

149-21

New Jersey Commissioner of Education

Decision

Leonor Alcantara, individually and as guardian *ad litem* for E.A., et al,

Petitioners,

v.

David Hespe, Commissioner of Education;
New Jersey State Board of Education; and the
New Jersey State Department of Education,

Respondents.

Synopsis

Petitioners – who include parents of students in the Lakewood Public School District (Lakewood) – alleged that the funding formula under the School Funding Reform Act, *N.J.S.A.* 18A:7F 43 - to -70 (SFRA) is inadequate in regard to Lakewood because it does not deliver sufficient funding to provide the district's students with a thorough and efficient education (T&E). The petitioners attribute this shortfall to the extraordinary costs that Lakewood incurs by providing transportation and special education services to a large number of resident students who attend private schools.

The ALJ found, *inter alia*, that: under the N.J. Supreme Court's *Abbott* and *Bacon* decisions, T&E is measured through a combination of factors, ranging from test scores to dropout rates to diversity of course offerings; by most of these measures, the education received by Lakewood's students is not constitutionally adequate; petitioners have failed to show that the SFRA is solely or significantly responsible for Lakewood's inability to provide its students with T&E; Lakewood's failure to raise taxes as permissible under the SFRA reduced its ability to take necessary steps to provide T&E; Lakewood has not shown that rising transportation costs are totally attributable to an increase in the number of nonpublic school students, nor that the district has done everything it can to cut down transportation costs; Lakewood has failed to develop strategies to educate more special education students in district and has not made progress towards a comprehensive preschool program for at-risk children. The ALJ concluded that Lakewood has been unwilling or unable, on its own, to provide T&E to its students but such failure cannot be attributed to the SFRA. Accordingly, the ALJ recommended that the Commissioner conduct a needs assessment for Lakewood similar to the study conducted in 2009 following the *Bacon* decision.

Upon review, the Commissioner, *inter alia*: disagreed with the ALJ's determination that Lakewood is not providing its students with T&E, but agreed that petitioners have failed to show that the SFRA is responsible for Lakewood's deficiencies; notwithstanding this determination, in light of the factual record elicited by the OAL, the Commissioner directed the Department to conduct a comprehensive review of the District in order to assess its compliance with the quality performance indicators in accordance with *N.J.A.C.* 18A:7A-11. In so doing, the Commissioner acknowledged Lakewood's educational shortcomings but pointed out that the deficiencies do not rise to the level of unconstitutional; further, the SFRA is constitutional as applied to Lakewood.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

149-21

OAL Dkt. No. EDU 11069-14
Agency Dkt. No. 156-6/14

New Jersey Commissioner of Education

Final Decision

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; Henry Moro and Ira Schulman, individually and as Guardian ad Litem for A.S.,

Petitioners,

v.

David Hespe, Commissioner of the New Jersey Department of Education; New Jersey State Board of Education; and New Jersey Department of Education,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the parties and participants pursuant to *N.J.A.C.* 1:1-18.4, and their replies thereto.¹

Petitioners in this matter are parents of children who attend Lakewood Township's public schools. In a 2014 petition² filed against the New Jersey Commissioner of Education, the New Jersey Department of Education (Department), and the New Jersey State Board of Education (collectively, "Respondents"), petitioners alleged that the Lakewood

¹ Participant Lakewood Township Board of Education did not file a reply.

² Petitioners amended their petition on September 4, 2018.

Township Board of Education (Lakewood) is unable to provide its public school students with a thorough and efficient education (T&E) because it does not receive sufficient funding under the School Funding Reform Act, *N.J.S.A.* 18A:7F-43 to -70 (SFRA). Petitioners maintain that the SFRA fails to account for the amount the district pays in special education and transportation costs for the large number of resident students who attend private schools. Subsequently, Lakewood and Paul Tractenberg, Esq., joined this matter as participants.³⁴

Following a hearing, the Administrative Law Judge (ALJ) found that Lakewood's public school students are not receiving T&E; however, petitioners failed to meet their burden of demonstrating that the SFRA is solely or significantly to blame. The ALJ found that the population boom in Lakewood Township over the past twenty years has resulted in a rise in attendance at private schools, totaling almost 30,000 non-public school students compared to approximately 6,000 students who attend Lakewood public schools. This causes a strain on the district financially, as the private school students are entitled to transportation at Lakewood's expense; further, tens of millions of dollars are spent each year to send special education students to out-of-district placements.

The ALJ concluded that Lakewood's public school students are not receiving T&E as they are not being prepared for college, career and life under the New Jersey Student Learning Standards. The ALJ found that the education received by Lakewood's students is not constitutionally adequate based on cuts in industrial arts and auto mechanics, foreign language programs (leaving Spanish as the sole option), low standardized test scores, chronic absenteeism

³ Mr. Tractenberg is a Professor of Law Emeritus and Board of Governors Distinguished Service Professor at Rutgers University. He established the Education Law Center, the Institute on Education Law and Policy, and the Center for Diversity and Equality of Education.

⁴ While Lakewood initially declined to join this matter as a party and joined instead as a participant in 2016, Lakewood subsequently filed a motion to intervene as a party at the start of the hearing in 2018, which was denied.

rates, increased dropout rates, low graduation rates, and low New Jersey Quality Single Accountability Continuum scores. Additionally, the ALJ considered the increased rates of teacher turnover, low per pupil classroom spending and classroom salaries, and the lack of a preschool program for three-year-old general education students in determining that Lakewood students are not receiving T&E.

Nevertheless, the ALJ found that the SFRA is not unconstitutional as applied to Lakewood and that Lakewood has failed to take steps to increase its ability to provide T&E. For example, the ALJ explained that Lakewood's transportation costs have continued to increase annually from \$23M in 2014-15 to \$31M in 2018-19, and there is little evidence that Lakewood has done everything possible to cut down these costs; further, there is no evidence that these rising costs are solely due to the increasing number of nonpublic school students in the district. Additionally, the ALJ noted that a large portion of Lakewood's budget is dedicated to special education due to the number of out-of-district placements (specifically, 343 special education students were placed in private schools for a cost of \$33M in 2018-19), but the record lacks evidence of any steps taken to set up a district-run program to save money by educating special education students in-district, as the Department has urged. The ALJ also reasoned that Lakewood has not made efforts to raise taxes to the extent permitted under the SFRA and does not offer a comprehensive preschool for three-year-old general education students. Further, the ALJ added that other legislation outside the SFRA has affected Lakewood financially, such as a tax levy cap on school districts and the annual Appropriations Act.

Finally, to address the deprivation of T&E, the ALJ recommended the Department to conduct a needs assessment with the goal of assessing Lakewood's educational needs and identifying ways to successfully address same. Through the assessment, the ALJ

hopes that the Department's transportation, special education, and preschool experts will be able to help identify strategies to deliver T&E to Lakewood's public school students.

In their submissions, petitioners agree with the ALJ that Lakewood students are not receiving T&E. Petitioners maintain that Lakewood's once rich curriculum has been reduced to bare-bones. Test scores have fallen, college enrollment is low, and any reported gains in those figures are insignificant. Petitioners explain that the district consists of low-income residents with a high minority population and limited English proficiency. Further, while Lakewood may offer educational opportunities to its students in areas such as vocational education, technology and the arts, petitioners argue that such programs provided through federal funding cannot be considered when evaluating whether students are receiving T&E as they are not funded through the district's operating budget.

While agreeing that Lakewood does not provide its students with the constitutionally required T&E, petitioners take exception to the ALJ's finding that the SFRA is not to blame for Lakewood's inability to provide T&E. First, petitioners argue that the ALJ applied the incorrect standard when she found that petitioners did not meet their "heavy burden," and instead should have applied a preponderance of the evidence standard. Petitioners then argue that the ALJ erred in finding that the district is not taxing up to its local fair share. According to petitioners, the ALJ improperly faulted Lakewood for not raising taxes by the maximum amount allowed during prior years when it did not need the additional funding, as well as for the failure of voters to pass a referendum. With respect to the Appropriations Act, petitioners maintain that they would not have had enough funding even with the amount that was cut in appropriations. Additionally, petitioners disregard the ALJ's findings on preschool because it was not addressed by the parties.

Petitioners emphasize that the SFRA provides funding based on 6,000 public school students, yet Lakewood is also required to pay transportation costs for an additional 30,000 private school students. Petitioners argue the ALJ erred in finding that rising transportation expenses are not totally attributable to the increasing number of nonpublic students. The record demonstrates that the district adds 2,500 to 3,000 nonpublic students each year, and the state monitors testified that Lakewood is operating its pupil transportation as efficiently as it can. Additionally, petitioners point out that the state monitors have not found ways to cut costs in special education. Finally, petitioners argue that the provision of advance aid is unsustainable and is a disguise for the failure to provide T&E; the ALJ should have found that the loans, as applied to Lakewood, are inconsistent with T&E. Accordingly, petitioners urge the Commissioner to reject the portion of the Initial Decision finding that SFRA is not unconstitutional as applied to Lakewood.

In their submissions, respondents take exception to the ALJ's conclusion that Lakewood is unable to provide T&E. Respondents argue that with the Department's assistance, the district has shown steady improvement on standardized test scores and graduation rates. Additionally, they contend that the district offers classes and opportunities to students in basic skills, vocational, arts and technology to prepare them for college, career and life. As such, respondents urge the Commissioner to reject this part of the Initial Decision.

Respondents, however, agree with the ALJ that the SFRA is not unconstitutional as applied to Lakewood. They argue that the ALJ appropriately applied a heavy burden on petitioners to demonstrate that the SFRA was solely or significantly to blame for any failure to provide T&E. Respondents are in accord with the ALJ's determination that Lakewood's fiscal mismanagement, general financial condition, and locally made choices have impacted

Lakewood's ability to provide a constitutionally-mandated education. Accordingly, respondents urge the Commissioner to reject the ALJ's conclusions regarding T&E.

Participant Tractenberg makes arguments similar to those of the petitioners. Specifically, he agrees with the ALJ that Lakewood cannot provide T&E to its public school students, but argues that: the ALJ applied the wrong burden with respect to whether the SFRA is constitutional; the ALJ's findings of fact do not support her conclusion that the SFRA is not significantly responsible for Lakewood's inability to provide T&E, and the ALJ's alternative explanations for Lakewood's financial situation are unsupported. Tractenberg further contends that the needs assessment ordered by the ALJ will not be helpful, and instead urges the Commissioner to take steps to forgive Lakewood's advance state aid repayments, support legislative action to adjust the SFRA's formula to respond to Lakewood's unique demographics, seek statutory changes so that the members of Lakewood's Board of Education accurately represents the public-school community rather than people who do not send children to public school, and consider a State takeover of the district.

Lakewood requests that the Commissioner reopen this matter and allow it to proceed as an intervenor – rather than a participant – so that it may present additional evidence of the significant progress and improvements the Board has made toward delivering T&E.⁵ Lakewood contends that it is providing T&E to its students, but that the funding formula of the SFRA is unconstitutional as applied to Lakewood.

Upon review of the record in this matter, the Commissioner disagrees with the ALJ that Lakewood is not providing T&E to its public school students. While the Commissioner acknowledges the ALJ's findings regarding the district's shortcomings, the record does not

⁵ The Commissioner denies Lakewood's request to reopen the case as a full record exists in this matter and such action would cause undue delay.

support a conclusion that Lakewood is failing to provide T&E. Notwithstanding, in light of the factual record elicited by the OAL, the Department is directed to conduct a comprehensive review of the District's organization, structure and policies to assess its compliance with the quality performance indicators in accordance with *N.J.A.C.* 18A:7A-11 to determine how the District can improve its educational program.

In *Abbott v. Burke (Abbott II)*, 119 *N.J.* 287 (1990), the New Jersey Supreme Court compared the educational opportunities available at affluent suburban schools and poorer urban districts to evaluate whether the urban schools were receiving a constitutional education. The Court looked at educational inputs, such as access to computers, science laboratories, foreign language instruction, music and art programs, vocational programs, and physical education. *Id.* at 359-62. The Court also explained that adequate physical facilities are also necessary for T&E so that children have an appropriate environment where they can learn. *Id.* at 362-63. Additionally, T&E can be measured by test scores, dropout rates, and attendance at college, in addition to teacher-student ratios and experience level of the staff. *Id.* at 366-68; 391. Similarly, in *Bacon, et al. v. New Jersey State Department of Education*, State Board Decision No. 4-03, decided January 4, 2006 at 39-40, the New Jersey State Board of Education evaluated whether districts were providing T&E and considered standardized test scores, dropout rates, and college attendance, in conjunction with “teacher-student ratios and the education and experience level of the professional staff, as well as facilities to accommodate appropriate class sizes, science labs, media centers and libraries, and the availability of advanced placement courses and programs for gifted students, art and music programs and quality physical education programs.”

While Lakewood's standardized test scores are below the State average, they have shown consistent improvement. For example, in the 2014-15 school year, 23 percent of high

school students met or exceeded expectations on the PARCC English assessment, and 5 percent met or exceeded expectations in math. By 2018-19, those scores rose to 33 percent for English and 21 percent in Math. Additionally, graduation rates were close to 75% in the 2014-15 school year and rose to 81% in 2018-19. With the exception of absenteeism, Lakewood has also met all of its Every Student Succeeds Act (ESSA) accountability targets. Additionally, while some of the educational opportunities at Lakewood have suffered cuts, including programs in industrial arts and auto mechanics, Lakewood still offers a range of classes and programs. Lakewood offers all of the required classes for graduation, and also offers a gifted program beginning in elementary school, along with high school Advanced Placement (AP) classes across several subjects, including calculus, English, Physics I and II, Spanish, and U.S. History. Lakewood offers art and music programs at every level, including elementary school. Specifically, the district offers band, chorus, and orchestra, as well as music lessons beginning in fourth grade. Furthermore, computer skills and library skills classes are offered beginning at the elementary level, and guidance counselors are available at all grade levels.⁶ While Lakewood only offers Spanish as a foreign language, it does provide opportunities for students to study other foreign languages online. Although Lakewood does have a high rate of teacher turnover and the student-teacher ratio in Lakewood's schools is higher than the State average, Lakewood did meet its ESSA facility accountability targets, with the exception of the middle school.

When considering the standards articulated in *Abbott* and *Bacon*, the Commissioner finds that the education provided by the Lakewood school district meets the constitutional threshold as students are prepared for college, career, and life under the NJSL.

⁶ Additional programs that are offered at Lakewood through Perkins or Title I grants include robotics, coding, horticulture, culinary, fashion and apparel, graphics design, photography and film, video technology, business data entry, and a technology classroom that has 3D printers, Apple TV, and a Mac Air Cart.

The following excerpt from *Abbott II* demonstrates the degree of deficiencies necessary to declare a failure to provide T&E:

In an elementary school in Paterson, the children eat lunch in a small area in the boiler room area of the basement; remedial classes are taught in a former bathroom. In one Irvington school, children attend music classes in a storage room and remedial classes in converted closets. At another school in Irvington a coal bin was converted into a classroom. In one elementary school in East Orange, there is no cafeteria, and the children eat lunch in shifts in the first 1 floor corridor. In one school in Jersey City, built in 1900, the library is a converted cloakroom; the nurse's office has no bathroom or waiting room; the lighting is inadequate; the bathrooms have no hot water (only the custodial office and nurse's office have hot water); there is water damage inside the building because of cracks in the facade; and the heating system is inadequate.

[*Abbott II*, 119 N.J. at 363.]

In evaluating the totality of the evidence, the Commissioner finds that while Lakewood may be struggling to provide its students with the premiere level of education that many have come to expect in New Jersey, these deficiencies do not rise to a constitutional deprivation. The record reflects that standardized test scores are below State averages, but the district is showing slow but steady improvement in that area. Lakewood offers a selection of educational programs, including multiple AP classes, as well as programs in music and art that begin at the elementary school level, which are more comprehensive and wide-ranging than those offered in the *Abbott* and *Bacon* districts. While some programs have suffered cuts, students still have a diverse array of educational course opportunities. The Commissioner acknowledges the lack of experience in Lakewood's teachers, however, in consideration of recognized teacher shortages, the improvement that the district has shown in test scores and graduation rates, together with the district's diverse curriculum, the Commissioner cannot conclude that Lakewood's students are not receiving T&E.

Because petitioners failed to meet the threshold inquiry of establishing Lakewood's failure to provide T&E, the Commissioner need not reach the issue of the constitutionality of the SFRA.⁷ Nevertheless, the Commissioner agrees with the ALJ, for the reasons thoroughly set forth in the Initial Decision, that the SFRA is constitutional as applied to Lakewood.

Accordingly, the Initial Decision of OAL is rejected in part and adopted in part for the reasons set forth above. The petition is hereby dismissed.

IT IS SO ORDERED.⁸



ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 16, 2021
Date of Mailing: July 16, 2021

⁷ For these same reasons, the Commissioner need not reach the issue raised in petitioners' exceptions regarding the burden of proof to be applied to the question of whether the SFRA is unconstitutional as applied to Lakewood.

⁸ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.