

149-24
OAL Dkt. No. EDU 11069-14
Agency Dkt. No. 156-6/14

New Jersey Department 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.

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.

Background and Procedural History

In a 2014 petition 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 Township Board of Education (Board or 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).¹

Following a hearing, the Administrative Law Judge (ALJ) found that Lakewood's public-school students are not receiving T&E, but concluded that petitioners failed to meet their burden of demonstrating that the lack of T&E derives in significant part from the SFRA. The ALJ found that the population boom in Lakewood Township over the past twenty years 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 students to out-of-district placements.

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. The ALJ found that although Lakewood had a budget surplus in 2010, it chose not to increase its levy to the cap for several years thereafter, despite being aware of population growth trends. Due to those choices, the district did not generate revenues that could have compounded over the years and was not taxing up to its local fair share. Relatedly, the ALJ found that Lakewood made little effort to exercise statutorily available tools to raise funds.

¹ Petitioners are parents of children who attend Lakewood's public schools. Lakewood and Paul Tractenberg, Esq., joined this matter as participants. 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. 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.

Additionally, the ALJ explained that although Lakewood's transportation costs have continued to increase annually from \$23 million in 2014-15 to \$31 million in 2018-19, there is little evidence that Lakewood has done everything possible to reduce those costs. Further, there is no evidence that these rising costs are solely due to the increasing number of nonpublic school students in the district. The ALJ also 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 students were placed in private schools for a cost of \$33 million in 2018-19), but the record lacks evidence of any steps taken to set up a district-run special education program to save money by educating these students in-district, as the Department has urged. The ALJ also noted that the SFRA provides greatly increased aid for in-district special education, as opposed to out-of-district special education, but found no evidence in the record that Lakewood even tried to avail itself of that option.

The ALJ also reasoned that Lakewood does not offer a comprehensive preschool for three-year-old general education students. The ALJ found no evidence that Lakewood even attempted to receive State financing for a preschool facility to accommodate more at-risk, non-special education children.

Finally, 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.

Following a review of the record, including the ALJ's Initial Decision and the exceptions and replies thereto, the Commissioner issued a decision concluding that petitioners failed to establish the lack of T&E in Lakewood. *Alcantara v. Hespe*, Commissioner Decision No. 149-21 (July 16, 2021). In doing so, the Commissioner relied upon improving standardized test scores,

success in meeting accountability targets, and the wide range of classes and programs offered to students. Nonetheless, the decision recognized that the quality of education in Lakewood could be improved, and therefore ordered the Department to conduct a comprehensive review of Lakewood's organization, structure, and policies to assess its compliance with quality performance indicators and to determine how it could improve its educational program. *Id.* at 7. As a result of the finding that Lakewood delivered T&E, the Commissioner did not reach the issue of the constitutionality of the SFRA. *Alcantara v. Hesper*, Commissioner Decision No. 149-21 (July 16, 2021).

Petitioners appealed, and the Appellate Division reversed and remanded the matter with instructions for the Commissioner to consider petitioners' substantive arguments pertaining to the SFRA. *Alcantara v. Allen-McMillan*, 475 N.J. Super. 58 (App. Div. Mar. 6, 2023).

On May 12, 2023, the Commissioner issued a letter directing the Department to expedite the comprehensive review of the Lakewood school district initially ordered in *Alcantara v. Hesper*, *supra*. The Commissioner indicated that the information that comprised the record before the OAL, the Commissioner, and the Appellate Division is now outdated and found that an updated record would assist the Department in identifying the root causes that led to the educational deprivations identified by the Appellate Division.

The Department retained Dr. Kimberly Markus, an education consultant who is also a former New Jersey Commissioner of Education, along with Public Consulting Group LLC, a management consulting firm that focuses on public sector clients, to complete the review. The report, entitled "Comprehensive Review of the Lakewood Public School District" (Comprehensive Report), was filed on March 1, 2024. The Comprehensive Report examined

five critical areas deemed relevant as influencing the provision of T&E in Lakewood: governance, curriculum and instruction, special education, finance, and transportation. The report closely evaluated each of these areas and presented a comprehensive analysis of each area's impact on T&E. The report's findings and conclusions are discussed in further detail below.

In response to the Comprehensive Report, petitioners² note that it confirms the conclusions of the ALJ and the Appellate Division that Lakewood students are not receiving T&E, and they urge the Department to remedy this denial as expeditiously as possible. According to petitioners, the Comprehensive Report does little to analyze the impact of the SFRA on the quality of education in Lakewood. Therefore, petitioners indicate that they do not feel the need to respond to the details of the report and instead choose to use their response to express their views regarding the final agency decision in this matter.

Petitioners take issue with the Comprehensive Report's framing of the obligation to provide T&E as an obligation of the district, rather than the State. Petitioners argue that the denial of T&E in Lakewood is primarily a function of the less-than-optimal performance of the SFRA and, accordingly, ultimate responsibility should be imposed on the State. Petitioners note that the SFRA has not been fully funded for 15 years, rendering any defense of its constitutionality at a disadvantage.³ Petitioners further contend that if the SFRA were functioning at an optimal level, it would not have been necessary for the district to receive

² A joint response was filed by Mr. Tractenberg and counsel for petitioners. For ease of reference, this decision will use the term "petitioners" when referring to this response, together with the statements and arguments made therein.

³ Petitioners acknowledge that the Governor's proposed budget for FY2024-25 would fully fund the SFRA if enacted.

\$215 million in advance state aid loans since 2015. Petitioners also argue that the Comprehensive Report set an improperly high burden on petitioners by stating that declaring the SFRA unconstitutional would require that the SFRA “be established as the singular cause for the denial of a thorough and efficient education.”⁴ Finally, petitioners set forth a number of suggestions for remediation, including forgiving the existing advance state aid loan balance, amending the SFRA, or passing separate legislation to provide additional funding to Lakewood.

Lakewood’s⁵ response identifies alleged factual errors in numerous areas of the Comprehensive Report. Lakewood objects to what it characterizes as the selective use of comments made by stakeholders, as well as to portions of the report dealing with issues which the reviewers allegedly did not discuss with Lakewood’s officials. According to Lakewood, the Comprehensive Report makes recommendations without discussion of the cost to the district and fails to analyze whether the recommendations will improve the provision of education to Lakewood students.⁶

Analysis

Upon review of the record, including the ALJ’s Initial Decision, exceptions and filings made in response to the Initial Decision, the supplemental information contained in the Comprehensive Report, and the parties’ written responses to the Comprehensive Report, the Assistant Commissioner concludes that the SFRA is not the significant cause of Lakewood’s

⁴ Comprehensive Report at 30.

⁵ The filing indicates that it is the response of Superintendent Dr. Laura A. Winters and the Superintendent’s Executive Leadership Team, and that it has been reviewed by both a committee of the Board and individual Board members.

⁶ The majority of these areas concern portions of the report not relied upon herein and, accordingly, they are not reviewed in detail. To the extent that Lakewood’s response does address items discussed herein, the response is detailed in the applicable section of the analysis below.

failure to provide T&E and that therefore, the SFRA is not unconstitutional as applied to Lakewood. “It is well recognized that legislative enactments enjoy a presumption of validity,” and when a constitutional challenge is raised, “there is a strong presumption that the statute is constitutional.” *Abbott ex rel. Abbott v. Burke* (“*Abbott XX*”), 199 N.J. 140, 235 (2009) (internal citations omitted). “Whether 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 light of the circumstances as they appear.” *Ibid.* Here, the constitutionality of the SFRA as applied to Lakewood “turn[s] on proof that [petitioners] suffer educational inequities and these inequities derive, in significant part, from the funding provisions” of the SFRA.⁷ *Abbott v. Burke* (“*Abbott I*”), 100 N.J. 269, 296 (1985).

The SFRA is a weighted school funding formula through which districts fund their budgets using a combination of local levies and State aid, which includes multiple categories of aid, discussed in more detail below.⁸ See N.J.S.A. 18A:7F-43 to -66. According to the legislative findings, the 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).

Equalization aid is a wealth-equalized category of State aid to school districts. The amount of equalization aid that a district receives is based, in part, on measures of local fiscal capacity to raise revenue to support the school district. The first component in calculating a

⁷ Based on this principle, the Acting Commissioner declines to apply the higher standard set forth in the Comprehensive Report – that the SFRA must be the “singular” cause for the educational inequities in Lakewood.

⁸ Although each type of aid discussed herein is categorized, these categories are all part of the district’s general fund revenue.

district's equalization aid is determining its adequacy budget, which is an estimate of a district's cost of providing educational opportunities to its students that are consistent with State standards and incorporates the characteristics of the student body. The calculation begins with a base per pupil amount, which reflects the cost of educating a student included in the district's resident enrollment in grades kindergarten through five who does not have any additional needs.⁹ *N.J.S.A.18A:7F-51(a)*. Next, this base per pupil amount is augmented using weights that account for students who are: enrolled in middle school or high school; "at-risk" (meaning that the student lives in a household in which income is no greater than 185 percent of the federal poverty threshold); English language learners; or enrolled in a county vocational school district.¹⁰ *Ibid.*

The adequacy budget also accounts for the provision of special education services, employing a census-based model that funds special education based on the assumption that a fixed percentage of the district's resident enrollment requires special education services at a specific excess cost. *N.J.S.A. 18A:7F-51(e)*.¹¹ Two-thirds of this cost is added to the district's

⁹ The base per pupil amount is established by the Educational Adequacy Report (EAR), which is issued by the Governor to the Legislature every three years. *N.J.S.A. 18A:7F-49; N.J.S.A. 18A:7F-46(b)*. The 2023 EAR is available at <https://www.nj.gov/education/stateaid/2223/EAR2023.pdf> (last visited March 13, 2024). For fiscal year (FY) 2023, the base per pupil amount was \$12,451. 2023 EAR at 5.

¹⁰ The EAR establishes these weights. *N.J.S.A. 18A:7F-49*. The SFRA also includes a county-level geographic cost adjustment. *N.J.S.A. 18A:7F-51(a)*.

¹¹ The percentage of students requiring special education services is based on the statewide average classification rate established in the EAR. *N.J.S.A. 18A:7F-51(e)*. For FY2023, the classification rate was 15.9 percent and the average excess cost was \$19,524. 2023 EAR at 11-12.

adequacy budget.¹² *Ibid.* Finally, the adequacy budget includes an allotment for students who receive speech-only services.¹³ *Ibid.*

The second component of calculating a district's equalization aid is determining its local fair share (LFS), which is an estimate of the amount that a district is able to raise through local taxation to support its education expenditures. This calculation considers two economic factors: the district's equalized property valuation and aggregate income, as determined based on New Jersey gross income tax returns.¹⁴ *N.J.S.A. 18A:7F-52(a)*. If a district's adequacy budget is greater than the LFS, the district's equalization aid equals the difference between the two; if the LFS exceeds the adequacy budget, the district does not receive equalization aid. *N.J.S.A. 18A:7F-53*.

Districts also receive security aid, which includes two components. First, districts receive a flat per pupil amount, multiplied by the district's resident enrollment.¹⁵ *N.J.S.A. 18A:7F-56*. Second, districts receive a per pupil amount that increases as the percentage of low-income students in the district's resident enrollment increases.¹⁶ *Ibid.* This per pupil amount is multiplied by the number of low-income students included in the district's resident enrollment. *Ibid.*

¹² The remaining one third is funded through special education categorical aid, which is dispersed to districts without regard to any measure of a district's wealth. *N.J.S.A. 18A:7F-55*.

¹³ For FY2023, the speech-only classification rate was 1.61 percent and the average excess cost was \$1,270. *N.J.S.A. 18A:7F-51(e)*; 2023 EAR at 11-12.

¹⁴ Each of these factors is multiplied by a Statewide rate, with the products being summed and divided by two; the resulting amount is the LFS. *N.J.S.A. 18A:7F-52(a)*.

¹⁵ The FY2023 per pupil amount was \$86. *N.J.S.A. 18A:7F-56*; 2023 EAR at 10.

¹⁶ For FY2023, the per pupil amount for the second component increases to a maximum of \$519 per pupil once the low-income concentration is equal to or greater than 40 percent. *N.J.S.A. 18A:7F-56*; 2023 EAR at 10.

Districts receive transportation aid for each student for whom the district is required to provide transportation, including nonpublic students. *N.J.S.A. 18A:7F-57*. Districts receive a base amount for each student who does not have any special transportation needs, plus an additional fee per mile between the student’s home and school.¹⁷ *Ibid.* For students who have special transportation needs – such as the need for a wheelchair on the school bus, a one-to-one aide or nurse assigned to the student, or transportation to an extended school year program – districts receive an increased base amount for each student, plus a mileage fee.¹⁸ *Ibid.*

On top of the transportation aid allocated for each nonpublic student, the State bears additional costs for nonpublic student transportation. For nonpublic school students, districts are subject to a maximum per pupil expenditure.¹⁹ *N.J.S.A. 18A:39-1a*. As the maximum increases beyond the amount of \$710 set for the 2001-2002 school year, the additional cost is borne by the State. *Ibid.*

Districts that educate students with higher special education costs receive additional funding in the form of extraordinary special education costs aid. This type of aid reimburses school districts for a portion of the costs incurred in educating students with disabilities in various educational settings. Specifically: 1) for students educated in a public school setting with general education peers, districts are reimbursed for 90 percent of the cost of instruction

¹⁷ For FY2023, the base amount is \$481.37 per pupil, plus \$13.17 per mile. *N.J.S.A. 18A:57(b)*; 2023 EAR at 10.

¹⁸ For FY2023, the base amount is \$3,355.31 per pupil, plus \$6.40 per mile. *N.J.S.A. 18A:57(b)*; 2023 EAR at 10.

¹⁹ If a district is unable to secure transportation between home and school for an eligible nonpublic school student within this limit, the district can satisfy its statutory obligation to provide transportation by making an aid-in-lieu-of transportation payment to the parent or guardian. *N.J.S.A. 18A:39-1.6*. Accordingly, the district’s cost to transport a nonpublic student should never exceed the statutory maximum.

and support services that exceed \$40,000; 2) for students educated in a public school setting who are in self-contained classrooms, districts are reimbursed for 75% of the cost of instruction and support services that exceed \$40,000; and 3) for students educated in a private, out-of-district placement, districts are reimbursed for 75 percent of the tuition costs that exceed \$55,000. *N.J.S.A. 18A:7F-55*.

In addition to the above principles, it is important to note that students enrolled in an approved private school for students with disabilities (APSSD) are included in the district's enrollment count for State aid purposes. See *N.J.S.A. 18A:7F-45* (including in the definition of "resident enrollment" a pupil who is a resident of the district and is enrolled in a "private school to which the district of residence pays tuition"). Accordingly, for purposes of calculating equalization aid, special education categorical aid, and security aid, a student enrolled in an APSSD is counted on the same basis as a student who attends Lakewood's public schools.²⁰

Throughout the proceedings in this matter, petitioners have argued that the SFRA is unconstitutional as applied to Lakewood because it does not take Lakewood's unique demographics into account. Specifically, petitioners cite Lakewood's extraordinary costs in providing transportation and special education services to more than 30,000 nonpublic school students.²¹ However, the record demonstrates that Lakewood's own choices and management issues have resulted in the unavailability of funds that could and should have been used to

²⁰ As noted above, the district may also receive extraordinary special education costs aid for students enrolled in APSSDs, based on the criteria set forth in *N.J.S.A. 18A:7F-55*.

²¹ As of 2019, Lakewood had approximately 6,000 public school students and more than 30,000 private school students. Initial Decision at 65. Lakewood's response to the Comprehensive Report indicates that Lakewood currently has approximately 5,000 public school students and more than 40,000 nonpublic students. Lakewood Response at 1.

provide T&E to its students. The ALJ found that these issues existed at the time of the Initial Decision; the Comprehensive Report found that the issues persist today.

The SFRA anticipates that both the State and the local district will contribute to the district's budget in amounts determined by the district's relative wealth. Our Supreme Court has long upheld the sharing of financial responsibility for schools between the State and local districts. *Robinson v. Cahill*, 62 N.J. 473, 510 (1975). Accordingly, the Court has considered a municipality's ability to raise funds to support its portion of school funding to be critical when analyzing the formula's constitutionality. Indeed, when finding previous funding regimes unconstitutional as applied to certain districts, the Supreme Court specifically relied upon those districts' *inability* to raise revenue due to the lack of a tax base and municipal overburden. *Abbott by Abbott v. Burke*, 119 N.J. 287, 357 (1990) (finding that municipal overburden "effectively prevents districts" from raising money to support education in special needs districts); *see also Robinson v. Cahill*, 69 N.J. 449, 465 (1976) (identifying the possibility of an as-applied challenge based upon a "showing of inability at the local level" to contribute sufficient funding). The Court reasoned that, even at full State funding, such districts could not achieve a thorough and efficient education due to the lack of local resources. That is simply not the case for Lakewood, which 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. Nothing in the record supports a finding that Lakewood suffers from municipal overburden to a degree that it cannot raise revenue to support its public schools and reduce the impact of transportation and special education costs.

As the ALJ found, Lakewood’s decision to not maintain adequate local fair share contributed to the district’s current fiscal problems. Initial Decision at 96-97. Lakewood had a \$5 million surplus in 2010. Initial Decision at 65. Lakewood chose not 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. Initial Decision at 96-97. From 2014 to 2018, Lakewood was not taxing up to its LFS and lost not only the increased revenue from those years, but the compounding value as well. *Id.* at 60, 71, 97. Over fiscal years 2015 through 2018, Lakewood raised \$31.5 million less than it would have had it taxed at its LFS level. *Id.* at 71. Furthermore, Lakewood chose not to avail itself of opportunities to present voters with a referendum to increase the school tax levy, as permitted by *N.J.S.A.* 18A:22-40 and *N.J.S.A.* 18A:7F-39, in any year except 2016.²² *Id.* at 97-98. As a consequence of all of these decisions, Lakewood’s school-tax rate was below the state average and below other districts. *Id.* at 52; *Cf. Abbott*, 119 N.J. at 355 (noting that special needs districts lacked resources but already had higher-than-average school tax rates and local tax levies). Lakewood only tried on one occasion in 2016 to raise additional money to help with transportation costs, which was unsuccessful. The Acting Commissioner concurs with the ALJ’s supported finding that Lakewood failed to take advantage of opportunities under the funding scheme to ameliorate its financial difficulties. *Id.* at 97. The SFRA cannot be solely blamed for the substantial loss of revenue attributable to Lakewood’s tax-related choices.

Additionally, the SFRA is not the only legislation that affects a district’s finances. *N.J.S.A.* 18A:7F-38 – which is not a provision of the SFRA – places a cap on the district’s tax levy, limiting

²² The 2016 referendum, which was aimed at providing courtesy busing, a non-T&E item, was rejected by the voters. Initial Decision at 63.

the district's ability to raise revenue. With the tax levy comprising a sizable portion of a district's funding, any restriction on the amount of the levy has financial consequences, separate and apart from the amount of State aid the district receives under the SFRA. The annual Appropriations Act also affects the amount of money districts receive through the SFRA. From FY2010 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 their 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.

The record also demonstrates severe deficiencies in Lakewood's fiscal management, including its failure to keep track of expenditures, records, and data and questionable spending practices. For example, testimony demonstrated that there were no purchase orders in place for students sent to out-of-district placements. Initial Decision at 36. The district did not keep an accurate position control roster reconciled with the names of staff. *Ibid.* An auditor from the Office of Legislative Services testified that an audit of Lakewood found financial transactions that were not consistent with government auditing standards, a lack of control environment leading to a lack of stability, lax reconciliation procedures, a lack of supporting documentation, Board approvals of contracts without review, and other questionable expenses. *Id.* at 54-44. The audit also noted that, in terms of special education costs, there was a lack of proper approval, tuition documentation, and attendance records for students placed in unapproved

nonpublic schools. *Id.* at 76. The New Jersey State Aid Audit Unit determined that poor record-keeping resulted in Lakewood incorrectly reporting hundreds of students on its Application for State School Aid (ASSA). *Id.* at 57.

Attention to administrative and financial detail remains an issue in Lakewood. There were significant data discrepancy and reporting issues related to special education State Performance Plan indicators and categorization of students by placement type. Comprehensive Report at 5. A financial audit noted that there are significant deficiencies in Lakewood's vendor management controls, payroll processing controls, financial close controls, and governance and IT cycle controls. *Id.* at 6. The Comprehensive Report found that the Board is not approving vendors before payment is issued, as required. *Id.* at 10. The transportation review noted that many nonpublic students do not have a student identification number in the District Report of Transported Resident Students (DRTRS), presenting a risk that students might be counted and funded in multiple counties. *Id.* at 20. A spot-check of transportation documents revealed several that listed the Township of Branchburg rather than the Lakewood Public School District as the contracting unit, which "could indicate a systemic lack of legal, procurement, and financial review and oversight of bid documents." *Id.* at 21.

The pervasive errors and questionable practices in Lakewood's record-keeping result in the inefficient use of funds.²³ If the Board is not properly vetting its vendors and only approving payments after services have been rendered, there is a risk that the district is overcharged. This practice is of even greater concern when paying for students' out-of-district

²³ Despite petitioner's suggestion to the contrary, the Assistant Commissioner does not find that the fault for these errors lies with the State monitor. It is not the monitor's responsibility to double-check the work of each member of Lakewood's staff.

placements or for special education services in nonpublic schools; the necessity of documenting tens of millions of dollars for those expenses, and thereby ensuring that all payments are proper, should be paramount. Furthermore, when students are incorrectly categorized or omitted from the rolls, Lakewood may be losing out on State aid for those students.

The record further reflects that transportation and special education costs accounted for more than half of the district's budget in 2017-2018. Initial Decision at 65. The financial impact of these areas was no surprise to the district. Through a Needs Assessment issued by the Department in 2009, when Lakewood was still running a surplus, the Department recommended that Lakewood take steps to reign in transportation and special education costs. Initial Decision at 74. This was followed by a 2014 Audit that made similar recommendations and observed the inevitable population trends. *Id.* at 75. Lakewood has not taken reasonable steps to control its special education and transportation costs despite receiving advice to do so for over a decade. Initial Decision at 77. In the 2009 Needs Assessment, the DOE noted that courtesy busing was contributing to the district's financial strain. *Id.* at 99. While the district no longer provides courtesy busing at its own expense, that practice was not stopped until 2016. *Id.* at 100. The cost of courtesy busing services – totaling \$4 million for the 2008-2009 school year,²⁴ and presumably similar for the other years in which it was provided – drained resources from the district that could have been used to provide T&E. The 2014 Audit observed that Lakewood used gendered buses and that tiering bell times could save \$6.7 million. Initial Decision at 75-76. At the OAL hearing, multiple experts, including one testifying on behalf of petitioners, stated that transportation costs could be reduced if route sharing were increased,

²⁴ Initial Decision at 100.

but it's unclear if any such initiatives have been explored. *Id.* at 10-12; 55-56. The ALJ found that Lakewood admitted it could stagger their school schedules to greatly reduce transportation costs, but noted that the record was unclear on whether such staggering had ever occurred. *Id.* at 100.

In terms of current transportation practices, the Comprehensive Report indicates that there is not sufficient separation between Lakewood as a contracting agency and the Lakewood Student Transportation Authority (LSTA) as a vendor. Comprehensive Report at 6. Additionally, the review notes that a single employee may have been employed full time by both Lakewood 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," in addition to the duplication of salary. *Id.* at 20. Furthermore, there are potential opportunities to lower prices by bidding tiered routes as packages rather than individually. *Id.* at 6. The Report notes that some buses run four to eight routes a day at a cost of over \$200,000 per bus, and finds extreme examples of the same bus being used for multiple routes. *Id.* at 145, 153. It also observes that for students transported by the district rather than the LSTA, buses run less full and costs per student are higher. *Id.* at 152.

Although the Commissioner acknowledges that Lakewood's demographics result in higher nonpublic transportation costs than in other districts, when the SFRA is fully funded, the majority of nonpublic transportation costs are supported by the State through a combination of the transportation aid for each nonpublic student and the State's assumption of the portion of the cost that exceeds \$710. By way of example, testimony indicated that Lakewood paid \$1,000 for each bused student in FY2018. Initial Decision at 21. Under the SFRA, that year

Lakewood would have received a minimum of \$466 for each nonpublic student who was required to be transported.²⁵ With the State bearing the cost in excess of \$710, that leaves \$244 per nonpublic student that must be covered by the district's tax levy (the \$710 local share per student reduced by the \$466 State aid payment per student); for 30,000 nonpublic students, the total would be approximately \$7.3 million. This cost is certainly substantial, but with an anticipated tax levy of \$96.9 million for FY2018,²⁶ Lakewood would have \$89.6 million remaining in its levy to use – in combination with other categories of State aid it received – to provide T&E to its students.

The 2009 Needs Assessment also recommended that Lakewood develop strategies to educate more of its special education students in-district, which would both save money and result in a greater allocation of extraordinary special education costs aid, which is structured to provide more aid for students who are educated in the district than for those in private placements. Initial Decision at 99-100. However, the ALJ concluded that petitioners had failed to demonstrate that Lakewood had taken steps to save money in this manner. *Ibid.* Furthermore, the ALJ concluded that even if none of the 343 students sent to out-of-district placements in the 2018-2019 school year (at a cost of \$33 million) could have been educated in-

²⁵ The base and mileage amounts are established by the EAR every three years and adjusted by the Consumer Price Index (CPI) for the following two years. *N.J.S.A.* 18A:57(b). For FY2017, the base amount was \$442.18 per pupil, plus \$12.10 per mile. 2023 EAR at 10. Because districts are required by *N.J.S.A.* 18A:39-1 to provide transportation to elementary students who reside more than two miles from school, the minimum transportation aid that the district would receive under the SFRA for each student was \$466.31 (\$442.18 + \$12.10 + \$12.10). This amount would have been slightly higher in FY2018 due to the CPI adjustment. The amount would also increase for any student who lived more than two miles from school, or for students with special transportation needs. However, for purposes of clarity, the lowest possible figure – the base amount from FY2017 – is used in this example.

²⁶ See Lakewood's User Friendly Budget, https://www.nj.gov/education/finance/fp/ufb/2017/reports/29/2520/UFB18_2520.pdf (last visited March 13, 2024.)

district, Lakewood could have applied for additional aid based on an usually high rate of low-incidence disabilities.²⁷ *Id.* at 101. Petitioners did not present any evidence that Lakewood availed itself of this opportunity. *Ibid.* Nor had Lakewood applied for facilities funding to increase its ability to serve special education students in-district, despite the fact that Lakewood's Superintendent testified that a barrier to providing in-district special education services was a lack of space. *Id.* at 17, 99-100.

The Comprehensive Report undermines the Lakewood's Superintendent's claim that so many out-of-district placements are necessary because of insufficient space within the District.²⁸ Initial Decision at 17. The Report notes that Lakewood has made substantial investments in state-of-the-art related therapy equipment but is underutilizing those resources because of the number of students with disabilities who are not educated in the public-school buildings. Comprehensive Report at 5. As the Comprehensive Report observes, "For students with disabilities to improve their academic achievement and reduce the achievement gap with their nondisabled peers, they need to be included in the core curriculum and receive evidence-based interventions . . . throughout a continuum of special education services which are provided in the Least Restrictive Environment (LRE), where, to the maximum extent appropriate, a student with a disability is educated with peers who are not disabled." *Id.* at 15. Notably, Lakewood has not met targets related to LRE and has been found to be significantly

²⁷ See *N.J.S.A.18A:7F-55(g)*.

²⁸ The Superintendent also undermined that claim herself to the extent that she conceded that the Board could have sought voter approval for additional facilities but failed to do so. Initial Decision at 18.

disproportionate with regard to white students being placed in separate settings.²⁹ *Id.* at 14. The Comprehensive Report concludes that there is room in most of the buildings in the district to provide special education services. *Id.* at 26.

Lakewood’s response to the Comprehensive Report indicates that because nonpublic students are not entitled to receive individualized services with respect to disabilities, students with significant disabilities typically leave nonpublic schools to enroll in Lakewood’s public school system. Lakewood then becomes responsible for providing the intensive assistance that these students need, including the obligation of finding out-of-district placements at increased costs. Lakewood response at 1. Although Lakewood correctly notes that it is responsible for these students once they have enrolled in the district, as the Comprehensive Report concluded, creating special education programming in-district “could be a huge cost saver in the long run and best for students.” *Id.* at 26. The Assistant Commissioner concurs with the ALJ’s finding that the record contains “scant evidence of the district’s efforts to educate more of these children in-district, which could save Lakewood substantial sums and result in more aid.” *Initial Decision* at 101.

Conclusion

As stated by the Appellate Division, “the State has a continuing obligation to ‘keep SFRA operating at its optimal level.’” *Alcantara v. Allen-McMillan, supra*, 475 N.J. Super. at 71 (quoting *Abbott XX, supra*, 199 N.J. at 146). However, this principle does not give districts a

²⁹ Lakewood’s response to the Comprehensive Report takes issue with the disproportionality finding, arguing that the Department’s data does not take into account the total population of Lakewood students. Lakewood response at 25. However, that argument has previously been rejected by the Appellate Division. See *Bd. of Educ. of the Twp. of Lakewood v. N.J. Dep’t of Educ.*, No. A-0709-21, 2023 N.J. Super. Unpub. LEXIS 2155 (App Div. Nov. 27, 2023), *pending certification*.

blank check to spend money unwisely at the expense of the State’s taxpayers. In light of Lakewood’s tax-related choices that decreased revenue, the significant deficiencies in Lakewood’s spending practices, and Lakewood’s failure to control its transportation and special education costs, the Assistant Commissioner concludes that Lakewood’s failure to provide T&E to its students does not derive, in significant part, from the provisions of the SFRA.

Accordingly, the petition of appeal’s claim regarding the constitutionality of the SFRA as applied to Lakewood is hereby denied.

IT IS SO ORDERED.³⁰



ASSISTANT COMMISSIONER OF EDUCATION³¹

Date of Decision: April 1, 2024

Date of Mailing: April 1, 2024

³⁰ 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.

³¹ Pursuant to *N.J.S.A. 18A:4-34*, this matter has been delegated to Assistant Commissioner Cary Booker.