent. Lakewood has about half this enrollment, at thirty-six percent.

A review of standardized testing paints an even more concerning picture. The record contains a summation of test scores on over eighteen subjects, including English Language Arts, Math, Algebra, and Geometry. Generally speaking, the statewide averages for most subjects hover somewhere around fifty percent. In no subject, during any year contained in the record, did Lakewood's students score above a forty-one percent proficiency rate.⁶ Aside from a single outlier, in every testing category, for all years in the record, there was a deficit of nearly ten percentage points between the averages. Discrepancies of thirty points or more are common.

Furthermore, this testing data does not provide uniform support for the Commissioner's assertion that the scores have shown "consistent

⁶ For example, the proficiency rate for geometry—a particularly difficult subject, according to the data—shows that in 2018, the statewide average proficiency rate was thirty percent. Lakewood's was 3.4%.

improvement." Instead, four of the eighteen subjects demonstrate a decline in scores over the four years tested. Other subjects only increased their proficiency by a point or two, and generally remain over twenty points behind the state averages.

On a deeper level, the record demonstrates a conceptual problem with using a positive statistical trend as primary support for a conclusion that a school district is providing a quality education. A high school with a one percent graduation rate one year and a two percent rate the next has shown remarkable statistical improvement—a 100% increase—but no one could seriously contend the school provides a thorough and efficient education. Of course, the situation in Lakewood is more nuanced than this hypothetical, but given the overwhelming statistics showing the District to be consistently and significantly underperforming in essentially every academic metric, the Commissioner's reliance on a perceived positive trend—alone—cannot adequately support her rejection of the ALJ's contrary determination.

The other reasons cited by the Commissioner—listing the District's course offerings and lauding Lakewood for (mostly) meeting federal accountability targets—are not significant enough to overcome this deficiency. A course offering means little if the course itself is ineffective. The above data supports the argument the quality of education in Lakewood, even in core,

non-elective areas, is deficient. The existence of other course offerings fails to address these issues.⁷


Finally, the ESSA is Federal legislation, which has no direct bearing as to whether Lakewood is performing to the standard required by our State's Constitution.

V.

For these reasons, we reverse and remand, with instructions for the agency to consider the substantive arguments pertaining to the SFRA in light of our Supreme Court's directive in Abbott ex rel. Abbott v. Burke (Abbott XX), 199 N.J. 140, 146 (2009): the State has a continuing obligation to "keep SFRA operating at its optimal level" and "[t]here should be no doubt that we would require remediation of any deficiencies of a constitutional dimension, if such problems do emerge."

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

⁷ For example, the fact the District offers a selection of AP classes means little if, as in Lakewood, only 2.6% of students score above a three on the AP exam, as compared to over twenty percent statewide.