290-19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Brick, Ocean County, et. als.,

Petitioners,

v.

Lamont Repollet, Commissioner of Education, and Elizabeth Maher Muoio, New Jersey State Treasurer,

Respondents.

Synopsis

Eight local boards of education, five municipalities and one individual taxpayer challenged recent amendments to the School Funding Reform Act of 2008 (SFRA), *N.J.S.A.* 18A:7F-43 et. seq. Petitioners asserted that the school funding formula as it is now written: requires that they pay more than their fair share of local property taxes to financially support the public schools; has resulted in an underfunding of State aid; and has created a funding formula that is neither equitable, predictable nor constitutional. Petitioners further claim that they have been deprived of due process and equal protection under the law. Respondents filed a motion to dismiss, arguing that the petition fails to state a claim upon which relief can be granted.

The ALJ found, *inter alia,* that: the five municipalities lack standing to bring claims on behalf of their constituent taxpayers regarding whether the SFRA unfairly burdens those taxpayers or whether it deprives children of a thorough and efficient education (T&E); municipalities do not have the legal capacity to challenge State action based on equal protection grounds; boards of education lack standing to bring claims on behalf of taxpayers or on equal protection grounds, but do have standing to raise claims of educational inadequacy and inequality, though their claims are not viable; the school boards herein cannot rely on *Abbott v. Burke* cases to support their contention that the SFRA as amended is unconstitutional, as the educational disparity *Abbott* was concerned with readily dwarfs the claims raised herein; as to the taxpayer petitioner in this matter, she does have standing to assert that the SFRA amendments deny her children T&E, and to bring claims of unfair taxation as well as an equal protection claim, but has failed to state a viable equal protection claim. Based on the foregoing, the ALJ dismissed the petition.

Upon a comprehensive review of this matter, the Commissioner agreed with the ALJ – for the reasons thoroughly analyzed and discussed in the Initial Decision – that the petition must be dismissed on the basis of standing and for failure to state a claim. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed.

October 31, 2019

OAL Dkt. No. EDU 02207-19
Agency Dkt. No. 19-1/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Brick, Ocean County; Board of Education of the Township of Jackson, Ocean County; Board of Education of the Manalapan-Englishtown Regional School District, Monmouth County; Board of Education of the Toms River Regional School District, Ocean County; Board of Education of the Township of Lacey, Ocean County; Board of Education of the Freehold Regional High School District, Monmouth County; Board of Education of the Township of Weymouth, Atlantic County; Board of Education of the Township of Ocean, Monmouth County; The Township of Brick Ocean County; The Township of Toms River, Ocean County; The Borough of South Toms River, Ocean County; The Borough of Beachwood, Ocean County; The Borough of Pine Beach, Ocean County; and Stephanie Wohlrab,

Petitioners,

v.

Lamont Repollet, Commissioner,
New Jersey Department of Education
and Elizabeth Maher Muoio,
New Jersey State Treasurer,

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 petitioners pursuant to *N.J.A.C.* 1:1-18.4, and the respondents' reply thereto.

Petitioners in this matter are eight local boards of education, five municipalities, and one individual taxpayer. Collectively, petitioners challenge the recent amendments to the School Funding Reform Act of 2008 (SFRA), *N.J.S.A.* 18A:7F-43 *et seq*, alleging that the new school funding formula is unconstitutional and inequitable as it results in an underfunding of State aid and forces petitioners to pay more than their fair share in local property taxes.

The Administrative Law Judge (ALJ) granted the respondents' motion and dismissed the petition. The ALJ found that the five municipalities lack standing to bring claims on behalf of their constituent taxpayers regarding whether the SFRA unfairly burdens those taxpayers or whether it deprives children of a thorough and efficient education (T&E); further, municipalities do not have the legal capacity to challenge State action based on equal protection grounds. Similarly, the ALJ found that the boards of education lack standing to bring claims on behalf of taxpayers or on equal protection grounds, but found that they do have standing to raise claims of educational inadequacy and inequality. Regarding the taxpayer petitioner, the ALJ found that she has standing to assert that SFRA amendments will deny her children T&E and to bring claims of unfair taxation, as well as an equal protection claim.

With respect to the T&E claim, the ALJ found that the school board petitioners and taxpayer petitioner failed to state a claim upon which relief could be granted. Specifically, the ALJ found that the petition does not demonstrate that "the students' educational opportunities are so deficient as to jeopardize their futures." (Initial Decision at 12). The *Abbott v. Burke* line of cases do not support their contention because the educational disparities in *Abbott* are of such a high magnitude that they are not comparable to the educational concerns in this matter. 119 *N.J.* 287 (1990) (*Abbott II*). Moreover, the ALJ found that claims involving "inequitable local

taxation cannot form the basis of a viable constitutional claim under the T&E clause." (Initial Decision at 13).

Additionally, the ALJ concluded that the petitioning boards have failed to state a claim that the New Jersey constitution entitles them to the funding set forth by the pre-amendment SFRA. The SFRA was declared constitutional in *Abbott v. Burke*, 199 *N.J.* 140 (2009) (*Abbott XX)* with respect to the educational inequality claims made only by Abbott districts, and the petitioners here are not Abbott districts. Finally, the taxpayer petitioner's equal protection claim alleges that she suffers from an unequal tax burden because she is required to pay more than her "fair share" in property taxes to support her local school district. The ALJ found that New Jersey courts are unwilling to decide school funding disputes through the equal protection clause, and therefore dismissed the claim, thus dismissing the entire petition.

In their exceptions, petitioners argue that the ALJ erred in failing to apply the proper legal standard on a motion to dismiss because she did not afford petitioners every reasonable inference of fact. For example, when the ALJ found that the educational deprivations in *Abbott* "dwarf" those presented by petitioners, and that therefore petitioners' claim could not be sustained, the ALJ compared and contrasted the educational disparities. Petitioners contend that "[e]ven if the educational inadequacies in *Abbott* were more extensive than Petitioner school districts . . . that would not automatically render Petitioners['] claims without merit." (Petitioners' Exceptions at 3). Additionally, many issues of material fact were also presented, and "whether Petitioners can ultimately prove their case (and demonstrate an entitlement to a particular level of funding) is a factual determination, which can only be made after a full record has been developed." (*Id.* at 5). Further, to the extent that the ALJ found the pleadings were not

specific or needed clarity, petitioners maintain that the proper remedy would be to allow for an amended petition, rather than dismissal.

Petitioners also take exception to the ALJ's characterization of this case as one about unequal taxation, rather than unequal education. The petition makes clear that due to inadequate state aid, the petitioner school districts cannot deliver T&E without placing an excessive burden on taxpayers. The educational deficiencies resulting from underfunding include staff reductions, the reduction of course offerings, the discontinuance of extra-curricular activities, and the inability to fund text book purchases, technology needs, or building and grounds repairs. Petitioners emphasize that the real cause of action is one of unequal education, and that unequal taxation is simply a consequence of that. Additionally, petitioners point out that the goal of the legislature in enacting the SFRA was to create a funding formula that is fair, equitable and predictable. The SFRA amendments are inconsistent with that goal as they result in certain districts facing uneven and inequitable fiscal challenges. Further, petitioners argue that because the SFRA amendments will result in an unequal and unpredictable funding pattern, it violates petitioners' equal protection rights.

Petitioners contend that the ALJ erred in relying on *Stubaus v. Whitman*, 339 *N.J. Super.* 38 (App. Div. 2001) for the conclusion that petitioners lack standing.[1] While *Stubaus*, only involved claims of disparate and burdensome tax rates, this matter involves educational deprivations and the failure to comply with T&E requirements. Petitioners claim that the ALJ should have placed more reliance on *Elizabeth Board of Education v. New Jersey State Department of Education, Division of Early Childhood Education*, EDU 09004-15, Initial Decision (July 14, 2017), *adopted* Commissioner's Decision No. 251-17, decided

[1] The Commissioner notes that the ALJ did, in fact, find that the taxpayer petitioner had standing, and instead dismissed the petition on the basis that the taxpayer petitioner failed to raise a viable claim upon which relief can be granted.

August 24, 2017, as it is substantially the same as this matter since both cases involve the inability to deliver required services to students due to insufficient funding. In *Elizabeth*, the ALJ made factual determinations only after hearing testimony and reviewing evidence, ultimately finding that the budgetary shortfall was due to the board's own conduct. Similarly, in *Abbott v. Burke*, 206 *N.J.* 332 (2011) (*Abbott XXI*), a Special Master heard testimony from Superintendents before determining whether the school districts could provide their students with T&E, despite reduced levels of state aid. Here, petitioners contend that the ALJ made findings of fact – such as that the allegations here differed from those in *Elizabeth* – without having developed a factual record through testimony and evidence, and disregarding that allegations in the petition are assumed to be true for the purposes of a motion to dismiss.

Petitioners point out that the ALJ failed to address their arguments regarding the unconstitutionality of the SFRA amendments as it applies to petitioners. The funding formula fails to account for municipal tax abatements, which skew the formula by artificially depressing a municipality's ratable property tax base. The ratable property base does not consider improvements on a property that are subject to Payments in Lieu of Taxes (PILOTs), which divert funds away from school districts to the municipality, thus cutting school districts out of the revenue source. Essentially, the wealth of municipalities with an artificially depressed ratable property tax base is distorted because the PILOTs are not considered in the funding formula. Therefore, the local fair share of the petitioning districts is inequitably increased.

In reply, respondents urge the Commissioner to adopt the Initial Decision. First, respondents argue that the ALJ properly found that the petitioner municipalities did not have standing to bring T&E or equal protection claims on behalf of their residents, and that the petitioner school boards did not have standing to raise claims involving an unequal tax burden on

behalf of taxpayers. Second, respondents maintain that "[p]etitioners' ability to plead different, more specific, facts will still not permit it to claim that inequitable local taxation is an actionable equal-protection violation under the T&E Clause of the State Constitution." (Respondents' reply at 4). Third, respondents contend that petitioners' request to amend the petition is useless because the ALJ found that their causes of action are unstainable as a matter of law. Finally, respondents argue that the ALJ properly found that the case involves one of unequal tax burden, and not unequal education, as petitioners have not alleged that students are being denied T&E since they are still being provided a constitutional education.

Upon a complete review of the record in this matter, the Commissioner agrees with the ALJ – for the reasons thoroughly analyzed and expressed in the Initial Decision – that the petition must be dismissed on the basis of standing and for failure to state a claim. The Commissioner concurs with the ALJ that the petition does not properly allege a claim that the SFRA as amended denies students in the petitioning districts access to T&E, nor have the petitioners raised a viable claim that their State aid was under-funded. The Commissioner further agrees that since New Jersey courts have declined to decide school funding disputes through the equal protection clause, the taxpayer petitioner's claim that she has been required to pay more than her fair share in property taxes must also fail.

The Commissioner does not find petitioners' exceptions to be persuasive. The ALJ applied the appropriate standard in deciding the motion to dismiss, and made determinations on the basis of law regarding the issues of standing and whether petitioners alleged viable claims; therefore, a full hearing with testimony is unnecessary. Additionally, although petitioners allege that certain budget cuts will result from the decreased funding – and even assuming that every educational deficiency alleged by petitioners is true – petitioners still fail to

demonstrate that the school districts cannot deliver T&E. Instead, petitioners argue that taxpayers have to pay more than their fair share in property taxes in order to provide the necessary funding for the local school districts. But as the ALJ found, such arguments on the basis of equal protection have not been entertained by New Jersey courts.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: October 31, 2019
Date of Mailing: October 31, 2019

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c*. 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

MOTION TO DISMISS

OAL DKT. NO. EDU 02207-19

AGENCY DKT. NO. 19-1/19

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, ET. ALS,

Petitioners,

v.

LAMONT REPOLLET, COMMISSIONER OF EDUCATION, AND ELIZABETH MAHER MUOIO, NEW JERSEY STATE TREASURER,

Respondents.

Stephen Edelstein, Esq., and **Mark Tabakin**, Esq., for petitioners (Weiner Law Group, attorneys)

Joan M. Scatton, Deputy Attorney General, for respondents (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 12, 2019 Decided: August 1, 2019

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Eight local boards of education, five municipalities and one individual taxpayer challenge recent amendments to the School Funding Reform Act of 2008 (SFRA).

N.J.S.A. 18A:7F-43 et. seq. They assert that the school funding formula as it is now written requires that they pay more than their fair share of local property taxes to financially support the public schools; has resulted in an "underfunding" of State aid; and has created a funding formula that is neither equitable, predictable nor constitutional. Petitioners claim that they have been deprived of due process and equal protection under the law. Respondents have filed a Motion to Dismiss, urging that the petition fails to state a claim upon which relief can be granted.

PROCEDURAL HISTORY

Petitioners filed their petition of appeal with the Commissioner of Education (the Commissioner) on January 22, 2019 and filed a Motion for Emergent Relief on February 11, 2019. The contested case was transmitted to the Office of Administrative Law (OAL) as an emergent matter on February 13, 2019. I conferred with counsel via telephone on February 20, 2019, at which time it was agreed, and memorialized in an order of the same date, that respondents did not need to formally respond to the emergent application. Petitioners' counsel clarified that his goal simply was to obtain as expedited a review of his clients' concerns as possible. By consent, respondents were afforded additional time to file an answer or Motion to Dismiss.

A Motion to Dismiss was filed on March 20, 2019. Petitioners opposed the motion on or about April 12, 2019. Respondents replied to the opposition on April 26, 2019. Oral argument took place on May 6, 2019. At oral argument I invited the parties to file supplemental briefs. They did so on May 28, 2019, and June 12, 2019, at which time the record closed.

FINDINGS OF FACT

Respondents' motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a Motion to Dismiss in lieu of an Answer. For purposes of the pending motion, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v City of Newark, 136 N.J. Super. 107, 112 (App. Div. 1975). I thus **FIND** as follows:

The petitioning school Boards are elected to supervise and direct the delivery of public educational services to students domiciled in their Type II school districts. The named municipalities are the governing bodies responsible for collecting the property taxes assessed for their local school districts. Stephanie Wohlrab is a resident of Brick Township, President of the Brick Township Board of Education, a parent of students who attend the public schools, and a taxpaying property owner in Brick.

The petition shares the history of New Jersey's struggle with constitutionally sound school funding as the backdrop for its challenge to the recent amendments to the SFRA. The SFRA was enacted in 2008 to provide a formula that would base State aid on needs of the student population and local fiscal capacity. N.J.S.A. 18A:7F-44. The statutory goal was to ensure that

> Every child in New Jersey must have an opportunity for an education based on academic standards that satisfy constitutional requirements regardless of where the child resides, and public funds allocated to this purpose must be expended to support schools that are thorough and efficient in delivering those educational standards. In turn, school districts must be assured the financial support necessary to provide those constitutionally compelled educational standards. Any school funding formula 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)]

The SFRA requires the adoption of an "adequacy budget" by each school district based on criteria established by the Department of Education (DOE). The DOE then determines the "local fair share;" or the amount that should be raised locally to support the schools, taking into account the taxable property and the income of the residents of the municipalities that comprise the school district. "Equalization aid" is the difference between the "adequacy budget" and the "local fair share." N.J.S.A. 18A:7F-53. Prior to the controverted amendments to the SFRA, a State Aid Growth Limit capped the total percentage increase in State aid a district could receive from year-to-year. N.J.S.A. 18A:7F-47 (repealed by P.L. 2018, c. 67, § 8, eff. July 24, 2018).

In July 2018 the Legislature amended the SFRA by enacting P.L. 2018, c. 67. These amendments eliminated Adjustment Aid[3] and the State Aid Growth Limit beginning with the 2018-2019 school year; thus modifying the way a school district's "local fair share" is calculated when a district is spending below "adequacy." See: N.J.S.A. 18A:7F-5d; N.J.S.A. 18A:7F-68. The amendments introduced a concept of "State Aid Differential," which is defined as

> . . . the difference between the sum of a school district's or county vocational school district's allocations of equalization aid, special education categorical aid, security categorical aid, transportation aid, adjustment aid, and non-SFRA aids in the prebudget year, and the sum of equalization aid, special education categorical aid, security categorical aid, and transportation aid as calculated for the budget year in each category in accordance with the provisions of sections 11, 13, 14, and 15 of P.L. 2007, c.260(C.18A:7F-53, C.18A:7F-55, C.18A:7F-56, and C.18A:7F-57), respectively.
>
> [N.J.S.A. 18A:7F-67]

Where State Aid Differential is positive, the excess aid would be phased out over a multi-year period. N.J.S.A. 18A:7F-68. Where the differential is negative, the statute provides that districts

> . . . shall receive State school aid in an amount equal to the sum of the district's State aid in the prior school year plus the district's proportionate share of the sum of any increase in State aid included in the annual appropriations act for that fiscal year and the total State aid reduction pursuant to subsection b. of this section based on the district's State aid differential as a percent of the Statewide total State aid differential among all school districts and county vocational school districts for which the State aid differential is negative.
>
> [N.J.S.A. 18A:7F-68(a)]

[3] Adjustment Aid was an amount designed "to ensure that the district receives the greater of the amount of State aid calculated for the district pursuant to the provisions of the [SFRA] or the State aid received by the district for the 2007-2008 school year multiplied by 102%." N.J.S.A. 18A:7F-58. In subsequent years, the SFRA provided for differing amounts of adjustment aid; for example, for 2009-2011 and 2010-2011 districts would "receive adjustment aid in such amount as to ensure that the district receives the greater of the amount of State aid calculated for the district pursuant to the provisions of [the SFRA] or the State aid, other than educational adequacy aid, received by the district for the 2008-2009 school year." N.J.S.A. 18A:7F-58(a)(2).

Under the amendments to the SFRA, if a district receives a reduction in State aid and is spending below "adequacy," the "required local air share shall equal 102% of the budgeted local share for the prebudget year…" N.J.S.A. 18A:7F-5d.

Petitioners point out that the SFRA's funding formula fails to account for the widespread use of municipal tax abatements. This artificially depresses a municipality's ratable property base, thus skewing the formula and negatively impacting the availability of State aid for districts located in municipalities that do not likewise use tax abatements. As part of the calculation of the "local fair share", the amended SFRA requires that values be inputted for a district's "equalized valuation" and income. N.J.S.A. 18A:7F-52(c). But the amended SFRA's definition of "equalized valuation" accounts for a municipality's ratable property base, but does not consider improvements on property subject to Payments in Lieu of Taxes (PILOT), which by their nature divert funds from school districts to municipalities.[4] Petitioners thus urge that the amended SFRA "still fails to account for the true wealth of a community in its funding formula."

The petitioning Boards now receive less State aid. They cannot deliver necessary educational services to their students without compelling taxpayers to pay more than their "local fair share;" these amounts range from 100.05% to 100.99% of the "local fair share". The shortfall in funding is outlined below:

District	**2017-2018 State Aid**	**2018-2019 Proposed**	**2018-2019 Actual**	**Shortfall from 2017-2018**	**Shortfall from Proposed**
Brick	$35,304,821	$36,055,619	$34,142,597	$1,162,224	$1,913,022
Jackson	$49,635,886	$50,122,386	$48,770,072	$865,814	$1,352,314
Manalapan-Englishtown	$19,440,358	$19,938,658	$18,773,314	$667,044	$1,165,344
Toms River	$66,975,394	$$68,224,666	$65,984,284	$991,110	$2,240,382
Lacey	$21,204,577	$21,556,936	$20,970,400	$234,177	$586,536

[4] Ninety-five percent of each PILOT payment is retained by the municipality, and 5% goes to the County, thus essentially cutting the school districts out of this revenue source, unless the municipality and the school district voluntarily enter into a tax revenue sharing agreement.

Freehold Regional	$51,564,083	$51,564,083	$50,269,156	$1,294,927	$1,294,927
Weymouth	$2,326,148	$2,365,542	$2,245,862	$80,286	$119,680
Ocean	$7,614,796	$8,079,720	$7,472,792	$142,004	$606,928

In an effort not to unduly burden local taxpayers, the Boards have reduced staff and eliminated programmatic and curricular offerings; they find themselves unable to afford new textbooks or technology needs; and were forced to forego necessary investments in buildings and grounds. In order to offset further property tax increases, a number of the petitioning districts have spent down their Fund Balance levels.

By way of example and not by way of limitation, Brick has been forced to eliminate six teachers and two supervisors. Elective programs, sports and co-curricular activities will be cut, or participation fees will be imposed. Brick will be unable to meet the goals of its Long-Term Technology Plan, and may have to eliminate its full-day kindergarten. Class sizes will increase. Jackson will be forced to eliminate course offerings and discontinue courtesy bussing. It will have to cut after-school enrichment programs and increase activity fees for sports; Jackson fears that ultimately it will be impossible to continue these activities. It will have to reduce its technology and custodial budgets; eliminate a total of 25 teaching positions; and increase class size. Jackson anticipates closing one school building.

Manalapan-Englishtown has already been forced to cut a media specialist; three full-time push-in enrichment specialists; pull-out enrichment teaching positions; one physical education position; and staffing for extra-curricular programs at the elementary level. It will have to curtail its technology plan. Manalapan-Englishtown will have to charge activity fees, anticipates future staffing cuts, and the need to close its sixth-grade building. Lacy Township will be forced to eliminate instructional, administrative, paraprofessional and athletic positions. It will have to increase class size. Lacy will be unable to support its district-wide preschool program. It will be forced to eliminate support programs it offers to at-risk students. Toms River will be forced to reduce staff; will be unable to meet the goals in its Long-Range Technology Plan; and fears that it might be forced to eliminate kindergarten.

Freehold Regional will be unable to comply with its Strategic Plan; will be forced to reduce its student support systems; reduce its athletic offerings; and eliminate certain world language options. It will have to eliminate personnel and increase class size. Freehold anticipates reducing its buildings and grounds budget, and will be able to support only mandatory health and safety repairs to its facilities. Weymouth is a small district with only one classroom per grade. It will be unable to purchase needed instructional technology items, and be unable to move forward with an initiative to establish a Library/Media Center. It will have to consider the elimination of extra-curricular activities and courtesy bussing. The current full-day pre-K and kindergarten programs will have to be reduced to half-day. Weymouth will need to make staff cuts; to include instructional, custodial, and office staff, as well as, an assistant assigned to at-risk students.

Ocean has already been forced to eliminate three faculty positions, two secretarial positions, and defer the hiring of needed security guards. It has been forced to charge a fee for its preschool program. It lacks sufficient funds to perform necessary routine maintenance of its buildings and grounds, and will be unable to implement aspects of its Strategic and Technology Plan. Ocean was in the midst of a district-wide solar panel project which it has now been forced to defer.

ANALYSIS AND CONCLUSIONS OF LAW

In ruling on a Motion to Dismiss, my inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the petition. Printing Mart-Morristown v Sharp Electronics, 116 N.J. 739, 746 (1989); see also R. 4:6-2(e). A reviewing forum must search "the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim . . . ," Printing Mart-Morristown, 116 N.J. 739 at 746 (citing DiCistofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div., 1957)). The petitioners are entitled "to every reasonable inference of fact. The examination of a complaint's allegations of fact . . . should be one that is at once painstaking and undertaken with a generous and hospitable approach." Id. But dismissal of a complaint "is mandated

where the factual allegations are palpably insufficient to support a claim . . .” Rieder v State of N.J. Dep’t of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). Under the foregoing standard, I **CONCLUDE** that the petition of appeal must be dismissed.

The SFRA was enacted in 2008 as part of New Jersey’s ongoing effort to ensure that public schools throughout the state receive the financial support needed to deliver a thorough and efficient free public education (T & E) to our children. N.J. Const. art. VIII, § 4, para. 1; N.J.S.A. 18A:7F-43 et seq. The statute sought to create a “clear, unitary, enforceable statutory formula to govern appropriations for education.” N.J.S.A. 18A:7F-44(g). The New Jersey Supreme Court found the SFRA facially constitutional in Abbott v. Burke, 199 N.J. 140 (2009) (Abbott XX). Two years later, the Court again addressed school funding with its determination that the action by the State in underfunding the SFRA could not be sustained, as “the shortfall in appropriations purports to operate to suspend not a statutory right, but rather a constitutional obligation. . .” Abbott v. Burke, 206 N.J. 332, 363 (2011) (Abbott XXI). Some seven years later, the legislature amended the school funding law in a manner, petitioners contend, that is inconsistent with the spirit and intent of the 2008 version of the SFRA. They posit several reasons why their State aid must be restored to pre-amendment levels.

These petitioners contend that their petition is motivated by a desire to maintain strong and vibrant public schools. I do not question the sincerity of their commitment to their students for a moment. Nonetheless, at its essence, their petition is a challenge to a perceived unfair local tax burden; this is a case about unequal taxation, not unequal education. The first count of the petition contains the somewhat odd allegation that the amendments to the SFRA violate the SFRA. As I am required to do, I have attempted to be hospitable to this claim, and I take this count to actually allege that the petitioning Boards are entitled to the level of State funding promised by the unamended SFRA; that the constitution demands nothing less. The second count quite directly avers that “[t]he SFRA, as amended … is unconstitutional as applied.”

Count three of the petition asserts that the amendments to the SFRA render it “unconstitutional as written,” because the widespread use of municipal tax abatements inequitably impacts the availability of State aid, thus increasing the local burden in districts that

do not use tax abatements. This count thus grounds its allegations of unconstitutionality exclusively on local burden disparity. The fourth and final count of the petition alleges that "[b]y placing a property tax burden on taxpayers in the Petitioning Districts which is greater than is constitutionally approved, the methodology directed by the Legislature, the Commissioner and the Treasurer, each in his/her official capacity, have caused violations of the Due Process rights and the Equal Protection rights of taxpayers in the Petitioning Districts." Again, the focal point of this count is unfair and inequitable local taxation.

The Municipal Petitioners

The named petitioners include five local municipalities. Standing is a "threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six-Month Extension of N.J.A.C. 5:91-1, 372 N.J. Super. 61, 85 (App. Div., 2004); Stubaus v. Williams, 339 N.J. Super. 38, 47 (App. Div. 2001). To have standing, a party "must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden Cty., 170 N.J. 439, 449 (2002). A petitioner must show a direct impairment of his own constitutional rights, and must have suffered a distinct injury or harm that was caused by the adverse party and that can be remedied by the administrative forum. See Trombetta v. Atl. City, 181 N.J. Super. 203, 221 (Law Div. 1981), aff'd o.b., 187 N.J. Super. 351 (App. Div. 1982); New Jersey Turnpike Auth. v. Parsons, 3 N.J. 235, 240 (1949); In re Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180 (App. Div. 1988). A desire to vindicate the public interest is insufficient to confer standing; there must be a specific connection between the petitioner and the public interest he alleges to represent.

The municipal petitioners clearly seek only to vindicate the rights of their constituents and thus lack standing. The claim that the amendments to the SFRA unfairly burden taxpayers in their communities can be brought only by those taxpayers. And any allegations that the SFRA amendments deprive the children in their communities of T & E is a claim that belongs to those taxpayers and their children, and not to the municipalities in which those children reside.

Stubaus v. Whitman, 339 N.J. Super. 38 at 56. To the extent that the municipal petitioners contend that they have asserted a direct impact or harm caused by the 2018 amendments to the SFRA, I have scoured the petition and could find no facts to support such a contention.

Additionally, relative to the claims raised in the petition's fourth count, our courts have recognized that "political subdivisions of the State, including municipalities and local boards of education, lack the legal capacity to challenge State action based on equal protection grounds." Stubaus v. Whitman, 339 N.J. Super. 38 at 48, citing Newark v. New Jersey, 262 U.S. 192, 196 (1923); McKenney v. Byrne, 82 N.J. 304, 315, n. 4 (1980); In re Charter School Application of Englewood, 320 N.J. Super. 174, 238 (App. Div. 1999). For this additional reason, I **CONCLUDE** that as to Brick Township, Toms River Township, South Toms River Borough, Beachwood Borough, and Pine Beach Borough, the petition must be dismissed.

The School Board Petitioners

Standing - The Unfair Taxation Claim

For the reasons expressed above, I **CONCLUDE** that the school Board petitioners likewise lack standing to vindicate the rights of their taxpaying citizens. And local Boards, like municipalities, cannot challenge State action on equal protection grounds. To reiterate, "[b]ecause school districts are 'creatures of the State,' no school district can be the 'subject of discriminatory practice by the State'." Stubaus v Whitman, 339 N.J. Super. 38 at 47, citing Borough of Glassboro v Byrne, 141 N.J. Super. 19, 23 (App. Div., 1976). I **CONCLUDE** that the claims by the Brick Township, Jackson, Manalapan-Englishtown, Toms River Regional, Lacey Township, Freehold Regional, Weymouth Township, and Ocean Boards of Education likewise must be dismissed.

The allegations of this petition stand in stark contrast to the claims made in Elizabeth Bd. of Educ. v. N.J. State Dept. of Educ., Div. of Early Childhood Education, EDU 09004-15, Initial Decision (July 14, 2017), aff'd, Comm'r (August 24, 2017), <https://www.nj.gov/education/legal/>. There, an Abbott district (now referred to as an SDA district) contended that early childhood funding provided by the Department was insufficient,

asserting alternatively that the district did not receive what the SFRA promised, or that the SFRA unconstitutionally offered it an insufficient amount of funding to permit it to deliver mandated pre-school services to its students. Unfair local tax burdens were not the central issue. Elizabeth thus offers these school district petitioners no solace.

The petitioners' reliance on Abbott XXI is likewise misplaced. The petitioning Boards urge that Abbott XXI reflects an evolution in the concept of standing, because in dicta the decision references "the importance of a predictable stream of education funding for any school district." Abbott v. Burke, 206 N.J. 332 at 370. But Abbott XXI dealt only with the aftermath of a legislative failure to fully fund the SFRA formula; it offers no precedential ruling concerning the standing of local school Boards to assert unfair local taxation claims.[5] I am accordingly unable to agree that Abbott XXI supports the claims of these petitioning districts that "now…school districts themselves have been granted entitlements adequate to form the basis for standing" for a claim that centers on inequities in local funding of schools.

The T & E Claim

But I must afford every inference to these petitioners, and I of course acknowledge that the petition does allege that programmatic cuts will flow from the controverted changes in the SFRA funding formula. In Stubaus the petitioning school districts were held to lack standing in large part because their petition did not allege that the funding system then at issue resulted in program inadequacy or educational inequality. I **CONCLUDE** that the school board petitioners have standing to raise claims of educational adequacy and inequality.

But their claims are not viable. The SFRA as amended, like any statute, is presumed valid. Stubaus v. Whitman, 339 N.J. Super. 38 at 52, citing In re CVS Pharmacy Wayne, 116 N.J. 490 (1989). These petitioners carry a heavy burden. Ibid; Smith v Penta, 81 N.J. 65

[5] The plaintiffs in Abbott were school children. Standing was addressed only vis-à-vis the request that the relief sought extend to students outside the Abbott districts. The Court rejected the notion that its jurisdiction extended beyond the rights of the plaintiff class before it.

(1979). And as respondents correctly urge, a properly pled deprivation of T & E would allege that the students in the subject districts are not being equipped for their roles as citizens and competitors in the marketplace. Abbott v. Burke, 119 N.J. 287, 313 (1990) (Abbott II).

This pleading makes no claims of constitutional dimension. These non-Abbott districts allege that staff will be cut; courtesy bussing will be discontinued; half-day kindergarten would be reinstituted; increases would be made in class size; course offerings reduced; and limitations placed on some extra-curricular offerings as a result of the amendments to the SFRA. To their constituents, and to these Boards, these cuts potentially affect the quality of the education that is delivered to their children. It is not the intent of this decision to minimize or trivialize this legitimate concern. But these Boards cannot rely on the Abbott v. Burke cases to support their contention that the SFRA as amended is unconstitutional. The educational disparity Abbott was concerned with readily dwarfs the claims raised here. The following excerpt from Abbott II hammers home this point:

> 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.
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> [Abbott v. Burke, 119 N.J. 287 at 363.]

Respondents argue that T & E "is student focused and to allege a deprivation of T & E requires a demonstration that the students' educational opportunities are so deficient as to jeopardize their futures." They assert that petitioners' allegations "are insufficient for a T &E claim." I agree. I moreover concur that if the petitioning Boards would like more generous State aid,

"their argument should more appropriately be made to the legislature." Stubaus v. Whitman, 339 N.J. Super. 38 at 56.

Moreover, and importantly, inequitable local taxation cannot form the basis of a viable constitutional claim under the T & E clause. Stubaus v Whitman, 339 N.J. Super. 38 at 52-57. Our Supreme Court has "rejected the argument that T & E mandates statewide equality of tax burdens and [has] interpreted T & E to ensure equal educational opportunity, but not taxpayer equality." Id. at 53, citing Robinson v. Cahill, 62 N.J. 473 (1973)(Robinson I). The State is obliged to provide public school children "an equal educational opportunity." Robinson v. Cahill, 62 N.J. 473 at 513. But it can "meet its obligation by financing education either on a statewide basis with funds provided by the State, or, in whole or in part, by delegating the fiscal obligation to local taxation." Robinson v. Cahill, 69 N.J. 133, 142 (1975) (Robinson IV), citing Robinson v. Cahill, 62 N.J. 473 at 519.

If local funding for these schools was unavailable, there might be a different outcome here. But the petitioning school Boards do not aver with any specificity that they will be unable to raise the local taxes needed to deliver T & E. They allege, in passing, that "in some instances" districts would be "unable to [raise local taxes] altogether because of the State-imposed cap on property tax increases." But the petition does not indicate whether or how a cap would directly impact any of the named petitioners, or specifically how that cap would affect the delivery of essential programming. I **CONCLUDE** that, to the extent the petition alleges that the SFRA as amended denies students in the petitioning districts access to T & E, it fails to state a claim and must be dismissed.

The Claim that the Funding Promised by the Pre-amendment SFRA is Likewise Promised by the New Jersey Constitution

The petition alleges that the SFRA amendments have resulted in "underfunding," and that the petitioning Boards are entitled to the State aid that would have been available under the version of the SFRA found facially constitutional in Abbott XX. They argue that the amendments to the SFRA "on its face and as applied, [are] a repetition of the Legislature's failures highlighted in Abbott XXI …. [that the amendments] constitute a failure by the State to

honor its Abbott XX obligations to fund its SFRA obligations." But respondents reply persuasively that the SFRA was declared constitutional relative only as to the claims of educational inequality made by the Abbott districts. These petitioners are not Abbott districts; accordingly, their reliance on Abbott XXI is once again misplaced. The Court held that

> …plaintiffs can look in vain for support in Abbott XX for a finding that the failure to provide full funding of SFRA to any district is the equivalent of the constitutional violation previously litigated and found to exist for children in the Abbott districts... in the prior application that led to the Abbott XX holding, we specifically declined to recognize that pupils from any district other than the Abbott districts were before us when taking up the question of the SFRA's facial constitutionality.
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> [Abbott v. Burke, 206 N.J. 332 at 370 (Abbott XXI).]

Abbott XXI thus lends no support to petitioners' contention that they are constitutionally entitled to the level of funding they would have received under the unamended SFRA.[6] I **CONCLUDE** that the school district petitioners have not raised a viable claim that their State aid was "underfunded."

The Taxpayer

Taxpayer Stephanie Wohlrab has standing to bring her claims of unfair taxation, and standing to assert that the amendments to the SFRA will deny her children T & E. Notwithstanding, she has failed to state a claim for the reasons discussed above. Unlike the municipal and school board petitioners, as a citizen, Wohlrab may bring an equal protection claim. Accordingly, it is necessary to address the allegations of the fourth count on its merits. I **CONCLUDE** that Wohlrab has failed to state a viable equal protection claim.

[6] The petition in paragraphs 32 and 33 avers that the State aid figures received by the petitioning districts were less than those included in the Governor's budget message. Respondents interpret these paragraphs as alleging that moneys promised by the SFRA were not properly appropriated. If this indeed is what the petition alleges, these claims "run directly into the holdings of" Camden v Byrne, 82 N.J. 133 (1980) and Karcher v Kean, 97 N.J. 483 (1984). Abbott v. Burke, 206 N.J. 332 at 370 (Abbott XXI). The Court has confirmed that "even though local government might find itself 'handcuffed' by statutory fiscal limitations, [the] Court is 'powerless to remove those handcuffs'." Camden v Byrne, 82 N.J. 133 at 157, citing N.J. State Policemen's Bene. Ass'n. Local 29 v. Irvington, 80 N.J. 271 (1979). The statutory fiscal constraints imposed on these petitioners is a matter of legislative, not judicial prerogative. Ibid.

New Jersey's equal protection clause provides that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. art. I, para. 1. The equal protection clause "prohibits the State from adopting statutory classifications that treat similarly situated people differently." Stubaus v. Whitman, 339 N.J. Super. 38 at 57, citing Sanchez v. Dep't of Human Servs., 314 N.J. Super. 11 (App. Div. 1998). Equal protection claims under the New Jersey Constitution are analyzed using a "balancing test to determine whether there is an appropriate governmental interest that is suitably furthered by the differential treatment." Stubaus v. Whitman, 338 N.J. Super. 38 at 60, citing In re Charter School Application of Englewood, 320 N.J. Super. 174, 237 (App. Div. 1999). Courts look to "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Ibid., citing Greenberg v. Kimmelman, 99 N.J. 552 (1985). Here, Wohlrab contends that the SFRA funding formula will cause an increase in her property taxes and an unequal tax burden; that she will be required to pay more than her "fair share" to support the public schools. Like the Stubaus plaintiffs, she contends that the "range of property tax rates establishes a 'present system of school funding [which] is irrational and grossly discriminatory'." Stubaus v. Whitman, 339 N.J. Super. 38 at 56-7.

Stubaus discusses at length the reluctance of the Robinson v. Cahill and Abbott v. Burke Courts to analyze school funding disputes on equal protection grounds. Stubaus observes that

> [t]he Court in Robinson I was unwilling to analyze the problem under equal protection because such an approach could raise questions regarding the delivery of all municipal services. In other words, if inequality in educational services among the various school districts in the State violated equal protection, it was an easy step to argue that so also would be unconstitutional any inequality among municipalities delivering fire, police and other services. The Court refused to mount this slippery slope, and instead turned the case on the T & E clause.
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> [Stubaus v. Whitman, 339 N.J. Super. 38 at 57.]

As Stubaus points out, thereafter, every court called upon to review the funding of public education has relied exclusively on the T & E clause. Abbott II reiterated "the monumental governmental upheaval that would result if the equal protection doctrine were held applicable to the financing of education…" Stubaus v. Whitman, 339 N.J. Super. 38 at 58, citing Abbott v Burke, 119 N.J. 287, 390 (1990). The Stubaus court thus declined to allow the case before it to continue on equal protection grounds, stating "[w]e have unease about pronouncing a willingness to decide the claim on an equal protection basis, and we conclude that we remain bound by Robinson I and reject any attempt to project equal protection into the school funding dispute." Ibid. I accordingly will do likewise, and **CONCLUDE** that the equal protection claims of the fourth count must be dismissed.

ORDER

Based on the foregoing, the petition of appeal is **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: August 1, 2019

Date Mailed to Parties:

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