SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-002493-23

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.
Petitioners,
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.

ON APPEAL THE FINAL DECISION OF THE COMMISSIONER OF EDUCATION

AGENCY REF. NO.: 156-6/14

OAL DOCKET NO. EDU 11069-2014S

SAT BELOW: HONORABLE SUSAN A. SCAROLA, ALJ

ON REMAND TO THE COMMISSIONER OF EDUCATION A-003693-20

APPELLANTS' BRIEF

Paul L. Tractenberg, Esq.
123 Washington Street
Newark NJ 07102
973-879-9201
paulltractenberg@gmail.com
Attorney for Petitioners
NJ Att. No. 024721975

Arthur H. Lang, Esq.
918 East Kennedy Boulevard
Lakewood, NJ 08701
732-609-5530
lakewoodlaw@gmail.com
Attorney for Petitioners
NJ Att. No. 014102012

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Hon. John S. Kennedy, ALJ, order granting Professor Tractenberg's motion to participate, March 11, 2015.

ALJ Kennedy's order denying Respondent's motion to dismiss, July 24, 2015.

Hon. Solomon A. Metzger, ALJ, order denying Petitioners' motion for summary decision, July 19, 2016.

ALJ Metzger's order granting Lakewood BOE's motion to participate, October 4, 2016.

Hon. Susan A. Scarola, ALJ, order denying Respondents' motion to adjourn; denying Lakewood BOE's motion for summary judgment; and denying Respondents' motion to bar Petitioners' expert witnesses, January 22, 2018.

ALJ Scarola's order granting Petitioners' motion to reopen the record; denying the BOE's second motion to intervene; ordering Petitioners to file an amended petition and ordering Respondents to file an answer, August 20, 2018.

ALJ Scarola's order denying Lakewood BOE third motion to intervene, October 9, 2018.

ALJ Scarola's order denying Respondents' second motion to dismiss, January 8, 2019.

ALJ Scarola's order asking the parties to stipulate to matters in the public record, July 29, 2019.

Initial Decision, Administrative Law Judge, March 1, 2021.

Final Decision, Commissioner of Education, July 16, 2021.

Appellate Division Decision reversing the Final Decision and remanding to the Commissioner of Education "with instructions for the agency to consider the substantive arguments pertaining to the SFRA," March 6, 2023.

Appellate Division Decision granting Petitioners' Motion in Aid of Litigants' Rights and ordering Final Decision ontheremand by April1,2024, November 27, 2023.

Final Decision, Commissioner of Education, April 1, 2024.

TABLE OF AUTHORITIES

Case Law:

PRELIMINARY STATEMENT

This nearly ten-year-old case has raised the following questions: (i)are Lakewood public school students being denied their fundamental state constitutional right to a "thorough and efficient" education (T&E)? (ii) if they are being denied T&E, is the School Funding Reform Act (SFRA) the cause? and (iii) if they are being denied T&E, what remedy must be provided?

Only the first question has been definitively answered thus far. With the Acting Commissioner's April 1, 2024, final agency decision (Final Decision) aligning with the administrative law judge's (ALJ) initial decision and with the decision by a unanimous panel of this court the relevant decision makers agree that Lakewood public school students are being denied T&E.

That consensus elevates Lakewood public school students to a special constitutional status, shared only with Abbott district students. In Abbott, the New Jersey Supreme Court accorded the students special constitutional protection, even shifting to the State the burden of proving the constitutionality of an underfunded SFRA. This court should consider doing the same for Lakewood students.

This court's March 6, 2023, remand order to the Acting Commissioner

directed her to address the second question-- the student-petitioners' argument that SFRA was the cause. Neither the Final Decision, nor the Comprehensive Review on which it is based, meaningfully address that question, however.

The Final Decision barely mentions SFRA, let alone evaluates its application to Lakewood and constitutionality as applied. In the Analysis section, there is a single conclusory sentence to the effect that "the Assistant Commissioner concludes that the SFRA is not the significant cause of Lakewood's failure to provide T&E."(Final Decision at 7) .

The Acting Commissioner's only attempt to support that conclusion is by referring to general presumptions of validity accorded to legislative enactments without addressing whether those general presumptions should apply here where there has been a final, unchallenged adjudication that Lakewood students have been denied their fundamental constitutional right to T&E.

Had the Final Decision delved into the details of how SFRA actually operates with respect to Lakewood it would have become clear that there is a fundamental mismatch between Lakewood's unique fiscal needs, caused by its unique demographic characteristics, and SFRA's statewide funding formula.

Because the Final Decision gave SFRA an unwarranted constitutional pass, it never addressed the third major question raised, the remedial issues regarding the State's school funding system, and especially SFRA. This brief will focus on the second and third questions. Student-petitioners' will argue as to the constitutionality of SFRA as applied that, even if the statutory formula is fully funded in the upcoming school year, it will fall far short of providing the district with enough funding to assure its students T&E. The simple reason, acknowledged by the State and everyone else, is that Lakewood has unique demographic characteristics and that SFRA's application to Lakewood has never been meaningfully evaluated and calibrated to those district characteristics, as required by Abbott XX.

We address the third question by explaining why the Final Decision's emphasis on local remedies regarding increased tax levies and improved local management efficiencies is manifestly wrong as a matter of law and fact. We then suggest how this court should launch an appropriate State-level remedial process as expeditiously as possible so that the longstanding and inexcusable denial of the Lakewood public school students' fundamental constitutional right to T&E can be remedied.

COMBINED STATEMENT OF RECENT PROCEDURAL HISTORY AND RELEVANT FACTS[1]

To spare this court from having to review yet again already well-plowed ground, we have combined into a brief statement the most salient recent procedural and factual matters on which we believe the court should focus.

The most recent, and relevant, phase of this lengthy litigation began with this court's unanimous March 6, 2023, decision ruling that Lakewood public school students are being denied their fundamental constitutional right to T&E (March 6 decision). Because the State did not appeal that ruling, it has become final and definitive. This court also remanded the case to the Acting Commissioner with specific instructions—to address the student-petitioners' argument that the denial of T&E was caused by SFRA. In this court's definitive and binding words, "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."[2]

---

[1]The following transcripts are in the record: February 5, 2018 (1T), February 7, 2018 (2T), February 12, 2018 (3T), February 13, 2018 (4T), February 23, 2018 (5T), March 27, 2018 (6T), July 10, 2018 (7T), August 20, 2018 (8T), October 3, 2018 (9T), December 18, 2018 (10T), July 9, 2019 (11T), July 10, 2019 (12T), July 22, 2019 (13T), July 23, 2019 (14T). References to the appendix accompanying this brief are numbered followed by the letter "a" (e.g., 1a, 2a, etc.). For references to the appendix that accompanied the original filing A-003693-20 on August 20, 2021 the letters "Pa" precede the number (e.g., Pa1).

[2]Earlier in its opinion, this court stated that "The record demonstrates Lakewood's school district is in a unique and precarious position" because "Lakewood's state-issued school aid is calculated based upon its 6,000 [now about 5,000] enrolled public school students,"

This court did not retain jurisdiction, presumably because it expected the Acting Commissioner to act promptly and responsively. Unfortunately, that did not happen despite repeated prompting by the student-petitioners.[3] More than two months after this court's remand order, on May 12, 2023, the Acting Commissioner denied the student-petitioners' motion seeking emergency relief and sent a letter to their attorneys announcing a comprehensive review of the Lakewood school district, which would be the centerpiece of the Acting Commissioner's response to this court's March 6, 2023, remand order.

The comprehensive review had originally been ordered by the Acting Commissioner on July 16, 2021, but apparently nothing had been done by the

---

but that its "education budget has been severely strained by its obligation to provide transportation and special education tuition to many of the 31,000 [now about 47,000] non-public school students not included in the aid calculation." Alcantara v. Allen-McMillan, 475 N.J.Super. 58, 62-63 (App.Div. 2023) (Emphasis added.).

[3] Between April 20, 2023, and February 12, 2024, student-petitioners' attorneys sent 15 communications to the Acting Commissioner seeking a timetable for the court-ordered remand process, compliance with the specific terms of the remand order, expedited action, and identification of the Acting Commissioner's attorneys for the remand process. These communications included emails, letters and formal motions. They preceded and followed this court's November 27, 2023, order granting student-petitioners' motion in aid of litigants' rights and ordering the Acting Commissioner to comply with the remand order by April 1, 2024. Nonetheless, none of those requests was responded to adequately (and most were not responded to at all) until a February 23, 2024, letter from Assistant Commissioner Booker. That letter stated that Acting Commissioner Dehmer would be recused because he had testified for the State in this case, and it set forth, for the first time, a specific timetable for the State's compliance with this court's remand order, as modified by your November 27, 2023, order.

NJDOE in response to that order. In her May 12, 2023, letter, the Acting Commissioner indicated that she was "now directing the Department to expedite" that review. The "expedited" review apparently did not begin until late in 2023, about six months after the Acting Commissioner ordered that it be expedited and more than 26 months after the Acting Commissioner first ordered it. Eventually, the review was done by consultants not by the Department, resulting in the March 1, 2024, release of the "Comprehensive Review of the Lakewood Public School District," (Comprehensive Review) on which the Acting Commissioner relied heavily in his April 1, 2024, Final Decision.

Student-petitioners are submitting this appeal to the Acting Commissioner's Final Decision as of right well before the appeal process has run because of our strong continuing belief that time is of the essence for those students. As just one indication of the urgency of resolving this case expeditiously, the Lakewood school district has requested another advanced state aid loan for the upcoming school year—this one for $104 million--to enable it to balance its budget. On top of the large outstanding loan balance, which the ALJ described more than three years ago as creating an unsustainable fiscal situation for the district, this could be the straw that

breaks the district's back. The real victims, yet again, would be the student-petitioners, Lakewood's public school students.

ARGUMENT

POINT I

THIS COURT'S DEFINITIVE AND UNCHALLENGED RULING THAT LAKEWOOD PUBLIC SCHOOL STUDENTS ARE BEING DENIED T&E SHOULD GIVE THEM SPECIAL CONSTITUTIONAL STATUS

This court's unanimous March 6 decision that Lakewood's public school students were being denied T&E elevated them to a status previously accorded only students in the Abbott districts. Together they constitute the only New Jersey public school students to have been judicially identified as being denied those fundamental constitutional rights.

The Abbott litigation resulted in the students being accorded special constitutional status. The best statement of that appears in the first paragraph of Justice LaVecchia's opinion for the court in Abbott XXI:

> The schoolchildren who comprise the plaintiff class in the Abbott v. Burke litigation have been denominated victims of a violation of constitutional magnitude for more than twenty years. [footnote

> omitted]. Because of the severity of their constitutional deprivation, that class of pupils was determined to be deserving of special treatment from the State. ...The State has for decades recognized the special status of that plaintiff class of pupils, [footnote omitted] and its compliance with this Court's remedial orders demonstrates the State's long recognition that plaintiffs' constitutionally based remedies have imbued them with status akin to that given to wards of the State. In sum, the Abbott plaintiffs have been the long-standing beneficiaries of specific judicial remedial orders, which were entered to correct proven constitutional deprivations that the State was unable to correct on its own. Abbott v. Burke (Abbott XXI), 206 N.J. 332, 340 (2011) (Emphasis added.).

The proven constitutional deprivations experienced by Lakewood public school students have not persisted yet for 20 years—and we profoundly hope that is not permitted to occur[4]—but those deprivations are, nonetheless, both

[4] The court should note that this case was filed almost 10 years ago, and consistently since the June 2014, filing with the Commissioner (then David Hespe) the student-petitioners have asserted that their fundamental constitutional rights were being violated and that that denial needed to be remedied as soon as possible. Indeed, the Final Decision acknowledges that the State was well aware of Lakewood's serious educational and fiscal

grave and unacceptable in a State that prides and touts itself as providing its students with an excellent education. The Lakewood students also share with the Abbott students a very high level of characteristics associated with educational disadvantage. They are 100% low-income, almost 95% Latino and black, and a high percentage speak English as a second language.[5]

POINT II

THE SPECIAL CONSTITUTIONAL STATUS ACCORDED LAKEWOOD PUBLIC SCHOOL STUDENTS SHOULD IMPACT HOW THIS COURT APPROACHES THE DECISION BEFORE IT REGARDING SFRA'S UNCONSTITUTIONALITY AS APPLIED TO THE LAKEWOOD SCHOOL DISTRICT

Because of the students' special status as "wards of the State," the Supreme Court in Abbott XXI placed on the State, not on the students, the burden of proof regarding whether an underfunded SFRA satisfied the State's constitutional obligation to the Abbott students. (See 206 N.J. at 357).

---

problems since at least the 2009 needs assessment conducted by NJDOE. Final Decision at 16. Thus, the denial of T&E to Lakewood public school students may not be as longstanding as the denial to Abbott district students, but it is surely longstanding.

[5] In this court's March 6 decision, those data appear in footnote 1.

The Alcantara circumstances are sufficiently analogous to suggest that this court should seriously consider adopting that approach in this case.[6] But the special constitutional status acquired by Lakewood's public school students goes far beyond that burden of proof issue.

The State has a special, heightened responsibility to Lakewood's students, as this court recognized in its March 6 decision and remand order, by concluding its opinion with a quote from Abbott XX: "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.'" Alcantara v. Allen-McMillan, 475 N.J.Super. 56, 71 (App.Div. 2023) (quoting from Abbott v. Burke (Abbott XX), 199 N.J. 140, 146 (2009).

In subsequent Argument Points, this brief will demonstrate: (i) how dramatically short of an "optimal level" SFRA has been operating for Lakewood, (ii) how that has resulted in clear "deficiencies of a constitutional dimension," (iii) why it is the State that has ultimate responsibility for those

[6] Even if this court were to choose to place the burden of proof on the student-petitioners, it should use the "significant cause" or "preponderance of evidence" standard, not an enhanced or "heavy" burden. In the early stages of Abbott, the ALJ rejected the State's similar effort to impose a "heavy" burden on the school funding law's challengers. "Based on the record developed, I must determine how Chapter 212 has actually been implemented and whether plaintiffs proved their contentions to be more likely true than not by a preponderance of the believable evidence." Abbott v. Burke, EDU5581-85 (initial decision), August 24, 1988.

deficiencies and their remediation, and (iv) why expeditious remediation of those deficiencies is required.

POINT III

SFRA HAS FALLEN FAR SHORT OF AN OPTIMAL LEVEL AS IT HAS BEEN APPLIED TO LAKEWOOD

For SFRA to operate at its optimal level requires, at a minimum, that it be fully funded every year and be periodically reevaluated and, as necessary, retooled with respect to every district. Lakewood has been especially victimized by the State's failure to meet either of those explicit constitutional conditions, and particularly the second, because of its concededly unique demographic circumstances and the drain that imposes on its budget.

Had the State seriously evaluated the extent to which SFRA's statewide formula, let alone a persistently underfunded version of SFRA, was meeting the needs of Lakewood public school students for T&E, it would long ago have engaged in substantial retooling of SFRA.[7] Instead of doing that, however, the State has sought to plug Lakewood's fiscal shortfalls by annual and ever-

[7] The only significant amendment of SFRA was S-2 in 2018, which principally phased out Adjustment Aid to Abbott districts and reallocated the funds to other districts. According to S-2's critics, that amendment was inconsistent with SFRA's and Abbott's funding equalization focus.

increasing advance state aid loans pursuant to N.J.S.A. 18A:7A-56[8] and to blame the district and the broader Lakewood municipality for their alleged shortcomings.

The advance state aid loan statutory provision has two explicit pre-conditions for a district to be eligible for such payments: (i) it must have a State monitor in place; and (ii) the Commissioner must recommend that "the payment is necessary to ensure the provision of a thorough and efficient education."[9] In the case of Lakewood, a succession of commissioners have certified the district's need for such advance state aid loans for eight of the last 10 years. Student-petitioners have argued almost from the start of this case, that those certifications are acknowledgements that SFRA funding for Lakewood is insufficient for the district to be able to provide its students with T&E and, effectively, prove their case without more. Instead of seeking to refute that legal assertion, the State has ignored it.

[8] $4.5 million in 2014, $5.6 million in 2016, $8.5 million in 2017, $28 million in 2018 (plus $1.57 million in emergency aid), $36 million in 2019, $55 million in 2020, $71 million requested for 2021 but replaced by federal COVID funding to Lakewood, $24 million in 2022 (supplemented by the balance of federal funds), $50 million certified in 2023 (with another $43 million pending), and $104 million requested, but still pending, for 2024.

[9] The process requires the Commissioner to submit a certification to the State Treasurer regarding the necessity for such an advance state aid loan, and the State Treasurer must approve.

The Comprehensive Review referred to $215,124,570[10] of such loans having been extended to Lakewood in a brief section of the PCG report entitled "District Financial Challenges," but it never describes the extent of that challenge and its impact on the district, let alone how that "challenge" can be overcome.

Under the governing statute, that district indebtedness is to be repaid within 10 years "through automatic reductions in State aid provided to the school district in subsequent years." That arrangement led the ALJ to characterize the use of advance state aid loans as a "Ponzi Scheme." (July 9, 2019, 12T 109-2 to 5). She also found that the already staggering amount of the loans by 2019 had created an unsustainable fiscal situation for the district. (ALJ at 66).[11]

For the upcoming school year, Lakewood has requested $104 million in additional advance State aid loans to fill its budget hole. One would expect that would lead the State to acknowledge that such annual loans, especially of this increasing magnitude, are an untenable way to meet its constitutional

[10] The district with the next highest amount of advance state aid loans is Lyndhurst with an outstanding balance of $2.9 million. See Joe Strupp, *Lakewood Schools seek $104 million state loan to help balance 2024-2-25 budget*, Asbury Park Press (Mar. 26, 2024).

[11] In a related fiscal context, the Lakewood school district's need to expend more than half of its total budget on transportation and special education costs for non-public school students, led this court, in its March 6 decision, to use similar terminology—that it constituted an "abnormal and unsustainable imbalance." 475 N.J.Super. at 62-63.

obligation to assure students sufficient resources for T&E,[12] as well as proof positive that SFRA is not working adequately for Lakewood, let alone at its "optimal level."

Unfortunately, that has not been the case. For the almost ten-year history of this litigation, and even well over a year after this court definitively ruled that Lakewood students were being denied T&E primarily for fiscal reasons, the State has persisted in arguing, against all reason, that SFRA and the State are not responsible. The Final Decision is the latest of many such iterations.

---

[12] The New Jersey Supreme Court has made explicit many times that T&E funding must be assured, certain, predictable, non-discretionary and timely to enable effective educational planning. Advance state aid loans meet none of those criteria, and, as repayable loans, they are not even "funding." Beyond that, New Jersey courts, and a sister court in another state with a T&E constitutional clause, have found that excessive reliance on forced loans is itself a violation of T&E. In a New Jersey case, the Appellate Division found that "Excessive debt burden…would result in a condition inconsistent with the 'thorough and efficient system of free public schools…' which the State is obligated to maintain and support." In re Pet. For Auth. To Conduct, 298 N.J. Super. 1, 7 (App.Div. 1997). In a school funding decision similar to Abbott, the Ohio Supreme Court ruled that although "some type of borrowing provision may be necessary to provide funds in the case of extreme emergencies or unexpected calamities,…any system that entails borrowing from future funds to meet ordinary expenses is not a thorough and efficient system.…[A] school district can get into a spiral where it is continually borrowing and paying back the following year. A school district, therefore, is always taking away from the future. Any time a school district does such borrowing into the future, it robs future generations of children." DeRolph v. Ohio, 89 Ohio St. 3d 1, 26 (2000); De Rolph v. Ohio, 78 Ohio St. 3d 193, 222 (1997).

POINT IV

THE SUB-OPTIMAL PERFORMANCE OF SFRA AS APPLIED TO THE LAKEWOOD SCHOOL DISTRICT HAS CAUSED CLEAR "DEFICIENCIES OF A CONSTITUTIONAL DIMENSION"

This analysis begins with the court's determination, in its March 6 decision, that Lakewood public school students are being denied T&E. That is clearly a deficiency of constitutional dimension. The only further ruling required is that SFRA was a significant cause of that denial and that is precisely the ruling student-petitioners seek in this appeal.

Try as the State might to squirm out of the obvious causal connection between the denial of T&E, largely for fiscal reasons, and SFRA, the State's school funding law, which is the main source of state education aid to school districts, including Lakewood, it is of no avail.

In the next Argument Point, this brief will address the State's deeply flawed contention that the main, if not sole, cause of the proven T&E denial is local tax policy and local school district educational and fiscal management practices. Those defenses to State accountability have been offered and rejected repeatedly throughout the history of New Jersey's school funding litigation. As we will demonstrate in this brief, they may be even less plausible in this case given both the huge and unprecedented amounts of advance

state aid loans necessary to fill Lakewood's gaping budget holes and the continuous presence in the district of multiple State monitors for the past ten years.

There is a clear nexus between the proven denial of T&E to Lakewood public school students and the flawed application of SFRA to the district. SFRA is supposed to ensure that, considering their particular circumstances, districts have sufficient assured funding to be able to provide T&E to their students. The Final Decision accepts that proposition when it quotes from SFRA's legislative findings that SFRA "should provide State aid for every school district based on the characteristics of the student population and up-to-date measures of the individual district's ability to pay." N.J.S.A. 18A:7F-44(d). Final Decision at 7 (Emphasis added.). The State's failure to adjust SFRA based on the admittedly unique characteristics of Lakewood's student population and on "up-to-date measures" of Lakewood's realistic "ability to pay" is at the heart of SFRA's unconstitutionality as applied to Lakewood.[13]

[13] The record in this case provides ample evidence that the State's effort to impose on Lakewood a far greater share of the financial burden of providing its public school students with T&E is ill-founded. After all, as of the 2010 U.S. census, Lakewood had the 555th lowest per capita income of New Jersey's 564 municipalities--$16,430, compared to the state's $34,858. (Pa261). This court also may judicially notice that the estimates for the 2023 U.S. census show Lakewood Township's median household income is $59,054, with 4.29 persons per household, and 25.4% of its total population lives in poverty. When the area of the Township dominated by retirement communities is excluded, the median

The main statutory vehicle for assuring that SFRA provides the funding for every district to provide T&E to its students is the "Adequacy Budget," which has been characterized by the New Jersey Supreme Court in Abbott XX as the "core" of SFRA's formula. Abbott XX, 199 N.J. at 153.[14] To even begin to have its fiscal needs met, Lakewood needs not only a fully funded Adequacy Budget, but also one that has been adjusted to reflect its students' unique characteristics. To provide T&E to its students, the district obviously needs not only to be receiving that amount, but also to be spending it.[15]

But Lakewood's unique demographics, and its consequent unique fiscal circumstances, make the solving of its fiscal problems also unique. Simply requiring, as N.J.S.A. 18A:7F-6 does, that expenditures be increased "so as to meet at least the adequacy budget" will not suffice because SFRA's

---

household income declines to $54,826, the number of persons per household increases to 4.94, and the poverty level rises to 30.1%. By comparison, the state median household income is $97,126, the number of persons per household is 2.64, and the number who live in poverty is 9.7%.

[14] During the earlier years in this litigation, when Lakewood was spending below its Adequacy Budget because its actual local tax levy was less than SFRA's formulaic "budgeted local share," and when its students were not being provided T&E, the Commissioner had the clear power and duty to require such a district "to increase expenditures so as to meet at least the adequacy budget within the next two budget years." N.J.S. A. 18A:7F-6.

[15] Of great relevance to this issue, SFRA used the term "adequacy budget" to replace the prior statutory formulation of "minimum T&E budget," without any indication that that change was intended to lower the State's fiscal commitment to school districts and their students.

statewide adequacy budget, as currently constituted, is just not adequate to enable Lakewood to provide its students with T&E.

As proof positive of the gross mismatch between Lakewood's actual circumstances and needs and SFRA's formulaic Adequacy Budget for Lakewood, just consider that for the past two school years, based on NJDOE state aid notices, Lakewood has been spending substantially more than its Adequacy Budget.[16]

According to SFRA's express terms, if a district proposes a budget that includes a budgeted local tax levy and equalization aid that together exceed the Adequacy Budget, it is deemed to be proposing "programs and services in addition to the core curriculum standards adopted by the State Board of Education," that is to say, beyond T&E, and the district must include in the legal hearing on the budget a statement to that effect. N.J.S.A. 18A:7F-5 (d) (10). Moreover, if the local voters reject a local tax levy for a budget exceeding the Adequacy Budget, the budget

[16] Illustratively, the notice published by NJDOE's Office of School Finance of Projected 2023-24 State School Aid (28a) shows Lakewood's "Amount Over Adequacy" as $7,392,666 (based on Projected Adequacy Spending or, "Adequacy Budget," of $123,706,303 and a Prebudget Year Spending of $131,098,969). Yet, Lakewood's User Friendly Budget Summary for the same school year— 2023-24— includes as "Unusual Revenues and Appropriations" an item amounting to "$98,368,439 with the source listed as "State aid," and the explanation listed as "Additional state aid needed to assure T&E." (32a). In fact, this was not normal "State aid" at all, but was a projected advance state aid loan, thus far only partially provided for that school year.

is submitted to the municipal governing body for a "determination of the amount that should be expended." If the governing body reduces the district's proposed budget, "the district may appeal any of the reductions to the commissioner on the grounds that the reductions will negatively impact on the stability of the district given the need for long term planning and budgeting." However, "A district may not appeal any reductions on the grounds that the amount amount is necessary for a thorough and efficient education." N.J.S.A. 18A:7F-5 (e) (1).

In other words, when a district's proposed budget exceeds its SFRA Adequacy Budget, there is in effect an unrebuttable presumption that anything proposed to be spent beyond the Adequacy Budget is not necessary for T&E. Yet, in the same school years when, according to statute, Lakewood was exceeding its SFRA-defined Adequacy Budget, the State was providing huge and annually increasing advance state aid loans to the district. And those loans were based on certifications by the commissioner to the state treasurer to the effect that, without the loans, Lakewood had insufficient funds to provide its students with T&E.

Clearly, there is a fundamental contradiction between how SFRA defines T&E formulaically through its Adequacy Budget and how the district,

the commissioner and the treasurer define it on the ground given Lakewood's unique demographic and fiscal circumstances. By extending these annual loans, the State's Executive Branch is acknowledging that SFRA funding is not sufficient for Lakewood; but the New Jersey courts have made crystal clear that annual discretionary loans cannot make up for SFRA's constitutional deficiencies.

The explanation for this gross mismatch between SFRA's Adequacy Budget and Lakewood's real-world needs is simple. The "thorough record"[17] compiled by the ALJ demonstrated to the satisfaction of this court that:

- "Lakewood's school district is in a unique and precarious position…due, in large part, to demographic trends in the area;"
- Lakewood Township "has approximately 37,000 school-aged children [now approximately 52,000], however, only about 6,000 [now about 5,000] are enrolled in the secular public schools…[and t]he majority—84%--are enrolled in private religious schools;"
- "Testimony before the ALJ established that this demographic trend is likely to continue and accelerate;"
- "Demographically, 8.1% of the District's [public-school] students are

[17] Alcantara v. Allen-McMillan, 475 N.J.Super. 58, 61 (App.Div.2023).

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;"

- Lakewood is, thus, "an outlier amongst other New Jersey school districts in which most of the students are enrolled in public schools;"
- "The non-public school students in Lakewood alone constitute nearly a quarter of all such students in our state;"
- Since "Lakewood's state-issued school aid is based upon its 6,000 [now about 5,000] enrolled public-school students… Lakewood's education budget has been severely strained by its obligation to provide transportation and special education tuition to many of the 31,000 [now about 47,000] non- public school students not included in its [SFRA] aid calculation;"
- From the extensive record developed before the ALJ, "the key takeaway is this: the total budget for the most recent school year at the time of that [ALJ] decision [2017-18] was $143.45 million…[and] 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." (Alcantara v. McMillan, 475 N.J.Super. 58, 62-63 (App.Div. 2023))

This extensive record evidence led the ALJ to conclude that Lakewood public-school students were being denied their fundamental constitutional right to T&E. This court agreed with, and reinstated, that conclusion in its March 6 decision.

Inexplicably, however, the ALJ did not follow the inexorable logic of her own findings outlined above and attribute that constitutional deficiency to SFRA. Standing alone, the $215 million of advance state aid loans extended by the State—because, without them, Lakewood would have insufficient funding to provide its student with T&E—offer all the evidence this court should require to support a ruling that SFRA is, at least, the significant cause of the T&E denial and that student-petitioners have proven that by a preponderance of the evidence.

Moreover, that ruling should not be called into question by the State's promise that SFRA, however belatedly, will be fully funded for the upcoming

school year. That will not, by itself, significantly alleviate the profound constitutional deficiency suffered by Lakewood public-school students. The students of the Lakewood school district will continue to suffer from that constitutional deficiency until this court acts decisively to require that SFRA, and the NJDOE's implementation of it, be retooled to meet the actual circumstances and needs of Lakewood students.

POINT V

THE STATE HAS ULTIMATE RESPONSIBILITY FOR ASSURING THAT LAKEWOOD PUBLIC SCHOOL STUDENTS RECEIVE T&E, AND, THEREFORE, FOR REMEDYING THE DEFICIENCIES OF A CONSTITUTIONAL DIMENSION REGARDING SFRA AND ITS APPLICATION

It is hard to understand how a foundational constitutional principle of more than 50 years standing in New Jersey—the State's ultimate responsibility for T&E—is being defied by the State, without its even acknowledging that that is what it is doing. The Final Decision is largely based on that inexplicable State constitutional default.

The principle was set forth in the New Jersey Supreme Court's first decision in Robinson v. Cahill in April 1973, and has formed a cornerstone not

only of the Robinson litigation, but also of Abbott v. Burke, which grew organically out of Robinson beginning in 1981.

In Robinson, Chief Justice Weintraub wrote on behalf of a unanimous court about the meaning of the state constitution's T&E clause:

> ...[W]e do not doubt that an equal educational opportunity for children was precisely in mind. The mandate that there be maintained and supported a 'thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years' can have no other import. Whether the State acts directly or imposed the role upon local government, the end product must be what the Constitution commands. A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, the obligation is the State's to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet

its continuing obligation. (Robinson v. Cahill, 62 N.J. 473, 513 (1973) (Emphasis added.)).

This seminal statement of New Jersey constitutional law has clear application to our case since the education being received by Lakewood public-school students has been determined to fall short of T&E. Consequently, rectifying that situation is ultimately the State's responsibility if the local district cannot do so. If the primary cause of the T&E denial is the state's school funding system, as we believe it is in our case, then the State's responsibility to cure the problem is obvious and undeniable.

Until quite recently the State's executive and legislative branches have adhered to this core constitutional concept of ultimate state responsibility for T&E. But something seems to have gone badly awry and it has infected the way in which the State has chosen to implement SFRA. Now the State seems to be seeking to impose ultimate responsibility for T&E on local districts, including Lakewood. The Final Decision reflects that wrong-headed and ahistorical approach, but the signs were there years before.

For example, when Kevin Dehmer, the Commissioner-Designate, testified in the Alcantara case on July 9, 2019, he clearly expressed that

constitutional misconception. He testified that, as Assistant Commissioner for the NJDOE's Division of Finance, his division oversaw the offices of School Finance, Fiscal Policy and Planning, and State monitors (11T 7-12), all highly relevant to our case. Later in his testimony, the following exchange occurred:

> Q Is it…the role of your office to see to it that every district is able to provide a thorough and efficient education?
>
> A My understanding is that generally [it is] the responsibility of the local board to ensure T&E. We [in NJDOE] do provide some different supports in different offices, but that's…usually when there's been a failure to provide it or something in the local board. (11T 89-12 to 19). (Emphasis added.)[18]

[18] Mr. Dehmer further testified that he thought there was an improvement plan for Lakewood, but he did not know what it was. "So there's a plan laid out by the State monitor, which I believe my deputy could speak in more detail about….[T]he monitor has a —has a plan that's required in order to plan to move the District ahead." (11T 120-23 to 121-18). But the only "plan laid out by the State monitor[s]" is legislative action to fix the formula. State monitor David Shafter suggested the creation of a "formula so that some portion of those [nonpublic] students could be counted as a percentage, in order to—in planning the adequacy budget." (5T 93-10 to 12).State monitor Michael Azzara testified that "They need more revenue. We're—if it comes from the taxpayers or it comes from the State, that's really a question for the legislature and the courts, not me. I mean, I would assume that it would come from the State because the district is tapped [out] for its property tax." (5T 129-23 to 130-3). As for the Department's plan that Mr. Dehmer thought his "deputy could speak in more detail about," it simply does not seem to exist. The ALJ

This seems to encapsulate the State's current view and it is reflected in the Final Decision—that the State Department of Education's role is to provide support to local school boards, and that it is the local boards which have ultimate responsibility for ensuring T&E.

It seems impossible to square that with the contrary view that the New Jersey Supreme Court announced in Robinson in 1973 and reiterated many times since in Abbott and other important T&E decisions. If, as seems clearly to be the case, the denial of T&E in Lakewood is primarily a function of the less-than-optimal performance of SFRA, then trying to impose ultimate responsibility on the local district makes absolutely no sense.

Yet, that is what the Final Decision unmistakably seeks to do. In attempting to explain why SFRA and its application to Lakewood is not the cause of the acknowledged denial of T&E, the Final Decision asserts that:

> ...the record demonstrates that Lakewood's own choices and management issues have resulted in the unavailability of funds that could and should

---

asked Glenn Forney,Deputy Assistant Commissioner of Finance, "if there's any end game here, without continually raising the [loan] amount that Lakewood gets. Assuming everything stayed the same." Mr. Forney answered, "We're just going year by year at this point." (14T 146-3 to 6).

> have been used to provide T&E to its students…[That Lakewood] has chosen not to require its tax base to further support its schools, and suffers from local mismanagement regarding its transportation and special education costs….[That] Lakewood's decision to not maintain adequate local fair share contributed to the district's current fiscal problems. Final Decision at 12-13.

The Final Decision then devotes eight of its 21 pages to an elaborate effort to blame the Lakewood district for all the problems that have conspired to deny its students T&E and to exempt SFRA's application to Lakewood from any blame.[19] These include Lakewood's failures both to raise more tax revenue to support its public schools and to correct its myriad educational, management and fiscal inefficiencies.

According to the Acting Commissioner, this buttresses the State's argument for why SFRA is not even a significant cause of the denial of T&E to

[19] The Lakewood school district submitted to the Acting Commissioner a detailed rebuttal of the Comprehensive Review's criticism of the district. In the Background and Procedural History section, the Final Decision briefly summarizes the district's submission (Final Decision at 6). In the Analysis section, however, the Final Decision makes only two passing references to points made in the district's rebuttal and dismisses both out of hand. (Final Decision at 19 and 20).

Lakewood public school students. However, the Final Decision never: (i) quantifies how much could be raised by Lakewood taxpayers by dint of greater efforts (within the legally-prescribed limits)[20] or saved by Lakewood school district personnel implementing State-recommended efficiencies, and how that would compare to the huge and constantly escalating amount of State loans extended to keep Lakewood afloat; or (ii) explains why, for at least the last 15 years,[21] the educational and fiscal problems afflicting the Lakewood school district have not prompted the State to use its undeniable power and duty to order the district to implement available and necessary fiscal and educational measures.[22]

---

[20] The Final Decision cites two statutory provisions, N.J.S.A. 18A:22-40 and N.J.S.A. 18A:7F-39, which it asserts Lakewood voters could have used to increase the local school tax levy, and, thereby, presumably T&E funding. The Final Decision criticizes Lakewood for having sought to use only one of those provisions and only once, in 2016. (Final Decision at 13). What the Final Decision fails to indicate is that one of those statutory provisions, 18A:7F-39, by its express terms, cannot be used to provide T&E funding and that the 2016 referendum pursuant to the other provision, N.J.S.A. 18A:22-40, was defeated by a vote of 99% to 1%. Commenting on that singular effort, State monitor Michael Azzara testified that, "The Department and local leaders and state leaders, and everybody was saying…that any separate questions are not going to be passed, so don't even bother holding the referendum and spending the money [on it]." 5T 113-8 to 13.

[21] The Final Decision refers several times to a 2009 needs assessment issued by NJDOE that alerted the State to these problems. (See, e.g., Final Decision at 16).

[22] As indicated supra, in the first modern New Jersey Supreme Court school funding decision in Robinson v. Cahill, a unanimous court opined in the strongest terms on April 3, 1973, that the State was ultimately responsible for the provision of T&E to students. For the ensuing 51 years, that has been a core constitutional principle of New Jersey law.

The Acting Commissioner's most extreme effort to absolve SFRA of responsibility appears in the middle of the Analysis section. The relevant language must be quoted in its entirety for the absurdity of the point to become clear:

> From FY 2010 through the enactment of P.L.2018, c.67, State aid was not allocated pursuant to the provisions of the SFRA. Instead, State aid was calculated based on provisions included in the State budget, with underlying funding policy changing every year. While petitioners assert that this fact contributes to the conclusion that the SFRA is unconstitutional, the Assistant Commissioner concludes that the opposite is true. Lakewood was not fully funded according to the provisions of the SFRA; therefore, even if Lakewood's funding levels had contributed to the denial of T&E during those years, the SFRA could not have been the cause. (Final Decision at 14) (Emphasis added.).

What an extraordinary admission by the State! The logical extension of this stunning assertion seems to be that a statute cannot be found unconstitutional as applied if it is not actually being applied fully or even at all. So, if the Legislature appropriated no funds for SFRA

and districts received no State education aid, SFRA could not be found deficient even though it was designated as the State's main vehicle for funding education. That cannot be an argument, logically or legally, supporting SFRA's constitutionality as applied.

It also underscores how haphazard and inefficient the State's implementation of SFRA has been since at least FY 2010, and how the State's promises to the New Jersey Supreme Court in connection with Abbott XX's ruling that SFRA was facially constitutional were dishonored almost immediately. SFRA, instead of being the promised uniform and equitable basis for statewide educational funding, was effectively overridden by the Legislature's annual appropriations process. That totally undermined the Supreme Court's constitutional requirement that funding of T&E be certain, predictable, non-discretionary and timely to facilitate effective educational planning.

To reach the conclusion it did, the Final Decision had to ignore not only the 50-year state constitutional principle of ultimate State responsibility for T&E, but also:

- The language of SFRA clearly placing ultimate responsibility on the Commissioner;[23]
- The State assignment to the Lakewood school district continuously for the past 10 years of multiple State monitors, who have broad statutory powers and duties to "oversee the fiscal management and expenditures of school district funds…; oversee the operation and fiscal management of school district facilities…; ensure development of an acceptable plan to address the circumstances…which resulted in the appointment of the State monitor…[and which] shall include measurable benchmarks and specific activities to address the deficiencies of the school district; oversee all district staffing…; have authority to override a chief school administrator's action and a vote by the board of education on any of the matters set forth in this subsection…; and shall report directly to the commissioner or his designee on a weekly basis…[and] monthly to the board of

[23] Among many relevant SFRA provisions, one stands out: "The commissioner shall not authorize the disbursement of funds to any district until the commissioner is satisfied that all educational expenditures in the district will be spent effectively and efficiently in order to enable students to achieve core curriculum content standards [T&E]. The commissioner shall be authorized to take any affirmative action as is necessary to ensure the effective and efficient expenditure of funds by school districts…." N.J.S.A. 18A:7F-60.

education and members of the public...;"[24] N.J.S.A. 18A:7A-55 (b) (1-5), (c).

- The extraordinary $215 million in advance state aid loans provided Lakewood over the past 10 years based on annual certifications of the Commissioner of Education to the effect that without those funds the district would be unable to provide its students with T&E.[25]

[24] The Final Decision's only reference to the State monitors assigned to the Lakewood school district is in a footnote stating: "Despite petitioner's [sic] suggestion to the contrary, the Assistant Commissioner does not find that the fault for these errors [ascribed to the Lakewood school district] lies with the State monitor. **It is not the monitor's responsibility to double-check the work of each member of Lakewood's staff.**" It is not clear on what basis the Assistant Commissioner reached that conclusion. It was certainly not based on the statutory language cited above. One can only imagine that, given the Final Decision's characterization of the State monitors' limited and ineffective role, the Lakewood school district must be wondering exactly why it has been required to pay the State monitors $2.01 million over the past 10 years. Final Decision at 15, n. 23 (Emphasis added.)

[25] The policy basis of a statute imposing on a fiscally struggling school district all the salary and other costs of State monitors assigned to that district to lead it out of its fiscal troubles seems questionable. That is especially the case, when the presence of multiple monitors is for the long-term—in Lakewood's case, potentially as long as 20 years. Both the long-term role of State monitors in Lakewood and the extraordinary amounts of advance state aid extended under another statute are linked since such loans can only be provided to districts with State monitors in place. This raises serious questions about whether the State has used those statutes beyond their reasonable purview as a means of evading the more direct and appropriate response to Lakewood's longstanding fiscal problems—a long overdue retooling of SFRA, and perhaps other legislative action, to directly and adequately address Lakewood's obvious fiscal problems and the denial of T&E to Lakewood public school students caused by those fiscal problems.

This court should affirm in the strongest terms the State's ultimate responsibility for T&E, a core New Jersey jurisprudential principle for more than 50 years.

POINT VI

THIS COURT SHOULD RULE THAT SFRA IS UNCONSTITUTIONAL AS APPLIED TO THE LAKEWOOD SCHOOL DISTRICT AND THAT THE EXECUTIVE AND LEGISLATIVE BRANCHES MUST FULLY REMEDY THE CONSTITUTIONAL DEFICIENCIES AS EXPEDITIOUSLY AS POSSIBLE

A. THIS COURT SHOULD RULE THAT SFRA IS UNCONSTITUTIONAL AS APPLIED TO THE LAKEWOOD SCHOOL DISTRICT

The prior argument points make clear that Lakewood public school students have been denied their fundamental constitutional right to T&E because SFRA has operated at a far less than optimal level for them. This court should confirm that inescapable conclusion by ruling that SFRA is unconstitutional as applied to the Lakewood school district.

B. THIS COURT SHOULD REQUIRE THE EXECUTIVE AND LEGISLATIVE BRANCHES TO FULLY REMEDY THIS CONSTITUTIONAL DEFICIENCY

The state constitution and statutes clearly impose responsibility for providing T&E on the Legislature and on the Executive. The constitutional education clause imposes on the Legislature clear and explicit responsibility for providing "for the maintenance and support of a thorough and efficient system of free public schools." N.J. Const. Art. VIII, par. 4. Sec. 1.

As a part of discharging that responsibility, the Legislature has made elaborate statutory provision in Title 18A for the Executive Branch's role in assuring T&E. Most of those statutory provisions attach to the Commissioner and State Board of Education and to the NJDOE, but the Governor is assigned an important role, too. For example, N.J.S.A. 18A:7F-46 creates a reporting system designed to assure that "the efficiency standards…necessary to achieve a thorough and efficient education" are periodically updated. The mechanism specified is that every three years "the Governor, after consultation with the commissioner, shall recommend to the Legislature through the issuance of the Educational Adequacy Report for the three years to which the report is applicable" various adjustments in the SFRA formula.

As the New Jersey courts did in Robinson and Abbott, and many related decisions, this court should order that the other branches take all necessary and appropriate steps to remedy the constitutional deficiencies identified in

this case regarding the Lakewood public school students. Of course, as was done in those earlier cases, this court should identify the relevant constitutional parameters for a remedy and defer to the other branches the development of a constitutionally sufficient remedy for a reasonable period of time, having in mind the extent to which time is of the essence to these constitutional claimants. To ensure that this response occurs within an expeditious timeframe, the student-petitioners urge this court to retain jurisdiction of this matter.

C. TO FULLY REMEDY THE CONSTITUTIONAL DEFICIENCES PROVEN IN THIS CASE, THE OTHER BRANCHES MUST ADHERE TO THE PARAMETERS OUTLINED BY THIS COURT

A constitutionally sufficient remedy must accomplish two main objectives:

- The Lakewood school district must be put on a sustainable fiscal footing; and
- Going forward Lakewood public school students must receive adequate and assured funding for T&E.[26]

[26] These objectives will not, however, deal with another dimension of the unconstitutional denial of T&E to a generation or more of Lakewood public school students who are no

Any meaningful remedy for the Lakewood school district's well-documented fiscal distress will have to rely, at least initially, on legislative action. After all, the appropriations' power of the State resides in the Legislature and the constitutional education clause starts with the words, "The Legislature shall provide for the maintenance and support" of T&E.

Still, that does not mean that the other branches of state government do not have essential roles to play in the remedial process. The executive branch can—and must—identify problems in the public education system and recommend changes to rectify those problems. And when changes are made, the executive must implement them properly.

The judiciary's role can be reactive—to determine the legality and sufficiency of the changes agreed to by the other branches, or proactive—to urge necessary action on the other branches when they have not taken the initiative as is the case here.

---

longer in attendance. Those students, perhaps those in attendance starting in 2009 when a NJDOE needs assessment identified serious fiscal and educational problems in Lakewood, have suffered serious negative effects on their lives and employment prospects by the denial of T&E to them. Justice Albin's statement from his concurrence in Abbott XXI, quoted *infra*, underscores those damages. Consequently, some form of compensation, even "reparations payments," might be appropriate and necessary to remedy the constitutional harm inflicted on them.

In this case, you have an opportunity and perhaps an obligation to suggest how SFRA's unconstitutionality as applied to the Lakewood school district can best be remedied. We may not yet be at the stage of a detailed remedial exposition, but it is an appropriate time to begin laying out the remedial parameters.

Here is a brief statement of those parameters:

1. If the Lakewood school district is to be placed on a stable and solid fiscal footing, the following State actions have to be taken: (i) the existing advance state aid loan balance must be forgiven in its entirety; (ii) the district must be reimbursed for repayments it has made against the loans;[27] and (iii) the district must be reimbursed for all payments it has made toward the State monitors' salaries and costs.[28]

[27] The loans were a direct result of SFRA's failure to provide the Lakewood school district with adequate funding for T&E. In effect, they—and probably additional dollars--should have come to the district as State education grants, not repayable loans. Therefore, any repayments already made or considered due should be reimbursed or forgiven. That would enable the district to go forward on a fiscally stable and sustainable basis.

[28] The Final Decision has called into question whether the Lakewood school district received value for its substantial outlay of dollars for salaries and costs of the multiple State monitors assigned to it for 10 years. Even aside from that question, it seems like questionable State policy to impose on a financially struggling district the substantial annual costs of State monitors charged by the State with overseeing the district's operations and helping it get back on its fiscal feet.

2. The annual state aid payments made to the district going forward must be sufficient to enable it to provide its students with T&E.[29]
3. The necessary legislative changes can be achieved through an amendment of the SFRA aid formula, or separate freestanding legislation, or a combination of the two, so long as they assure that the Lakewood school district receives adequate annual funding

[29] The student-petitioners are not alone in their belief that statutory changes must be made to the current funding approach to enable them to be assured T&E. For example, the State monitors placed in the Lakewood school district have made repeated public comments about the district's problems being revenue problems not spending problems. (See videotaped statement of State monitor Michael Azzara provided by letter of then-participant Paul L. Tractenberg, dated March 29, 2015, marked in the OAL as Exhibit 15). The district's independent auditor was recently quoted as saying that: "the district needs to see a better state funding approach because it cannot rely on loans and a mounting debt;" "to me, it is a state funding formula issue;" "Lakewood is a one-of-a-kind school district, it does not fit like any other school district;" "district leaders are forced to rely too much on state loans due to an inadequate state aid funding formula." https:// www.app.com/story/news/local/2024/02/26/auditor-latest-to-demand-better- state-aid-formula-for-lakewood-schools/72699102007/. In much the same vein, a July 11, 2023, internal report by State Auditor David Kaschak was featured in an August 15, 2023, article in the APP, entitled "NJ Auditor finds 'severe fiscal distress' in Lakewood schools, recommends new funding model." That report stated that the "Lakewood school district may be considered a district confronted by severe fiscal distress and could benefit from the creation of an additional state aid category." Finally, State Senator Robert Singer, whose Ocean County district includes Lakewood, said of the Office of the State Auditor's report that: "the report is proof that a state aid change is needed." He also was quoted as saying that "We have no option but to do this.... We have asked to change the formula. This explains why it has to happen." Singer expressed the hope that legislation to alter the state aid formula could be introduced after the November 2023, elections, and expressed optimism about such a change being adopted because "The administration has been very cooperative with this." (https://www.app.com/story/news/local/2023/08/15/lakewood- schools-under-severe-fiscal-distress-auditor-finds/70587887007/).

consistent with the Abbott criteria—that it be certain, predictable, non-discretionary and timely to enable effective educational planning.

D. THE DENIAL OF T&E MUST BE REMEDIED AS EXPEDITIOUSLY AS POSSIBLE SINCE TIME IS OF THE ESSENCE FOR LAKEWOOD'S PUBLIC-SCHOOL STUDENTS

It is essential that the remedial process proceed as expeditiously as possible. Lakewood's public school students have already suffered devastating injuries as a result of the denial of their fundamental constitutional right to T&E. As we have argued from the start of this overlong litigation, time is of the essence for those students.

The most powerful statement of this principle is in Justice Albin's concurring opinion in Abbott v. Burke, 206 N.J. 332, 478 (2011) (Abbott XXI) (Albin, J., concurring opinion):

> Children go to school for a finite number of years. They have but one chance to receive a constitutionally adequate education. That right, once lost, cannot be reclaimed. The loss of that right will have irreparable consequences, particularly for the disadvantaged children to whom SFRA was

> intended to give a fair chance at a thorough and efficient education.

We have been arguing this point, perhaps less elegantly but more frequently, from the start of this litigation. Our only notable success thus far has been this court's November 27, 2023, order, which accelerated the remand clock.

It is difficult to explain, let alone justify, how almost 10 years have been consumed by this case and how generations of Lakewood public-school students have suffered from inadequate education while the State, supposedly the protector of their interests, delays, obfuscates and denies that it has ultimate power and duty to assure their rights to T&E.

This court must now stand up for those students because it is not clear that anyone else will. As the New Jersey Supreme Court stated many years ago, the judiciary must be the "designated last-resort guarantor" of the students' fundamental constitutional rights to T&E. Robinson v. Cahill, 69 N.J. 133, 154 (1975).

Earlier in that opinion, the Supreme Court made a statement that anticipates the situation currently before this court:

> The Court has now come face to face with a constitutional exigency involving, on a level of plain, stark and unmistakable reality, the constitutional obligation of the Court to act. Id. at 139.

In its response to that obligation, the Court stated:

> This Court, as the designated last-resort guarantor of the Constitution's command, possesses and must use power equal to its responsibility. Sometimes, unavoidably incident thereto and in response to a constitutional mandate, the Court must act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of government....And while the court does so, when it must, with restraint and even reluctance, there comes a time when no alternative remains. That time has now arrived. Id. at 154-55.

Respectfully submitted,

s/ *Paul L. Tractenberg Esq.*

s/*Arthur H. Lang, Esq.*

Dated: April 17, 2024

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION

Docket No. A002493-23

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.
Petitioners,
v.

ANGELICA ALLEN-MCMILLAN, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF EDUCATION; the NEW JERSEY STATE BOARD OF EDUCATION; and the NEW JERSEY DEPARTMENT OF EDUCATION
Respondents.

ON APPEAL FROM A FINAL DECISION OF THE ASSISTANT COMMISSIONER OF EDUCATION

AGENCY REF. NO.: 156-6/14

OAL DOCKET NO. EDU 11069-2014S

SAT BELOW: HONORABLE SUSAN A. SCAROLA, ALJ

ON REMAND TO THE COMMISSIONER OF EDUCATION A-003693-20

APPELLANTS' REPLY BRIEF

Paul L. Tractenberg, Esq.
123 Washington Street
Newark NJ 07102
973-879-9201
paulltractenberg@gmail.com
Attorney for Petitioners
NJ Att. No. 024721975

Arthur H. Lang, Esq.
918 East Kennedy Boulevard
Lakewood, NJ 08701
732-609-5530
lakewoodlaw@gmail.com
Attorney for Petitioners
NJ Att. No. 014102012

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Final Decision on the remand, Commissioner of Education, April 1, 2024.

TABLE OF AUTHORITIES

Statutes:

Case Law:

PRELIMINARY STATEMENT

We decided to file this reply brief even though we believe that our prior brief stands largely unaddressed and unrebutted by the State's brief. We are doing so to point out and stress that the State's brief is more notable for **what it does not say** than for **what it does say**. As a result, our reply brief's Argument focuses only on the few points the State's brief addresses and includes other points only as place holders for the arguments we made in our prior brief. We see no point in burdening this court with arguments previously made adequately and unrebutted by the State's brief.

- **What the State's brief primarily says** can be set forth simply. It says, repetitively and without legal basis, that the conceded denial of a thorough and efficient education (T&E) to the Lakewood School District's (LSD) public school students, which it acknowledges continues to the present time, is caused by myriad unchecked failures of the local school district and that the School Funding Reform Act (SFRA), the State's primary vehicle for funding the public schools, is not even a significant cause of the denial.
- **What it does not say** is that for more than 50 years it has been a core constitutional principle in New Jersey that it is the State, not local

districts, that has ultimate responsibility for assuring T&E, and that the State has whatever power is required to discharge that high constitutional duty.

- **What it does not say**, in dereliction of its duty to respond to this court's express remand order, is that the real cause of the denial is the failure of SFRA, the State's chosen vehicle for directing funding to school districts, to provide the LSD with sufficient T&E appropriate funds over many years. This is the argument appellants have made ever since this case was filed more than 10 years ago and it has never provoked an honest, fact-based and persuasive response from the State.
- **What it does not say** is that the State's implementation of SFRA has fallen unconstitutionally short regarding two explicit conditions that the New Jersey Supreme Court established 15 years ago in *Abbott XX* — namely, full funding every year and periodic evaluation of whether SFRA is working adequately for every district given its particular circumstances, and, if it is not, what statutory or other adjustments are necessary. Indeed, the State's brief acknowledges that the SFRA funding formula was not even in effect between FY 2010 and FY 2017, virtually half of SFRA's entire life span, because school funding during those eight fiscal years was

"calculated based on provisions included in the State budget, with underlying funding policy changing every year." [State Brief (SB) at 6].

- **What it does not say** is that reliance on annual discretionary advance state aid loans, repayable by LSD within 10 years, has proven to be a manifestly unsuccessful, and arguably unconstitutional, effort to enable the district to keep its schools open; in the words of the Administrative Law Judge (ALJ), who conducted a lengthy hearing in this case, this has created "an unsustainable fiscal situation" in the district and effectively functions as a "Ponzi scheme."
- **What it does not say** in any meaningful way is what the State will be doing to remedy the acknowledged denial of T&E to Lakewood students beyond more of the same— presumably more repayable advanced state aid loans on top of the $215 million already burdening the LSD, a "new state monitor," presumably to replace the multiple State monitors who have been continuously in place in the district for more than 10 years without, according to the State, any ability to remedy the constitutional denial, and the State's much belated "exploring [of] the degree of oversight and intervention" required of it to "protect the constitutional rights of LPSD's public-school students."

COMBINED STATEMENT OF RECENT PROCEDURAL HISTORY AND RELEVANT FACTS

This case was filed more than 10 years ago as a contested matter with the New Jersey Department of Education (NJDOE) and was referred to the Office of Administrative Law (OAL), where it remained for almost seven years until Administrative Law Judge (ALJ) Susan Scarola filed a lengthy and detailed initial decision on March 1, 2021. Her decision, and its many findings of fact, were based on a lengthy hearing.

She concluded that LSD public-school students were being denied their fundamental constitutional right to T&E, mainly for fiscal and budgetary reasons, but she nonetheless adopted the State's assorted arguments for why SFRA, the State's primary vehicle for funding the public schools, was not the cause of that denial.

In a brief Final Agency Decision (FAD) on July 16, 2021, the Acting Commissioner (AC) accepted all the ALJ's findings, but rejected the ALJ's conclusion based on those findings that the students had been denied T&E. Because the AC found no T&E violation, she did not address SFRA's constitutionality as applied to LSD. She did, however, recognize that the LSD

had significant educational problems and ordered NJDOE to conduct a comprehensive review of the district.

The AC's FAD resulted in an appeal as of right to this court by the student-appellants and a unanimous decision on March 6, 2023, overturning the AC's FAD regarding T&E. Because the AC had not addressed SFRA's constitutionality as applied to LSD, this court decided to remand the case to the AC for her 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)." Alcantara v. Allen-McMillan, 475 N.J. Super. 58, 71 (App.Div. 2023). This court also chose not to retain jurisdiction, presumably expecting the AC to respond promptly and fully to the remand order as she was legally obliged to do.

Earlier in its opinion, this court described the AC's remand responsibilities as follows: "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." [Id. at 67].

Soon thereafter, the student-appellants began pressing the AC for a

schedule of how she was going to comply with the remand order. That led to a March 12, 2023, letter to the student-appellants' lawyers stating that the comprehensive review by NJDOE ordered on July 16, 2021, but apparently never started, would be "expedited." She did not, however, provide a schedule for how she would be complying with the court's remand order.

As the remand period dragged on for months without apparent action by the AC or the NJDOE, the student-appellants tried various formal and informal means of expediting the process, but none bore fruit. Finally, on October 23, 2023, student-petitioners filed a motion in aid of litigants' rights with this court, which the court granted on November 27, 2023. That consisted of an order that the AC submit the FAD on the remand by April 1, 2024.

The comprehensive review, conducted mainly by a highly paid educational consulting firm based in Boston without apparent expertise in school finance, statutory analysis or state constitutional law, was submitted to the appellants and to LSD on March 1, 2024, exactly three years after the ALJ's initial decision was issued. The appellants responded with a letter brief to the AC on March 6, 2024, and the LSD submitted a lengthy and detailed rebuttal of the State consultants' report by their own educational consultant later in March 2024.

As appellants had warned repeatedly in advance, the State consultants' report did not seem to provide the AC with a basis for responding to the court's explicit remand order. When the AC's FAD was issued on the appointed date of April 1, 2024, that concern became manifest. Neither the consultants' lengthy report, nor the AC's FAD—nor for that matter the State's Brief responding to appellants' brief--reflected any serious attempt to respond to this court's remand order. They all focused almost exclusively on the perceived failures of the local district and managed to ignore any failures of SFRA.

ARGUMENT

SINCE THE COMMISSIONER OF EDUCATION HAS FAILED TO RESPOND ADEQUATELY TO THIS COURT'S REMAND ORDER, AND THE STATE'S BRIEF HAS FAILED TO RESPOND TO THE RELATED CONSTITUTIONAL ARGUMENTS PRESENTED BY THE APPELLANTS IN THEIR BRIEF TO THIS COURT SUPPORTING THEIR APPEAL, THE COURT SHOULD RULE NOW ON THE CONSTITUTIONAL QUESTION IT POSED OF WHETHER THE DENIAL OF T&E TO LSD PUBLIC-SCHOOL STUDENTS WAS A RESULT OF SFRA'S UNCONSTITUTIONALITY AS APPLIED TO THE DISTRICT

As appellants argued in our prior brief to this court, the AC was legally obliged to respond to the court's remand order in precisely the manner delineated. Neither the AC's FAD nor the Respondents' Brief in Opposition to the Appeal, submitted by the respondents' lawyers in the New Jersey Office of the Attorney General (NJOAG) on August 2, 2024, did so. Nor did either respond to the related constitutional arguments presented by the appellants on appeal.

At a minimum, the State's brief should have dealt in a serious substantive manner with three matters:

1. This court's explicit remand order to respond to the appellant's legal argument that the denial of T&E to LSD students was caused by SFRA;
2. The argument in the appellants' brief supporting this appeal that the State, not local districts, has ultimate responsibility for assuring that the students receive T&E; and
3. The explicit constitutional condition in *Abbott XX* that SFRA's constitutionality as applied is dependent upon its being periodically evaluated to determine whether it needs to be modified, in this case based on LSD's concededly "unique demographic situation," to assure that LSD students are actually receiving T&E.

Inexplicably, the State's brief addresses none of those matters. That leaves a gaping void that this court can and must fill by rendering a decision on the constitutionality of SFRA as applied to LSD.

As to responding to this court's remand order, the AC failed in his FAD to meaningfully address this court's explicit remand question—essentially a legal and statutory question—about the extent to which SFRA caused the denial of T&E.

We had warned about that impending failure early and often as soon as the AC announced his plan to base his response to this court's remand order on having highly paid consultants hired by the State, who lacked any expertise in school funding laws, statutory analysis and law, carry out a comprehensive review of the LSD. And the State got what it paid for—a long, detailed report focused on the alleged inadequacies of the district's educational management and dealing not at all with SFRA's application to LSD and adequacy to meet the educational needs of LSD students.

The State's brief underscored, even worsened, the State's default. That is inexplicable since the respondents' lawyer, the NJOAG, surely has the capability to evaluate a statute and its implementation and to make legal judgments about their sufficiency. Unfortunately, the State's brief provides no

meaningful indication that the NJOAG was any more willing to address this court's explicit remand question than the AC's FAD.

Instead, the brief's Argument section consists overwhelmingly of a rehash of the brief's over-long section on Procedural History and Counterstatement of Facts. The Argument's three sub-heads make clear and explicit the bases of the State's argument that SFRA is constitutional as applied to LSD ("A. The **District's** Ineffective Policies and Extreme Mismanagement Are a Root Cause [sic] of Its Inability to Provide T&E;" "B. The **District** Has Failed to Take Steps to Reduce Its Special Education Costs;" and "C. The **District** Has Severely Mismanaged Its Transportation Responsibilities, Resulting in Inflated Costs").

The State's brief does not include any reference to how SFRA is working in practice for LSD, a district that everyone, including this court, has recognized is demographically unique. This is at the very core of the court's remand order. The State's brief does not seek to explain why the State has rarely, if ever,[1] used its extensive powers to require LSD over the past 15 years to implement the reforms that the State now claims are obvious and could have solved all the district's fiscal and educational problems.

[1] The State's brief refers in passing to the state monitors requiring the district—in 2014--to increase their local taxation and the district complying. SB at 8 and 39. Otherwise, the brief refers to State "suggestions" and an unquantified amount of money the district could have saved over the years had it implemented those "suggestions."

The State's brief does not respond to the appellants' argument that annual discretionary and repayable advance state aid loans cannot constitute "additional aid" for T&E [SB at 33] because: (i) they simply don't constitute "aid" in a meaningful sense since they are supposed to be repaid by the district out of future state aid; and (ii) they do not meet the New Jersey Supreme Court's clear and repeated standards for T&E funding [See, e.g., Abbott XX, 199 N.J. at 211; Abbott III, 136 N.J. at 448; Abbott II, 119 N.J. at 385].

Nor does the State's brief mention, let alone respond to, the ALJ's references to the loans as having created an "unsustainable fiscal situation" in LSD [ALJ at 66], or as being a "Ponzi Scheme" [July 9, 2019, 12 T 109-2 to -5].

The State consultants' report, on which the State's brief relies so heavily, could be read to suggest that the $215 million in loans already extended to LSD were necessary only because of the district's alleged gross inefficiencies and mismanagement. But nowhere in the report or brief is there a suggestion of how much money the district could have saved, if any, by implementing the consultants' recommended reforms. Nor does the State's brief respond to appellants' argument that excessive reliance on loans to support a district's ongoing educational program can itself constitute a T&E violation.

Thus, the State's position, without support in the ALJ's detailed findings or in anything else of probative weight, seems to be that:

- SFRA by itself provides LSD with enough funding to provide its students with T&E;[2]
- The $215 million in repayable advance state aid loans, provided to LSD over the past 10 years, has only been necessitated by LSD's refusal to raise more local taxes; and
- The district is ultimately responsible for those failures and the State has no authority to require that corrective action be taken—it is only a powerless bystander whose role is to make suggestions.[3]

As to the last point, it is only in the very last paragraph of the State's brief that it seems to take a different tack.

> Irrespective of this appeal, the Department recognizes the State's constitutional duty to address the lack of T&E in the District, and... steps to remedy that situation. [SB at 49].

[2]This is at odds with the language of the Commissioner's annual certifications to the State Treasurer, which underlay the advance state aid loans, to the effect that without such loans the district would have insufficient funds to provide T&E. [N.J.S.A. 18A:7A-56].

[3]A careful review of the State's brief produced only one reference to the State requiring the LPSD to take any action—the monitor's requirement in 2014 that the District "increase its tax levy up to the maximum amount," a requirement that the District satisfied. [SB at 8 and 39]. Otherwise, the State's brief refers multiple times to "recommendations," "warnings," "suggestions," and "recognition" by the State to LPSD [see, e.g., SB at 2, 6, 7, 8, 29, 40 and 42]. The LPSD did respond to one of those non-requirements—the elimination of courtesy busing, but the State's brief even criticized that by stating that, although the District responded, it did not do so "with any sense of urgency." [SB at 7].

The State's brief describes these "steps" as including:

- "ensuring the District has sufficient funds to meet its **immediate** needs;"
- "moving to install a **new** State monitor;" and
- "**exploring** the degree of oversight and intervention [by the Department?] that **may be necessary** to protect the constitutional rights of LPSD's public-school students." [Id. (Emphasis added.)].

As to the first step, the reference to meeting the District's **"immediate** needs" seems to suggest continuation of the annual discretionary advance state aid loans or short-term legislative fixes rather than a substantial ongoing modification of SFRA's formula, or other legislative action, to address LSD's unique demographics.

As to the second step, the State's brief fails to explain why a "new" State monitor will be more effective than the 10-year succession of multiple State monitors placed in the LSD (at an outlay of more than $2 million by the **district**). In a final footnote to its brief [SB 49, n.13], the State seeks to explain the ineffectiveness of the prior and present State monitors, but not why a new State monitor could be more effective. In an obvious throwing up of the hands, suggesting that installing a new State monitor is a kind of bureaucratic Hail Mary, the footnote ends by stating that "Regardless of what past

monitors did or did not know, the Department will be installing a new monitor." [Id.]

As to the third step, the State really needs to explain and justify why in 2024, more than 15 years after the LPSD's problems resulted in a State-ordered needs assessment and more than 10 years after this case was filed on behalf of LPSD public-school students complaining of the denial of T&E, the State is just "**exploring** the degree of oversight and intervention that **may be necessary** to protect the constitutional rights of LPSD's public-school students." [Id. at 49 (Emphasis added.)].

A careful review of the State's brief indicates that only four of its 49-page total, and only four of its 21-page Argument deal with legal argumentation. The main legal discussion relates to the appellants' argument that this court might shift to the State the burden of proving that SFRA is constitutional as applied to LSD because the Lakewood public school students have joined the Abbott/SDA students as the only ones in the state to have been definitively adjudicated as being denied their fundamental constitutional rights to T&E.

This is hardly a do-or-die point—although we believe that our

position and not the State's, is the sounder one.[4] Even if the usual burden were placed on the student-appellants—to prove SFRA's unconstitutionality as applied by "a preponderance of the believable evidence [Abbott v. Burke, EDU5581-85 (initial decision), August 24, 1988]—we believe that appellants have easily met that burden.

Even as to that point, the best the State's brief can do is to assert that, according to the New Jersey Supreme Court in Abbott XX, SFRA "is **designed** to achieve a thorough and efficient education for every child, regardless of where he or she lives." Abbott v. Burke (Abbott XX)199 N.J. 140, 175 (2009) (Emphasis added.).

Such a statement might support a holding that a statute is constitutional **on its face**, but not that it is constitutional **as applied**. To conclude that it is constitutional as applied, the court must conclude that its "effect," not just its "design," is constitutionally sufficient.

The State doesn't establish that, or even try to do so in a serious and substantive manner. Therefore, any boiler plate presumption of constitutionality of a statute must give way to its actual impact on the

[4] The State's main effort to distinguish the situation of LSD students from those in the Abbott/SDA districts is by arguing that LSD students don't suffer from "the same municipal overburden common to SDA districts" [SB at 31]. The State does not seem to recognize that LSD students suffer from a different, and quite likely much greater, form of "overburden." As the ALJ found, and this court accepted, LSD students suffer from the unique fiscal burden of costs for tens of thousands of nonpublic school students that consume more than half of the entire public school district budget [Alcantara, 475 N.J.Super. at 62-63].

students of LSD. We know that to be a denial of T&E and the State's effort to attribute that solely to local failures falls far short of the mark.[5]

Indeed, the State's brief cites, with apparent approval, a "familiar standard for as-applied constitutional challenges" that seems to mirror our position—"[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, 195 N.J. at 235 (citing Robinson v. Cahill,[6] 69 N.J. 449, 455 (1976)].

This standard is consistent with the appellants' view and with our arguments throughout the 10-year history of this litigation. Unfortunately, although the State now cites it with approval, it is inconsistent with how the

[5]To the extent that the State asserts one of LSD's failures relative to T&E is its failure to raise more local tax revenue to help to support its public schools, there are three answers: (i) state statutes both cap a district's capacity to increase local taxes and explicitly preclude some increases in local taxation from being used for T&E purposes; (ii) the only time that the State, through its State monitors in 2014, required LSD to increase local tax revenue, the district complied— otherwise the most the State did was to "suggest" that LSD consider increasing its local taxes; and (iii) the capacity of Lakewood to increase its local taxes, even to the level of its LFS, is unclear since it is regularly listed as one of New Jersey's poorest municipalities, with the highest percentage of residents living in poverty, more than 39%. As to the last point, see https://www.app.com/story/news/local/2024/07/14/new-jersey-most-least-livable-small-cities-ranking-smartasset/ 74381963007/

[6]This is the only reference in the State's brief to Robinson v. Cahill, proof positive that the State has totally ignored our argument about the State having ultimate responsibility for T&E, which derives from the first New Jersey Supreme Court opinion in Robinson in April 1973 and has been a core principle of the State's jurisprudence ever since. Robinson v. Cahill, 62 N.J. 473 (1973).

State has litigated this case and with its latest brief.

From this court's perspective, the AC's April 1, 2024, FAD and the State's Brief in Opposition to the student-appellants' appeal constitute a bad news-good news scenario.

The bad news is that the State's response to your remand offer, both as manifested in the AC's FAD and in the State's latest brief, provides you with little help in deciding the central question of whether SFRA is unconstitutional as applied to LSD and its demonstrably unique demographic circumstances.

The good news is that it's not a close question. Although SFRA might still be viewed as "constitutional on its face" because it is based on a laudable "design," its unconstitutionality as applied at least to Lakewood is absolutely clear as both a substantive and procedural matter.

The commissioner's annual certifications to the state treasurer supporting advance state aid loans to Lakewood, now totaling more than $215 million, and certain to increase by ever-growing annual amounts if SFRA's formula is not dramatically altered for Lakewood, demonstrate conclusively SFRA's inadequacies. The fact that to the present time neither of the two constitutional conditions the New Jersey Supreme Court specified in Abbott XX 15 years ago for SFRA's constitutionality as applied, and especially the one

requiring periodic evaluation and adjustment, has been met add to the overwhelming case for unconstitutionality.

Add to that the acknowledgement in the State's brief that for about half of SFRA's life it has not even been the vehicle for the distribution of State aid to districts, including Lakewood, the case for SFRA's unconstitutionality as applied becomes even more overwhelming.

Finally, this court has ample record evidence that supports a decision ruling that both that SFRA is unconstitutional as applied to LSD and that the appropriate remedy is a long overdue legislative amendment to SFRA, or separate legislation dealing with Lakewood's fiscal overburden, or both.

The State monitors assigned to LDS, whom the State's brief goes out of its way to malign, have stated publicly numerous times that the district's problem is a revenue problem not a spending problem. The report of the OLS's Office of State Auditor, and statements from the district's professional auditors and a number of prominent state legislators from the area all attributed LSD's educational problems to SFRA's shortcomings, not local mismanagement, and they join the student-appellants in urging that the statutory funding formula be modified.

As to SFRA-related failures, the State would have this court ignore: (I) the

State's failure to periodically evaluate and adjust SFRA to meet LSD's concededly unique demographics and their enormous drain on the public school budget; and (ii) the Commissioner's annual certifications that have generated hundreds of millions of dollars of repayable loans to LSD, creating an unsustainable fiscal situation, because LSD otherwise would have insufficient funds for T&E (in other word, SFRA doesn't generate enough funding for the LSD to provide T&E).

A. THE COURT SHOULD SET OUT THE REMEDIAL PARAMETERS AND PROVIDE THE EXECUTIVE AND LEGISLATIVE BRANCHES WITH A CONSTITUTIONAL BASIS, AND REASONABLE TIME PERIOD, FOR FULLY REMEDYING THE CONSTITUTIONAL DEFECTS

We simply underscore what we have set out in our prior brief and rely on that Argument point here. This court must couple a constitutional judgment that SFRA is unconstitutional as applied to LSD with remedial instructions that assure the student-appellants' fundamental constitutional rights are vindicated, at long last, as soon as possible.

B.THE COURT SHOULD ACT EXPEDITIOUSLY RECOGNIZING THAT TIME IS OF THE ESSENCE FOR THE STUDENT-APPELLANTS

There is no better way to make this point and conclude this reply brief than by quoting again Justice Albin's eloquent statement in Abbott XXI:

> Children go to school for a finite number of years. They have but one chance to receive a constitutionally adequate education. That right, once lost, cannot be reclaimed. The loss of that right will have irreparable consequences, particularly for the disadvantaged children to whom SFRA was intended to give a fair chance at a thorough and efficient education. Abbott v. Burke (Abbott XXI), 206 N.J. 332, 478 (2011) (Albin, J., concurring opinion).

CONCLUSION

Despite the State's continuing efforts to confuse and complicate matters, this is a straightforward case:

1. The New Jersey Constitution guarantees students T&E;
2. The state is ultimately responsible for assuring that;
3. SFRA is the vehicle the State has chosen to assure that every district, including LSD, has enough funding to guarantee that its students receive T&E;
4. To accomplish this, SFRA has to be fully funded and periodically evaluated and, if need be, adjusted to assure that every district, in respect of its particular circumstances, (in LSD's case, its concededly unique demographic

circumstances) has enough assured funding for its students;;

5. LSD students are being denied T & E;

6. This court remanded the matter to the Commissioner for one explicit purpose—to consider the LSD students' argument that SFRA was the reason for their denial of T&E;

7. Instead of responding to that judicial mandate, the State has sought to place the blame entirely on the local district in direct contradiction of more than 50 years of New Jersey Supreme Court jurisprudence that the State is ultimately accountable for T&E, and for doing everything necessary to achieve that end.

8. This court can take notice of the fact that for an extended period of time, and especially during the past six months, there has been a crescendo of commentary from educators, policy experts and legislators raising serious questions about SFRA's funding formula and urging its updating and improvement.[7]

9. To provide LSD students with a long overdue remedy for the denial of their fundamental constitutional right to T&E, however, should not have to await an undoubtedly lengthy, complicated and controversial process of addressing SFRA's application to New Jersey's approximately 600 school districts.

10. This court, and everyone else, recognizes Lakewood's unique demographic situation. By definition, a unique situation demands a unique remedy, not

[7] New Jersey Spotlight News alone has issued at least 12 articles and videos between February 22, 2024, and August 12, 2024, dealing with school funding and state education aid. Many of these include quotes from legislators, school district administrators and even the commissioner of education recognizing the need for modifications of SFRA. See www.njspotlightnews.org. A report issued by the Education Law Center, the lawyer for the Abbott plaintiffs, in March 2024, is the most comprehensive "Roadmap for Improving New Jersey's School Funding Formula."

dependent on a global solution.

11. LSD public-school students are unique in another important and relevant way—only they and the Abbott/SDA students have been found, as a matter of law, to have been denied their fundamental constitutional right to T&E. For that reason, they stand apart from the rest of New Jersey's public-school students and are entitled to special judicial and legislative solicitude.

Respectfully submitted,

s/ *Paul L Tractenberg*

s/*Arthur H. Lang*

Dated: August 20, 2024

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 No.: A-2493-23 CIVIL ACTION ON APPEAL FROM A FINAL DECISION OF THE ASSISTANT COMMISSIONER OF EDUCTION Agency Docket No.: 156-6/14

RESPONDENTS' BRIEF IN OPPOSITION TO APPEAL

Date Submitted: August 2, 2024

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

Donna Arons
Assistant Attorney General
Of Counsel

Ryan J. Silver (Attorney ID: 278422018)
Christopher Weber (Attorney ID: 012122013)
Deputy Attorneys General
On the Brief

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

NEW JERSEY CONSTITUTION

PRELIMINARY STATEMENT

This court has ruled that the Lakewood Public School District (LPSD) is not providing its students with a constitutionally-mandated thorough and efficient education (T&E). But the source of that deficiency is contested by the parties and is at the heart of this appeal. Pursuant to this court's prior opinion, the Department of Education has undertaken a comprehensive review of LPSD's operations, which establishes that the failure to provide T&E is due to problems occurring at the district level. In contrast, Appellants claim that the court's finding is attributable to the School Funding Reform Act of 2008 (SFRA), N.J.S.A. 18A:7F-43 to -71, arguing that the statute is therefore unconstitutional as applied to the District. But Appellants' claim is unsustainable because they have failed — and, in fact, have refused — to examine the root cause of the District's failings. Essentially, Appellants wholly disregard the real issue affecting students in LPSD: the District is plagued by decades of mismanagement and poor decision-making. These deficiencies, rather than the SFRA, have led to the inefficient use of substantial State aid and, worse still, resulted in public school students receiving a sub-par education.

LPSD has a pattern and practice of mismanaging funds. It failed to take steps to increase tax revenues in order to support its school programing, failed to address its growing special education and transportation expenses despite

repeated warnings to do so, and failed to establish appropriate internal controls to ensure costs are reasonable and that payments are properly tracked. The District's own policies also limit chances for student success. These include requiring teachers to adhere to strict scripts and pacing guidelines which do not allow teachers the time to address student needs or ensure that students understand and comprehend the lessons. This is especially true for English Language Learners (ELL) and students with disabilities; District teachers have reported that the students are essentially left behind. LPSD also makes technology a necessity for student success, but failed to take steps to ensure its students have equitable access to the required tools. On top of that, the record demonstrates a culture of apathy and low expectations for students.

Appellants ignore these critical failings and instead simply claim that because the State has provided LPSD with loans to assist it in balancing its budget (due to the District's poor planning), the District must not be receiving enough funding through the SFRA. This logic is fundamentally flawed. LPSD has received sufficient aid through both the SFRA and State loans. If the District still cannot provide T&E with all of the assistance it has received, clearly the issue is not one solely of funding. For these reasons and those that follow, the court should affirm the well-reasoned decision of the Assistant Commissioner and find the SFRA constitutional as applied to LPSD.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

A. The School Funding Reform Act of 2008.

In an effort to provide a funding formula that satisfied the T&E clause and the Court's Abbott mandates, in January 2008 the State enacted a new statewide school funding formula to ensure that public schools throughout the State receive financial support needed to deliver T&E: the SFRA. L. 2007, c. 260; N.J.S.A. 18A:7F-43 to -71. The core of the SFRA is the adequacy budget, which is an estimate of what it costs each district to provide the core curriculum content standards (CCCS)[2] to each student according to each district's enrollment and student characteristics. N.J.S.A. 18A:7F-51. A major component of each district's State aid — equalization aid received from the State — is calculated based on a district's ability to contribute to its overall adequacy budget through its local contribution, otherwise known as its "local fair share" or "LFS." Abbott v. Burke (Abbott XIX), 196 N.J. 544, 556-57 (2008); N.J.S.A. 18A:7F-5(b) and -52(a). In other words, the SFRA, as a wealth-equalized formula, presumes a

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

[2] The CCCS are now known as the New Jersey Student Learning Standards. See N.J.A.C. 6A:8-1.1 to -3.3; N.J.S.A. 18A:7F-4.1 to -4.7. The Supreme Court has found the standards to be a reasonable expression of constitutionally sufficient T&E. Abbott v. Burke (Abbott IV), 149 N.J. 145, 161-62 (1997).

district's contribution to its annual budget is the amount of funds which may be raised through local taxes to support the district's annual budget. N.J.S.A. 18A:7F-52, -5(b) and (c).[3]

B. The Lakewood Public School District.

Lakewood Township is a rapidly expanding municipality, growing from a population of 92,843 in 2010 to an estimated 139,506 in 2023. (Ra165).[4] As a result, it is now New Jersey's fifth largest municipality. Ibid. Approximately 50,000 school-aged children live within the District, but only 4,600 of those students are enrolled in Lakewood's public schools. Ibid. The remaining 45,400 students (84% of the school-aged children) are enrolled in non-public schools, most of which are private religious schools. Ibid. By last count, there were 9 public schools and over 170 non-public schools located within the District. Ibid.

[3] A district's ability to raise its local levy is capped. In April 2007, the Legislature enacted L. 2007, c. 62, which imposed a 4% limitation on school district and municipal tax levy increases. L. 2007, c. 62 §§ 1-2; N.J.S.A. 18A:7F-38 and -39. In July 2010, the Legislature further revised the tax growth limitation provisions, reducing the amount by which local tax levies could increase from 4% to 2%. L. 2010, c. 44, § 4; N.J.S.A. 18A:7F-38. The new law permitted districts to submit a special question to the voters to increase the levy above the capped amount under certain circumstances and to "bank" any portion of the permitted 2% increase plus applicable adjustments not used by the school district in a budget year. L. 2010, c. 44, § 5.

[4] "Aa" refers to Appellants' appendix; "Ra" refers to Respondents' appendix; and "Ab" refers to Appellants' brief.

1. The District's Financial Condition and SFRA Funding.

In 2010, LPSD had a budget surplus of $5,000,000. (Aa13). However, from 2011 to 2014, the District chose not to raise its tax levy to the cap. Ibid. As a result, LPSD was not taxing up to its LFS from 2014-2018. (Aa13; Ra71). Altogether, LPSD taxed $31,501,523 less than its LFS from 2014-2018. (Ra71; Aa13). The District also chose not to exercise its authority under N.J.S.A. 18A:22-40 and N.J.S.A. 18A:7F-39 to present voters with a referendum to increase the school tax levy in any year except 2016, when the voters rejected it. (Ra98; Aa13).

At the same time it was failing to increase its LFS, the District was also making significant expenditures for special education and transportation costs for both public and private students. (Ra72-73). From the 2014-2015 to 2018-2019 school years, LPSD's special education tuition expenditures rose from $21,122,137 to $33,305,378. (Ra72). Over that same time period, its total transportation costs for non-special education students rose from $23,235,597 to $31,155,570. (Ra73). Because of LPSD's ballooning expenses and lack of action to increase revenues, it had a budget deficit of approximately $6,000,000 in 2013-2014. (Ra65-66).

Annually, the amount of State aid a district receives is determined by the

Legislature's annual Appropriations Act. N.J.S.A. 52:27B-20; N.J.S.A. 18A:7F-5. From fiscal year (FY) 2010 through the enactment of L. 2018, c. 67, State aid was not allocated according to the provisions of the SFRA; instead, "it was calculated based on provisions included in the State budget, with underlying funding policy changing every year." (Aa14).[5]

The Department has also provided State aid advances pursuant to N.J.S.A. 18A:7A-56 in order to help LPSD meet its needs. From FY15 to FY24 the Department provided $215,124,570 in loans on top of its State aid. (Ra166).

2. The State's Monitoring of the District.

In 2009, the Department conducted a Needs Assessment of LPSD to "assess[] the adequacy of the educational inputs and programming currently being provided" and to "identify the unique educational needs of the students . . ." (Ra73). In its assessment, the Department noted that while the public school enrollment was stable, LPSD's non-public enrollment was increasing at a rapid pace. (Ra74). The assessment also identified transportation and special education costs as large strains on LPSD's budget, but found that the District "could do significantly more with the funds currently available to it." Ibid.

[5] From FY18, State aid has started to be allocated based on the SFRA's funding formula.

Specifically, the Department recommended that the LPSD reconsider its courtesy busing[6] policy and develop ways to educate more special education students in-district, neither of which the District acted on with any sense of urgency. (Ra74; Ra100; Aa16).

In 2014, LPSD was subject to a State audit by the Office of the State Auditor (OSA). (Ra75). The audit, which examined the period of July 1, 2011, to December 31, 2013, was intended to "determine whether financial transactions were related to the school district's programs, were reasonable, and were recorded properly in the accounting systems." Ibid. After reviewing LPSD's operations, OSA found that the District's "financial transactions . . . were not always reasonable or properly recorded in the accounting system." Ibid. And just as the Department had back in 2009, OSA found transportation and special education expenses were significant sources of concern. Ibid. OSA

[6] School boards are required to provide transportation to public school students who live "remote"—meaning, beyond two and a half miles for high school students and beyond two miles for elementary school students—from their assigned school of attendance, N.J.S.A. 18A:39-1; N.J.A.C. 6A:27-1.3, non-public students who reside remote from their school of attendance and meet the eligibility criteria of N.J.A.C. 6A:27-2.2, and students with disabilities who reside remote from their assigned school or who require transportation services in accordance with their individualized education program (IEP). N.J.A.C. 6A:27-1.3. School boards may also, but are not required to, provide transportation for public and non-public students who do not meet the eligibility criteria. N.J.S.A. 18A:39-1.1 to -1.3; N.J.A.C. 6A:27-1.4. This is known as "courtesy busing."

provided a number of recommendations to the District to rein in those costs, including eliminating separate start and end times for non-public schools, developing bus routes based on school location rather than specific school, tiering bus routes for bidding purposes, and improving the District's approval and document retention practices for special education students. (Ra75-76).

Because LPSD had run a deficit, a State monitor was appointed to the District in 2014. (Ra65-66). The monitor required the District to increase its tax levy up to the maximum amount. (Ra61; Ra97; Aa13). But, because LPSD had not increased the levy to the maximum amount in prior years, the District was still not generating the level of money it could have had such proactive steps been taken earlier. (Ra97; Aa13).

C. The July 7, 2014 Petition of Appeal.

On July 7, 2014, Appellants filed a petition of appeal with the Commissioner alleging that the SFRA is unconstitutional as applied to LPSD because the District was not receiving sufficient funding to provide its students with T&E. (Ra2; Ra112-13). The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on September 4, 2014. (Ra3).

Appellants amended their petition four years later, on September 4, 2018, to clarify the relief they were seeking. (Ra5). The amended petition sought a determination that: (1) the SFRA as applied to LPSD 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.

D. The March 1, 2021 Initial Decision.

On March 1, 2021, the Administrative Law Judge (ALJ) issued an initial decision concluding that LPSD was not providing T&E to its students. (Ra91; Aa2). But she did not find that the failure to provide T&E was a result of any constitutional infirmity with the SFRA as applied to the District. (Ra95; Aa2). Rather, she concluded LPSD's failings were a result of a number of contributing factors distinct from the SFRA, including fiscal mismanagement by the District, community choices, and other legislation. (Ra95-102).

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." (Ra97). Although the State-appointed monitor required LPSD to increase the levy, the District's failure to do so earlier meant that it was "not taxing up to its local fair share" and "not generating the money that it could have been" to support the

District's obligation to provide T&E. Ibid. The ALJ also found that LPSD 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. (Ra100-02). Lastly, the ALJ concluded that other, non-SFRA legislation such as N.J.S.A. 18A:7F-38 and the annual Appropriations Act contributed to the District's financial situation. (Ra98-99).

As a result of these voluntary choices and non-SFRA factors, the ALJ held that the SFRA was not unconstitutional as applied to LPSD. (Ra102).

E. The July 26, 2021 Final Agency Decision.

On July 16, 2021, then-Acting Commissioner Angelica Allen-McMillan issued a final decision rejecting the initial decision in part and adopting it in part. (Ra121). In reaching her decision, the Commissioner accepted the ALJ's findings of fact, but disagreed that such findings led to the conclusion that LPSD's public school students were not receiving T&E. (Ra117-18). Despite this conclusion, the Commissioner recognized the concerning educational deficits revealed during the course of the OAL hearing, and ordered the Department to conduct a comprehensive review of LPSD's organization, structure, and policies. (Ra118). 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 the District. (Ra121).

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

On March 6, 2023, this court issued a published decision reversing the Commissioner's decision. Alcantara v. Allen-McMillan, 475 N.J. Super. 58 (App. Div. 2023). The court reviewed the Department's statistics, comparing the performance of LPSD's public school students to State averages, and found the record showed that the District's public school students were not receiving T&E. Id. at 69-70. The court did not, however, reach whether such a failure was a result of the SFRA. Instead, the court remanded the matter to the Department to "consider [Appellants'] substantive arguments pertaining to the SFRA . . . ." Id. at 71.

G. The Comprehensive Review of the District.

Following this court's March 6, 2023 decision, the Commissioner expedited the comprehensive review of LPSD. (Ra122). The Department retained the services of Dr. Kimberley Harrington Markus, a former Commissioner of the Department; Public Consulting Group (PCG), a public sector consulting firm with an extensive background in education; and Jeremiah Ford, an expert in New Jersey public school transportation, to undertake the analysis. Ibid. PCG, in turn, assembled a multidisciplinary team of educational

specialists and a financial auditing firm to conduct the evaluation, focusing on five key areas: governance, curriculum and instruction, special education, financial practices, and transportation. (Ra126).

The experts issued their report on the comprehensive review of LPSD on March 1, 2024. (Ra124). The report answered two questions: (1) "what is the role of SFRA in deprivation of T&E in [LPSD]?" and (2) "what other causes may be impacting [LPSD's] deliver[y of] T&E?" (Ra126). The report concluded that the SFRA was not the cause of the District's failure to provide T&E. (Ra154). Rather, the report outlined significant issues with LPSD's overall management and functioning, including finding the District to be plagued by poor communication, a lack of "intentional planning," and ineffective or inefficient systems. (Ra131-34).

1. Governance.

The Comprehensive Report details a number of significant concerns directly related to LPSD's overall governance and structure. Starting with LPSD's Board of Education, the Report found that the Board did not adhere to standard practices typically exercised by boards of education and outlined by the New Jersey School Boards Association. (Ra126; Ra182). Notably, meetings lack action items and are conducted without discussion on any agenda items or committee reports. (Ra134; Ra181). Nor does the Board read, review, discuss,

or question District policies. Ibid. Even during meetings where there were a significant number of new policies placed on the agenda, the Board held no discussions. (Ra134; Ra182). This caused the Report to question Board members' level of involvement and to note that absent more formal discussion, the Board is "not able to inform the public about changes and additions to policies" that will affect the school community. (Ra124; Ra182-83).

And despite the District's financial struggles, the Board does not discuss financial issues or present detailed budgetary information during meetings, unlike comparable districts in the State. (Ra181-82). The Board also has no strategic plan in place and has "minimal" involvement with the budget. Ibid. In fact, Board members were "not entirely familiar with [budget] details." (Ra184).

Board meetings are also not led by the Board President, whose responsibility should be to ensure adherence to proper procedure. (Ra180-81). Rather, the Board President has effectively abdicated his role and responsibilities to the Board's attorney. (Ra133; Ra173; Ra180). The Report noted that the level of control exercised by the Board's attorney is unusual, as he takes a "far more active role than the typical board attorney in District business." (Ra127; Ra173; Ra191). On top of that, the Report found that LPSD's "legal expenses per pupil are significantly higher than" comparable

districts. (Ra127; Ra173; Ra191).[7] In the 2021-2022 school year, for example, the District's per pupil legal costs were over four times higher than the next highest comparison district, despite the fact that LPSD has a significantly smaller public school population. (Ra171; Ra191).

The Report also highlighted certain Board policies which "have a big impact on the school District and its operations . . . ." (Ra184). First, the Report looked at Policy 5112: Entrance Age, which was raised as a concern by District staff because in most districts students entering kindergarten must turn five-years old by October 1 of that given school year. (Ra135; Ra184-85). Under Policy 5112, LPSD permits students who will not turn five-years old until December 31 to register for kindergarten. (Ra135; Ra184-85). As a result, the District's kindergarten classes can have students aged four to six years old for nearly half of the school year, and by third grade classes can have students aged seven to ten years old. (Ra135; Ra185). This policy is "particularly problematic" because "[s]tudies have shown that in the early stages of school age children development, there is a significant difference in terms of maturity,

[7] For purposes of comparative analysis, the Comprehensive Report selected four districts—Toms River Regional School District, Brick Township Public Schools, Jackson Township School District, and Jersey City Public Schools—as comparison districts due to their proximity to LPSD, size of district, socioeconomic makeup of the district, and financial status. (Ra170).

behavior, and cognitive abilities between children during these stages of development." (Ra185-86). Thus, cognitive development for LPSD students enrolled in the same class can be "substantially different" and may present as gaps in literacy development and math. (Ra135; Ra185). These "gaps [will] continue as the student moves into upper grades." (Ra185).

The Report also noted that this policy may affect student achievement and identification for special education placement. (Ra135; Ra185). One study from the National Bureau of Economics found that students "who start school at an older age do better than their younger classmates and have better odds of attending college." (Ra185). There is also evidence, the Report explained, that students who start school earlier are more likely to be "placed in special education or diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD)," as "the youngest students in a kindergarten cohort are 40% more likely to be placed in special education than are the oldest students." Ibid.

The Report also examined Policy 2330: Homework, and Policy 7523: School District Provided Technology Devices to Pupils. (Ra186). Under Policy 7523, technology devices made available to students are not considered "mandatory to a successful completion of a pupil's classroom curriculum." Ibid. Similarly, Policy 2330 states that students do not require a computer to complete assignments. Ibid. But these policies are at odds with the current instructional

approach used by the District. Ibid. The Report found that in LPSD's high school, "most instruction . . . uses a SMART Board, a District provided PowerPoint and a Chromebook with Google Classroom installed." Ibid. "In many instances, students do not have traditional textbooks, but rather digital textbooks or supplemental materials on their Chromebooks." Ibid. Also, both in-class assignments and homework are assigned and submitted through Google Classroom. Ibid. Thus, "a computer is needed to complete assignments." Ibid. But many students do not have access to a personal computer, and the District does not allow students to take home district-purchased devices. Ibid. Therefore, many students use their cell phones to complete assignments, "which may not be conducive to producing quality work," or they just do not complete computer-based assignments, which directly affects their grades. Ibid. The Report concluded these "outdated policies directly impact teaching and learning practices" and student ac122hievement in the District. Ibid.

And based on observations and discussions with District staff, the Report found there was "a district-wide culture of low expectations for students across the [LPSD.]" (Ra127; Ra131; Ra192). District staff attributed students' "low academic performance, poor attendance, lack of motivation, and [] overall poor attitude" on their "poverty or lack of English proficiency." (Ra131; Ra192). Specifically, District staff reported that "[t]he low academic ability of students

makes it challenging to have higher-level conversations and ask thought-producing questions;" "[m]any students are late to school, miss school, and are dealing with family, cultural, financial, and living conditions issues that they bring to school or interfere with their learning;" "[m]any students have an apathetic attitude towards school because many of them are exhausted from working jobs until very late;" and "[t]he cultural diversity makes it difficult to teach to the students' needs. The students are all on different levels depending on where they came from." (Ra193). This lack of academic optimism can negatively affect students' academic achievement. (Ra131; Ra193).

In addition to a lack of academic optimism, the Report detailed diminished staff wellness and morale. Teachers are "overloaded" and many believe that the work "can be defeating and deflating." (Ra131-32; Ra193). And teachers explained that "frequent changes and new rules from the District . . . create confusion and inconsistency, contributing to the overall sense of overwhelm." (Ra193).

Lastly, the Report described communication as an area of weakness in the District, particularly with students and parents. According to District data, 77.2% of students report Spanish as their home language, "making the need for translation services in the District high." (Ra195). Despite this, only 15% of the documents on the District's website are in Spanish, and most documents are

PDFs written in English that do not function with Google Translate. (Ra132; Ra195). In terms of staff, only 5% of District staff speak Spanish. (Ra195). For these reasons, "[t]ranslation services were referenced frequently as a challenging area for the District." (Ra132; Ra194).

2. Curriculum and Instruction.

The Report found that a significant amount of the curriculum is developed in-house without oversight from an Assistant Superintendent in charge of curriculum. (Ra135; Ra203). Consequently, there is a "lack of evidence, research-based, current resources to support the curriculum." (Ra135). And the locally-developed curricular resources are "not research backed or supported," and do not fully align with State standards. (Ra136). They also contain "mistakes" that teachers "constantly . . . find and report." (Ra212). As for curricular resources purchased by LPSD, the Report found the resources being used are old; some materials are at least eleven years old. (Ra135; Ra205).

The Report also described LPSD's "strong commitment to the use of scripts and pacing guides at every grade level and within each content area." (Ra136; Ra207). Teachers receive a script and instructional framework for each lesson. (Ra207-08). These scripts and guides are created in-district, and require teachers to stay within ten days of the pacing guide expectations. (Ra136; Ra207-08). The scripts and guides are also subject to "constant" change both

during and at the end of the year, "which means that teachers are relearning the curriculum and often familiarizing themselves" with new lessons constantly. (Ra136; Ra210).

Teachers are also subject to "significant" oversight to ensure they adhere to the scripts and pacing guides. (Ra210). According to the Report, on top of the teacher evaluation program, supervisors conduct classroom walkthroughs and observations each week, and "instructional coaches" observe classrooms on a weekly basis. Ibid. Plus, principals and assistant principals are required to complete three to five classroom walkthroughs per day. Ibid. This level of oversight, the Report found, was "excessive and has had [a] negative [impact] on school-based staff." Ibid.

Because of the strict adherence to the District's pacing guides, teachers are required to "move on to keep up with the pacing guides" even if "their students are struggling." (Ra212; Ra229). This is especially true for ELL students — while "some scripts and instructional frameworks may have suggestions for differentiating for their ELL students, there is no time to incorporate those ideas as [teachers] have to rush through their lessons to ensure they are on track." (Ra212). And the frequency of walkthroughs is also "likely disruptive to classroom instruction and has not resulted in increased student gains." Ibid.

Notably, a survey of educators in LPSD revealed the deleterious effect these policies have had on the quality of education in the District. Specifically, educators complained that: "[LPSD] doesn't use high quality curriculum to meet the needs of students;" "[c]urriculum created 'in-house' lacks the materials and resources to reach all students;" "[t]he curriculum provided for math is awful, and not aligned properly with the [S]tate standards;" "[t]he curriculum is not appropriate for the population of students" taught and "creates a barrier for students to succeed and learn;" the District switches programs too often; the District is overly focused on strict adherence to pacing guidelines which "doesn't allow teachers time to teach what is needed to get the students to meet" educational standards; and the District's "curriculum in both math and ELA is riddled with mistakes that affect student growth." (Ra211). Sadly, these are just some of the many issues and concerns teachers raised. See ibid.

Also, district boards of education are required to implement systems for planning and delivering intervention and referral services, including multidisciplinary team approaches such as New Jersey's Multi-Tiered Systems of Support (MTSS) Framework.[8] N.J.A.C. 6A:16-8.1. While LPSD has

[8] MTSS is a three-tiered framework for support services. (Ra213-14). Tier 1 "provides high quality learning environments, evidence-based curricular and instructional practices, and a continuum of supports and interventions in general education classrooms;" Tier 2 "provides supplemental supports and

nominally adopted MTSS, most teachers reported they did not know what MTSS was or said their school did not use it. (Ra136; Ra216). Even when implemented, the support systems were not able to be implemented effectively due to the District's strict structure and pacing of local curriculum. (Aa12; Ra216). According to the Report, teachers struggle to meet student needs because "often almost the entire classroom requires Tier 2 intervention." (Ra216). Further, school staff reported that LPSD elects to end Tier 3 intervention (individual support) in third grade. (Ra136; Ra216). But, as explained above, "[t]his is especially problematic given the local policy extending [the] kindergarten cutoff date," resulting in many third grade students still being "developmentally young" and "continuing to struggle with reading." (Ra135; Ra184-86). Without the necessary tiered supports and structured intervention time, "the [developmental] gap will continue to expand for students." (Ra136).

3. Special Education.

As to special education, the Report found that LPSD has unusually high numbers of students identified with disabilities. In 2021-2022, the percentage of students aged 5-21 with an individualized education plan (IEP) was 28.8%.

---

intervention;" and Tier 3 "provides intensive supports and interventions that may be delivered individually and provided in or outside of the classroom after the delivery of core instructions." (Ra214).

(Ra243). This is nearly 10% higher than the State average, and twice the national average. (Ra243-44). The rate of students in the District diagnosed with an intellectual disability is also nearly twice the national rate. (Ra244). There are also "not[able]" incident rates specific to student demographics — in 2022, 84% of students in the District identified as Hispanic and 9.8% identified as White; of these, 67% and 25.9%, respectively, had an IEP. (Ra245). Notably, the Report detailed concerns within the District about student identification, including the eligibility criteria used and that "parents believe their children have not been properly evaluated." (Ra261).

These rates of identification have affected LPSD's ability to use federal funds earmarked for special education. As the Report explained, districts receive federal funding for special education through the IDEA Part B. (Ra249). However, the District has been found significantly disproportionate in its representation of students with disabilities in 2022 and 2023. Ibid. As a result, the District is required to set aside 15% of its IDEA funding for Comprehensive Coordinated Early Intervening Services (CCEIS). Ibid.

LPSD also has a high number of students in out-of-district placements. In 2021-2022, 171 students aged 3-4 and 535 students aged 5-21 were placed in Approved Private Schools for the Disabled. (Ra254). Of these students, the majority were diagnosed with speech or language impairment as a primary

disability. (Ra256). The Report found it was "unclear why so many students" with such a disability are in out-of-district placements rather than in-district. Ibid.

LPSD also has significant costs attached to students in out-of-district placements. In 2019-2020, the District spent $48,755,738 for 402 students in out-of-district placements, for an average per-pupil cost of $121,282.93. (Ra266). In 2021-2022, while the number of students in out-of-district placements decreased to 372, the total expenditure increased to $57,499,863 and the per-pupil amount increased to $154,569.52. Ibid.

As to the quality of education provided, the Report found that LPSD has, for the past three years, failed to meet State targets for educating special education students in the least restrictive environment. Ibid. Further, due to the strict pacing guidelines detailed above, teachers have expressed concerns over their ability to meet the needs of students with IEPs. (Ra267). Because of this, students are often in "disengaged learning," using "[r]ote fill-in-the-blank prompts" with "limited checking for understanding or mastery." (Ra269-70). The pacing guidelines were an "impediment in nearly all" classrooms. (Ra271). Also, the District does not have programming for Emotional Regulation Impairment, Visual Impairment, or Intellectual disabilities. (Ra129; Ra238; Ra264).

The Report also found several issues with IEPs. These include, but are not limited to: most did not include necessary rating scales to evaluate students, (Ra274); parental input was almost nonexistent, ibid.; and goals and progress reports were "inconsistent," with some even being left blank. (Ra274-75).

4. Financial Practices.

As part of the Comprehensive Review, a forensic analysis of LPSD's financial data analytics and internal controls was conducted. (Ra142; Ra294). This analysis revealed "significant deficiencies . . . on the vendor management controls in the procure to pay cycle as internal controls related to vendor selection, review, and retention are not operating effectively." (Ra294). The analysis also found "significant deficiencies . . . on the payroll processing cycle, as internal controls related to review and completion of the payroll register and payroll processing checklist, respectively, are not operating effectively." Ibid. And there were "significant deficiencies" in internal controls related to new hire training and "deficiencies noted on the financial close cycle" related to "review of cash flow statements." Ibid.

5. Transportation.

Finally, the Comprehensive Report reviewed LPSD's transportation practices, finding several areas of concern which "may have an impact on [the] provision of" T&E. (Ra143; Ra315). The District is responsible for providing

transportation to all eligible public school students, as well as many of the non-public students residing in the District. N.J.S.A. 18A:39-1; N.J.A.C. 6A:27-1.3, -2.2; (Ra304). As of October 2023, "the district financially supported transportation for 4,727 public school students . . . and over 36,231 nonpublic school students." (Ra304). Because of the sheer number of non-public students in the District, LPSD's transportation obligations "dwarf[]" that of comparable districts. (Ra305).

LPSD does not operate its own bus yard; instead, it uses the public bidding process to procure contracts for all bus routes. Ibid. The Lakewood Student Transportation Authority (LSTA), established by L. 2016, c. 22, is a consortium that was designed to support LPSD in meeting its transportation needs with respect to non-public students. (Ra306). A 2020 study found that the LSTA saves the District over $11,000,000 as compared to the District bidding and managing all routes. (Ra306-07). But these savings were not passed on to the District. Instead, any savings were used to provide courtesy busing — that is, non-mandated transportation — for both public and private school students "in accordance with the local government's preferences." (Ra307).[9] And a significant portion of LPSD's transportation funding goes to courtesy busing.

[9] In 2024, the State passed L. 2023, c. 326 which requires any savings to be returned to the District.

(Ra305). In FY24, LPSD provided transportation to 40,958 students. Ibid. Of these students, 11,410, or 27.8%, were students for whom the district provided non-mandatory courtesy busing at the district's expense. Ibid.

In terms of bus routes, the Report found that in some cases, buses were being used for multiple routes, but the routes are bid on as stand-alone routes. (Ra143; Ra310-11). The District could save on transportation costs, the Report found, by soliciting bids on pre-packed groups of routes based on historical busing patterns, and could double or triple tier routes in order to decreases expenses. (Ra143; Ra311).

The Report also found potential mismanagement and lack of internal controls of the District's transportation operations. Notably, the Report indicated there was insufficient separation between LPSD as a contracting agency and the LSTA as a vendor. (Ra131; Ra303). And at least one high-salaried employee may have been employed by both the District and the LSTA, creating "potential for procurement issues, diminished incentive to return saved funds to Lakewood, and potential for conflicts in contract oversight of the LSTA as a vendor." (Ra144; Ra315). Furthermore, many non-public students do not have an identification number in the District Report of Transported Resident Students (DRTRS), which is the State transportation system, creating the risk

that students might be counted and funded in multiple counties. (Ra144; Ra315).

Because of these issues, as well as the multitude of issues listed above, the Comprehensive Report concluded that "[t]he pervasive inefficiencies, deficiencies, and the apparent shortfall in oversight and strategic systemic action by the District," rather than the SFRA, have caused LPSD's failure to provide T&E. (Ra154). Both Appellants and LPSD had the opportunity to respond to the Report, including its findings and conclusion, and did so. (Aa5-6).

H. The April 1, 2024 Final Agency Decision.

After reviewing the entire record in this matter, including Appellants and LPSD's responses to the Comprehensive Report, Assistant Commissioner Cary Booker issued a final agency decision on April 1, 2024, finding that "[LPSD's] failure to provide T&E to its students does not derive, in significant part, from the provisions of the SFRA." (Aa21).[10] In reaching this decision, the Assistant Commissioner rejected LPSD's argument that the SFRA fails to take into consideration its unique demographic situation and the fact that it bears extraordinary costs in providing transportation and special education services to

[10] Commissioner Kevin Dehmer replaced Angelica Allen-McMillan as Commissioner of Education on February 12, 2024. The final decision on remand was then delegated to Assistant Commissioner Booker pursuant to N.J.S.A. 18A:4-34.

more than 30,000 nonpublic school students. (Aa11). Rather, the Assistant Commissioner concluded that "[LPSD's] own choices and management issues have resulted in the unavailability of funds that could and should have been used to provide T&E to its students." (Aa11-12).

More specifically, the Assistant Commissioner found that LPSD has "chosen not to require its tax base to further support its schools," in accordance with N.J.S.A. 18A:22-40 and N.J.S.A. 18A:7F-39, "and suffers from local mismanagement regarding its transportation and special education costs." (Aa12). The Assistant Commissioner concluded that these issues, rather than infirmities in the SFRA, are significant contributing factors in the District's inability to provide T&E. (Aa21). Furthermore, he explained that other laws, such as those affecting local tax levies and annual appropriations, play as much of a role in LPSD's finances as the SFRA. (Aa13-14). And he concluded that the District's ongoing and pervasive fiscal mismanagement have led to inefficient use of funds that otherwise could have been used to ensure students were receiving T&E. (Aa14-15). For example, the Assistant Commissioner found that LPSD failed to keep track of expenditures, including failing to have any purchase orders in place for students sent to out of district placements. (Aa14). LPSD also did not keep proper documentation for special education students and had "significant data discrepenc[ies] and reporting issues related to

special education." (Aa15).

Further, the Assistant Commissioner noted that transportation and special education services were recognized as areas of concern since 2009, yet LPSD never took significant steps to address those concerns. (Aa16-17). For these reasons, and in light of the information contained in the administrative record and comprehensive report, the Assistant Commissioner rejected LPSD's claim that the SFRA was unconstitutional as applied to the District. (Aa21).

This appeal followed.

ARGUMENT

THE SCHOOL FUNDING REFORM ACT IS CONSTITUTIONAL AS APPLIED TO THE LAKEWOOD PUBLIC SCHOOL DISTRICT.

Appellants bring this action seeking a ruling that the SFRA is unconstitutional as applied to LPSD, but their claim falls far short. As the Assistant Commissioner correctly found, the District's failure to provide T&E to its students is not due to the SFRA, but rather systemic, pervasive mismanagement by the District. As such, the SFRA is not unconstitutional as applied to LPSD.

Few enactments in our State have undergone as much scrutiny as the SFRA, with the Supreme Court twice declaring it to be constitutionally sound. Shortly after its passage, the State filed a motion with the Court seeking a

declaration that the SFRA is constitutional. Abbott v. Burke (Abbott XX), 199 N.J. 140, 145 (2009). The Court declared the SFRA constitutional, stating that through the SFRA, "[t]he State has constructed a fair and equitable means designed to fund the costs of [T&E.]" Id. at 172. The Court further held that the SFRA "is designed to achieve a thorough and efficient education for every child, regardless of where he or she lives." Id. at 175.

A few years later, the Court revisited the SFRA in Abbott v. Burke (Abbott XXI), 206 N.J. 332, 370 (2011), when a State budget crunch led to funding shortages. The Court opined that the "SFRA is the preferable and predictable way to provide funding . . . so that sufficient resources are provided and can be planned for in the preparation of cohesive educational programming." Id. at 369. Thus, the Court once again reaffirmed the constitutionality of the SFRA. Id. at 369-70 (directing that funding to the Abbott districts be calculated and provided in accordance with the SFRA).

The SFRA, therefore, is entitled to a presumption of constitutionality that can be rebutted "only upon a showing that the statute's repugnancy to the Constitution is clear beyond a reasonable doubt." Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 285 (1998); accord Lewis v. Harris, 188 N.J. 415, 459 (2006); Town of Secaucus v. Hudson County Bd. of Taxation, 133 N.J. 482, 492-93 (1993), cert. denied sub nom., 510 U.S. 1110 (1994).

Appellants erroneously claim that because this court has found that its students were being denied T&E, LPSD should be afforded a "special constitutional status" akin to SDA districts,[11] and that the Department should bear the burden of establishing the SFRA's constitutionality as it did in Abbott. (Ab7-10). But this matter is unlike Abbott. There, in finding previous school funding regimes unconstitutional as applied to certain districts, the Court relied upon those districts' inability to raise revenue either due to a lack of a tax base or municipal overburden. Abbott v. Burke (Abbott II), 119 N.J. 287, 325 (1990) (finding that municipal overburden "effectively prevents districts" from raising money to support education in special needs districts). There is nothing in the record to suggest, nor do Appellants allege, that LPSD suffers from the same municipal overburden common to SDA districts such that "it cannot raise revenue to support its public schools and reduce the impact of transportation and special education costs." (Aa12). And, unlike SDA districts, LPSD has received sufficient financial assistance through State aid and loans to help cover its budget shortages. Despite this, "the record demonstrates that [LPSD's] own choices and management issues," including its decision to not raise its tax levy

[11] The school districts from the Abbott cases were historically referred to as "Abbott districts." Abbott XXI, 206 N.J. at 406. Effective January 13, 2008, the Legislature eliminated that designation and replaced it with a new one, "SDA district," L. 2007, c. 260, § 39.

to the cap, "have resulted in the unavailability of funds that could and should have been used to provide T&E to its students." (Aa11-13).

Appellants ignore these clear distinctions and cite no law to support their conclusory claims. As such, this matter is reviewed under the familiar standard for as-applied constitutional challenges; that is, "[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)). A statute's constitutionality is "presumed," and the burden falls on the party challenging to "demonstrate[e] the unconstitutionality" of the statute. DePascale v. State, 211 N.J. 40, 63 (2012). And, whether the SFRA is unconstitutional as applied to LPSD "turn[s] on proof that [Appellants] suffer educational inequities and these inequities derive, in significant part, from the funding provisions" of the SFRA. Abbott v. Burke (Abbott I), 100 N.J. 269, 296 (1985).

Appellants have failed to make that showing here. They do not identify any facts in the record to support their claim that LPSD's failure to provide T&E is due in significant part from the SFRA. Instead, Appellants simply declare that because the District is not providing T&E, the SFRA is "not adequate," (Ab18), and is operating below "its optimal level" (Ab11).

Appellants also take aim at the State's provision of significant additional financial aid to LPSD in the form of loans, asserting that these loans demonstrate that "SFRA funding for Lakewood is insufficient." (Ab12). But Appellants miss the mark. At no point do Appellants identify what would be "adequate," "optimal," or "[]sufficient" levels of funding, and Appellants sorely misconstrue the conclusions to be drawn from the State's provision of loans to the District.

Between FY15 and FY24, the Department provided LPSD $215,124,570 in loans on top of its SFRA funding. (Ra166). Despite this, Appellants admit that students are still being denied T&E. Because LPSD has received sufficient State aid, plus additional aid in the form of State loans, its inability to provide T&E, taken to its logical conclusion, cannot be a direct result of the SFRA.

This raises a question unanswered — and, in fact, ignored — by Appellants: if it is not a funding issue, then what is causing the District to not provide T&E? As the administrative record and Comprehensive Report reveal, it is the District's own choices and significant mismanagement of the substantial funds it has received that are at the core of its failure to provide T&E.

While this court reviews constitutional questions de novo, Abbott I, 100 N.J. 298-99, absent a "clear showing" that the agency's decision is "arbitrary, capricious, or unreasonable, or lacks fair support in the record," this court must "give substantial deference to the agency's fact-finding," Twp. Pharmacy v. Div.

of Med. Assistance & Health Servs., 432 N.J. Super. 273, 284 (App. Div. 2013), and must be "mindful of an administrative agency's day-to-day role in interpreting statutes within its implementing and enforcing responsibility," In re State Bd. of Educ.'s Denial of Petition to Adopt Regulations Implementing N.J. High Sch. Voter Registration Law, 422 N.J. Super. 521, 530-31 (App. Div. 2011) (internal quotations omitted).

A. The District's Ineffective Policies and Extreme Mismanagement Are a Root Cause of its Inability to Provide T&E.

As the record clearly demonstrates, LPSD is plagued by severe mismanagement, which has directly and negatively impacted the level and quality of education district students receive. There are reasons why this court concluded that LPSD has failed to provide its students T&E, Alcantara, 475 N.J. Super. at 70, and they have little to do with the SFRA.

As the Comprehensive Report revealed, LPSD's inefficient and ineffective policies have had a direct impact on the quality of education district students receive. The District's curriculum is developed in-house and suffers from a "lack of evidence, research-based, current resources to support the curriculum." (Ra135). The locally-developed curricular resources are also "not research backed or supported," and do not fully align with State standards.

(Ra136). And the curriculum is constantly changing, requiring teachers to re-learn new curriculum on a yearly basis. Ibid.

Also, in most districts in the State, students entering kindergarten must turn five-years old by October 1 of that given school year. (Ra135; Ra184-85). But under Policy 5112, LPSD permits students who will not turn five-years old until December 31 to register for kindergarten. (Ra135; Ra184-85). In practice, this means that LPSD kindergarten classes can have students aged four to six years old for nearly half of the school year. (Ra135; Ra185). This age gap is not insignificant: "Studies have shown that in the early stages of school age children development, there is a significant difference in terms of maturity, behavior, and cognitive abilities between children during these stages of development." (Ra185). These differences in cognitive ability manifest, for example, in gaps in literacy development. Ibid. And these gaps may not be bridged. One study from the National Bureau of Economics found that students "who start school at an older age do better than their younger classmates and have better odds of attending college." Ibid. Significantly, these gaps can also affect a student's classification as "the youngest students in a grade cohort are more likely to receive both ADHD diagnoses and special education placements than are the oldest students." Ibid. At least one study found that "the youngest

students in a kindergarten cohort are 40% more likely to be placed in special education than are the oldest students." Ibid.

This is particularly problematic in LPSD's case, because while the District has adopted New Jersey's MTSS Framework, the support systems are not implemented effectively due to the District's strict structure and pacing of local curriculum. (Aa12; Ra136; Ra216). Further, school staff reported that LPSD elects to end Tier 3 intervention (individual support) in third grade. (Ra136; Ra216). But, as explained above, because the LPSD's policies extend the kindergarten cutoff date, many of the District's third grade students are still developmentally young and continue to struggle in areas such as reading. (Ra136; Ra216). As a result of LPSD's enrollment policies and without the appropriate tiered support and structured intervention time, students face an ever-growing developmental and educational gap, and the risk that these students will later be identified as special needs increases, (Ra136; Ra216), resulting in higher educational costs and further strain on the District's budget.

Additionally, most instruction in LPSD's high school "uses a SMART Board, a District provided PowerPoint and a Chromebook with Google Classroom installed." (Ra186). In most instances, students do not have traditional textbooks, but instead use digital textbooks or supplemental instructional materials on their district-issued Chromebooks during class time.

Ibid. And in addition to in-class assignments, students are typically assigned homework using personalized Google Classroom accounts. Ibid. In short, technology is a critical component of students' ability to learn and complete assignments. But "many [of LPSD's] high school students . . . do not have a computer in their home," and the District "does not allow students to take home district-purchased devices." Ibid. As a result, students who do not have equitable access to a computer must resort to "using their personal cell phones to complete homework assignments, which may not be conducive to producing quality work," or they just do not complete computer-based assignments. Ibid.

LPSD also requires all teachers to adhere to strict scripts and pacing guidelines for curriculum. (Ra136; Ra207). Because of this, "even if students are struggling, [teachers] have to move on to keep up with the pacing guidelines. There is not time to pause to ensure" that students have comprehended or retained the lesson. (Ra212). This has a profound impact on ELL students where "even though some scripts and instructional frameworks may have suggestions for differentiating [] ELL students, there is no time to incorporate those ideas" as teachers "have to rush through their lessons to ensure they are on track." Ibid. As a result of the mandated adherence to pacing guidelines, as well as constant changes to curriculum, there is "little room for differentiating to support the needs of individual students." (Ra136; Ra203).

These policies directly explain this court's finding that the "quality of education in Lakewood . . . is deficient." Alcantara, 475 N.J. Super. at 70. And Appellants do not argue otherwise. In addition to limiting the quality of education students receive, these policies have destroyed educator morale and resulted in "a district-wide culture of low expectations for students across the [LPSD.]" (Ra127; Ra131; Ra192).

Along with the deficiencies in the delivery of education, LPSD is also mismanaged in terms of governance and administration, resulting in inefficient use of funds and a failure to raise necessary capital to provide T&E. This starts at the top, with the Board of Education. Board meetings are conducted without discussion on any agenda items or committee reports, which deprives the public from being fully apprised of the Board's actions. (Ra134; Ra181). Further, boards of education play an integral role in developing the district's budget; they are required to adopt a budget which provides T&E. N.J.A.C. 6A:23A-8.1. But despite LPSD's financial struggles, the Board does not discuss financial issues or budgets during meetings, does not discuss district policies, and does not have a strategic plan in place. (Ra126; Ra173; Ra181-82). Rather, the Board's "involvement with budget development is minimal," (Ra183), and Board members were "not entirely familiar with [budget] details." (Ra184). Also, the Board President has effectively abdicated his role and responsibilities to the

Board's attorney, permitting the Board attorney to control the board's operations. (Ra133; Ra173; Ra180). In turn, LPSD's "legal expenses per pupil are significantly higher than" comparable districts. (Ra127; Ra173; Ra191). In the 2021-2022 school year, LPSD's per pupil legal costs were over four times higher than the next largest comparison districts. (Ra171; Ra191).

To the extent that underfunding is a cause of the lack of T&E in the District, that problem is attributable to LPSD, not the SFRA. The District has failed to take necessary steps to control expenses and contribute to the District's budget. As the Assistant Commissioner explained, the District chose not to exercise its authority under N.J.S.A. 18A:22-40 to "raise its tax levy to the cap from 2011-2014, despite the fact that the community's non-public school population was rapidly increasing." (Aa13). It was not until 2014, when a State monitor was installed, that LPSD was required to increase the levy, but "the decision not to increase the levy during the previous years means that the District [was] not taxing up to its [LFS] and that not only was the District not generating money that it could have been during that time period, but that any additional revenue from increasing the levy would have compounded." (Ra97; Aa13). Because of this, from 2014 to 2018, the District taxed $31,501,523 less than its LFS — money which could have gone directly to providing T&E to students. (Ra71; Aa13).

LPSD also chose not to avail itself of its power under N.J.S.A. 18A:22-40 and N.J.S.A. 18A:7F-39 to present voters with a referendum to increase the school tax levy in any year except 2016, when the voters rejected it. (Ra98; Aa13).[12] Appellants downplay the failure to increase the levy under N.J.S.A. 18A:7F-39 by noting that this provision does not allow the funds to be used for T&E. (Ab29). But what Appellants fail to realize is that any additional funds raised could free up other funds that can be directly used for services to ensure T&E; and, as a result of its choices, LPSD's school tax rate was below the State average and below other districts. (Aa13; Ra72).

On top of this conscious decision not to take steps to raise funds, the record also demonstrates severe deficiencies in LPSD's fiscal management. For years, LPSD ignored recommendations by both the Department and OSA for reining in special education and transportation costs, as discussed further below. (Ra77). Also, the 2014 OSA report found that "financial transactions . . . were not always reasonable or properly recorded in the accounting system." (Ra75). The record revealed that LPSD did not have purchase orders in place for students sent to out-of-district placements, (Ra36), and that, in terms of special education costs, "there was a lack of proper approval, tuition documentation, and

[12] The referendum was aimed at raising more than $6,000,000 to continue LPSD's courtesy busing policy, a non-T&E item. (Ra98; Aa13).

attendance records" for students placed in private schools. (Ra76; Aa15). Further, the New Jersey State Aid Audit Unit "determined that poor record-keeping resulted in [LPSD] incorrectly reporting hundreds of students on its Application for State School Aid (ASSA)." (Aa15; Ra57).

Record-keeping deficiencies continue and were again confirmed by the Comprehensive Report, which found that "[t]here were significant deficiencies noted on the vendor management controls in the procure to pay cycle." (Ra130; Ra294). Specifically, the Report found that LPSD's Board of Education is not approving vendors before payment is issued. (Aa15; Ra134). As to transportation, the Report found that many non-public students did not have an identification number in the DRTRS, creating the risk that students might be counted and funded in multiple counties. (Aa15; Ra144; Ra315). And a spot-check of LPSD's records revealed documents that listed other districts as the contracting unit, which "could indicate a systemic lack of legal, procurement, and financial review and oversight of bid documents." (Ra315). As a result of the pervasive errors and mismanagement in LPSD's record-keeping, the District is failing to use its funds efficiently to provide T&E. (Aa15).

For these reasons, "the record demonstrates that [LPSD's] own choices and management issues have resulted in the unavailability of funds that could and should have been used to provide T&E to its students." (Aa11-12).

B. The District Has Failed to Take Steps to Reduce Its Special Education Costs.

As this court previously found, a significant portion of LPSD's school funding is spent on special education. Alcantara, 475 N.J. Super. at 63. But the record demonstrates that the District has not taken steps to reduce its expenditures, despite repeated warnings to do so.

In the 2009 Needs Assessment, the Department found that LPSD "could do significantly more with the funds currently available to it" and "find ways to ensure that its resources are directed to meet the instructional needs of its students." (Ra74). In terms of special education, the assessment recommended that the District "develop strategies to educate more of its special education students in-district." Ibid. Five years later, OSA's audit report found "a lack of proper approval, tuition documents, and attendance records . . . for students placed in unapproved nonpublic schools." (Ra76). OSA recommended that LPSD address its growing special education costs. Ibid.

But as the ALJ found, the record is devoid of any "evidence of the steps [LPSD] has actually taken to save money by educating more of its special education students in a district-run program." (Ra100). As outlined above, there were 706 students aged 3-21 in specialized out-of-district placements in 2021-2022, the majority of whom had a primary diagnosis of speech or language

impairment. (Ra254; Ra256). It is "unclear why so many students" with such a disability are not educated in-district, the Report found. (Ra256).

In failing to develop in-district programs, LPSD has not availed itself of opportunities for additional SFRA funding. Under the SFRA, the State provides "extraordinary special education aid" to assist districts with special education costs that exceed $40,000 per pupil for students educated in in-district programs, and $55,000 per pupil for students educated in private school settings. N.J.S.A. 18A:7F-55(b). The SFRA also ensures that districts receive a higher rate of reimbursement for those expenses when the children are educated in a public, as opposed to a private, school setting. Ibid. This, the ALJ aptly noted, "is a substantial difference" (Ra101) and one that LPSD has failed to capitalize on.

And even assuming none of its students could have been educated in-district, LPSD could have applied for additional aid based on an unusually high rate of low-incident disabilities. N.J.S.A. 18A:7F-55(g); (Ra101; Aa19). The record does not contain any evidence that LPSD did so, or that it had applied for facilities funding to increase its ability to serve more special education students in-district. (Ra17; Ra99-101; Aa19). Thus, it is LPSD's own choices that caused what this court described as "abnormal" special education costs, see Alcantara, 475 N.J. Super. at 63, draining critical resources from other programmatic areas which would ensure students receive T&E.

Aside from its failure to educate more students in-district, there is an even deeper-rooted problem when it comes to LPSD's special education obligations: the District has unusually high, and therefore possibly inaccurate, incidence rate of students identified with disabilities. In 2021-2022, the percentage of students aged 5-21 with an IEP was 28.8%. (Ra243). This is nearly 10% higher than the State average, and twice the national average. (Ra243-44). Further, the rate of students in LPSD diagnosed with an intellectual disability is also nearly twice the national rate. (Ra244). Despite this, there is no evidence in the record to suggest that LPSD has sought to identify the cause of this discrepancy.

In fact, it appears that the District has ignored this issue. As noted in the Comprehensive Report, there are questions as to the "eligibility criteria and whether [special education] determinations are accurate." (Ra261). There have also "been cases in which parents believe their children have not properly been evaluated." Ibid. Further, a review of student IEPs revealed that most did not include parental input, or even an indication that such input was sought. (Ra274). Nor did IEPs include information on the student's background, interpretation of the student's evaluations, or how those factors impacted the student academically. Ibid.

And even for special education students educated in-district, LPSD is not providing adequate services to ensure student success. As noted above, the

District requires teachers to adhere to strict pacing guidelines. (Ra136; Ra267). Because of this, teachers are not always able to "meet[] the individual needs of students with IEPs" which "create[s] barriers to individualized learning for students." (Ra267). The District does not have programming for emotional regulation impairment, visual impairment, or intellectual disabilities in its schools. (Ra129; Ra238; Ra264). Thus, LPSD has effectively abdicated any responsibility in ensuring student identifications and placements are accurate, to the detriment of both the affected students' education and its own growing expenses.

Lastly, in addition to SFRA funding, districts also receive federal funding for special education through the IDEA Part B. (Ra249). However, the District is unable to use the full amount of its federal funding because it has been found to be significantly disproportionate in its representation of students with disabilities in 2022 and 2023. Ibid. So, LPSD is required to set aside 15% of its IDEA funding for CCEIS. If the number of students with disabilities is not accurate, then its failure to investigate and remedy that problem has the result of taking money away from services to provide T&E. Ibid.

Because LPSD's own policies and choices inefficiently use its resources and effectively leave students, especially special needs students, behind, the record supports the Assistant Commissioner's determination that it is LPSD's

mismanagement rather than the SFRA that is the cause of the District's failure to provide T&E.

C. The District Has Severely Mismanaged Its Transportation Responsibilities, Resulting in Inflated Costs.

Just as with special education, this court also found that transportation comprises a significant strain on LPSD's budget. Alcantara, 475 N.J. Super. at 63. But as the ALJ correctly found, there "is an absence of evidence in the record to indicate that . . . [LPSD] has done everything it can to rein in its transportation costs in order to free up more funds for T&E for its public school students." (Ra100).

In the same 2009 Needs Assessment in which the Department provided recommendations for LPSD to lower its special education costs, the Department also addressed the District's transportation spending. (Ra74). The Assessment noted that the District's courtesy busing policy was contributing to its financial strain. (Aa16; Ra99). LPSD eventually ended its courtesy busing policy, but not until 2016. (Aa16; Ra100). Thus, the District continued to provide transportation to ineligible students, including non-public students, at its own expense — and at the expense of providing T&E to its public school students — for seven years after the Department counseled against continuing this practice. (Ra100; Aa16). To put it in perspective, the cost of courtesy busing totaled

$4,000,000 in the 2008-2009 school year. (Aa16). Even assuming that number remained consistent from 2008-2009 until LPSD ended its policy in 2016, that is millions of dollars that were available but not used to provide T&E. (Aa16).

In addition to the Needs Assessment, the 2014 OSA audit also highlighted concerns in the District's transportation spending. OSA noted that the majority of the non-public bus routes were segregated by gender, and because most of the private schools had the same start time, "the demand cause[d] increased pricing by vendors." (Ra75). Additionally, each non-public school had separate buses which created longer bus routes and required more buses at an increased cost. Ibid. And most non-public schools had multiple starting and end times which "creates inefficiencies and the need for one-way routes." (Ra76). By separately tiering the starting and ending times, OSA found that the District could save up to $6,700,000. (Ra75). And if bus routes were developed by school location rather than having separate buses for each non-public school, OSA found the District could save approximately $750,000. Ibid. There is no evidence in the record showing that LPSD took any steps in response to the OSA's findings.

These are not just issues of the past; rather, the Comprehensive Report shows that similar issues persist in the District. Specifically, the Comprehensive Report found that for students transported by LPSD, buses run less full and that costs per student are higher. (Aa17; Ra143; Ra310-11). The Report also found

that in some cases, buses were being used for multiple routes, but the routes are bid on as stand-alone routes. (Ra310-11). Similar to the OSA audit, the Report found the District could save on transportation costs by soliciting bids on pre-packed groups of routes based on historical busing patterns, and could double or triple tier routes in order to decreases expenses. (Ra311).

The Comprehensive Report also found potential mismanagement and lack of internal controls of the District's transportation operations. In regards to the LSTA, the Comprehensive Report indicated that there was insufficient separation between LPSD as a contracting agency, and the LSTA as a vendor. (Aa17). And at least one employee may have been employed by both the District and the LSTA, creating "potential for procurement issues, diminished incentive to return saved funds to [LPSD,] and potential for conflicts in contract oversight of the LSTA as a vendor, in addition to the duplication of salary." (Aa17; Ra144; Ra312-13). Furthermore, many non-public students do not have an identification number in the DRTRS, creating the risk that students might be counted and funded in multiple counties. (Aa15; Ra144; Ra315). As such, the record reveals that it is LPSD's own choices and inefficiencies which have caused its transportation costs to run out of control and reach the "unsustainable imbalance" noted by this court. Alcantara, 475 N.J. Super. at 63.

The record thus supports the Assistant Commissioner's conclusion that the SFRA is not a significant cause of LPSD's failure to provide its students T&E. Rather, "[t]he pervasive inefficiencies, deficiencies, and the apparent shortfall in oversight and strategic systemic action by [LPSD] have culminated in this inadequacy." (Ra124). The Assistant Commissioner's decision should therefore be affirmed because the SFRA is not unconstitutional as applied to LPSD.

Irrespective of this appeal, the Department recognizes the State's constitutional duty to address the lack of T&E in the District, and is continuing to take steps to remedy that situation. This includes ensuring the District has sufficient funds to meet its immediate needs, moving to install a new State monitor,[13] and exploring the degree of oversight and intervention that may be necessary to protect the constitutional rights of LPSD's public-school students.

[13] While Appellants point to the fact that a State-appointed monitor has been in place in LPSD, the monitor's authority is not so great as to be able to unilaterally address all of the issues identified in the District. Furthermore, as the Comprehensive Report found, the LPSD Board of Education essentially operates in secret, failing to discuss any policies or the budget during meetings. (Ra134; Ra181). For this reason, it is unclear what extent the monitor was even fully apprised of LPSD's many failings, or had the tools to fix the issues. Regardless of what past monitors did or did not know, the Department will be installing a new monitor.

CONCLUSION

For these reasons, the Assistant Commissioner's decision finding the SFRA is not unconstitutional as-applied to LPSD should be affirmed.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

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

Date: August 2, 2024